

Biden's DOJ Predicted to Up the Ante on False Claims Act Enforcement

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The upcoming administration change, the ongoing pandemic, and an unprecedented stimulus package create uncertainty regarding Justice Department enforcement priorities. Epstein Becker Green health-care attorneys make some predictions, like an uptick in False Claims Act enforcement, including CARES Act-related FCA matters, and a DOJ that will flex its qui tam dismissal authority.

The arrival of a new administration, particularly one that changes the political party in the White House, presents an opportunity for prognostication about priorities and policies. Will the incoming administration alter long-standing policy, or will it merely roll back recent changes?

These educated guesses, formed by history and experience, provide insight and perspective. In 2020, however, nothing is normal. When the next administration takes office, it will inherit a global pandemic, economic headwinds, and a federal workforce hampered by staffing challenges.

One prediction we can safely make is that of continuing uncertainty. Despite the lack of clarity about the future, here are three predictions about False Claims Act (FCA) enforcement policies and priorities of a Biden Justice Department:

- The long shadow of the coronavirus pandemic will impact enforcement priorities and trends for years to come.
- Despite uncertainty about future Justice Department leadership, FCA cases will remain a priority, and enforcement is likely to increase.
- The fate of Trump-era FCA policy pronouncements is unclear.

Covid-19 and Enforcement

The Coronavirus Aid, Relief, and Economic Security (CARES) Act provided \$1.8 trillion in direct aid to individuals and businesses, the largest stimulus package in U.S. history. It allocated stimulus funds (\$175 billion) to a provider relief fund, which the Department of Health and Human Services (HHS) is distributing to hospitals and health-care providers on the front lines of the coronavirus response.

This infusion of billions of federal dollars into the economy provided much-needed relief but, like any stimulus program, with the attendant risk of fraud, waste, and abuse.

To address this risk, the CARES Act created the special inspector general for pandemic recovery, who, along with the HHS inspector general, is actively engaged in monitoring the flow of funds and addressing fraud, waste, and abuse in CARES Act-funded programs. Currently, enforcement efforts are underway. Still, we anticipate the filing of a significant number of sealed qui tam lawsuits alleging fraud on CARES Act programs.

Given the importance of safeguarding relief funds, it is likely that a Biden DOJ will prioritize pursuing CARES Act-related FCA matters.

If, as most expect, Congress provides additional coronavirus relief funding, the DOJ will likely redouble its enforcement efforts. The Coronavirus Oversight and Recovery Ethics (CORE) Act, pending in the Senate, is intended to increase government authority over the use of CARES Act and other stimulus funds.

Among other enforcement mechanisms, the CORE Act grants the Congressional Oversight Committee subpoena powers. It also establishes specific whistleblower protections for private workers or government contractors who report fraud, waste, or abuse related to Covid-19 relief.

Assuming passage, whether in its current form or after amendment, we expect additional sealed FCA filings, prompting new investigations and, eventually, publicly filed FCA claims.

Finally, Covid-19 laid bare significant challenges facing long-term care providers. Given the DOJ's current emphasis on elder care initiatives and the disproportionate impact of Covid-19 on long-term care residents, we anticipate an increasing focus on long-term care facility-related quality of care FCA cases.

While "worthless services" cases have recently fallen out of favor with the courts, the scourge of coronavirus may present courts with facts that warrant reconsideration of the worthless services theory.

FCA Enforcement Will Continue and Likely Increase

For the last 20 years, qui tam complaints filed by relators, rather than government-initiated filings, have driven FCA enforcement. The qui tam sealing requirement and the time needed to investigate the relator's allegations means the time between filing and unsealing is routinely several years. For this reason, we are unlikely to see drastic changes in the number of public FCA cases in the short term.

However, we do expect increasing qui tam filings and related government investigations for several reasons.

First, investigations have continued despite the coronavirus, but they have slowed. The prospect that the pandemic will end sometime next year makes increasing investigative activity likely.

Second, recent DOJ controversies affect rank-and-file morale and distract from the department's core mission. If the new administration succeeds in moving past those controversies, career prosecutors will be able to engage fully and fearlessly in their work investigating and evaluating filed qui tam cases.

We also anticipate continuing focus on pending FCA actions, including those related to the federal physician self-referral prohibition (the Stark Law), federal Anti-Kickback Statute, managed care, and electronic health record fraud. These cases, along with the anticipated increase in the FCA pipeline, due to CARES Act-related filings, will lead to an increase in government investigations and FCA litigation.

The Fate of Recent Policy Pronouncements Is Unclear

DOJ memoranda in recent years have changed the landscape of FCA enforcement policy. For example, in January 2018, the Granston Memorandum signaled the DOJ's willingness to flex its dismissal authority under 31 U.S.C. § 3730(c)(2)(a) in qui tam cases. This authority historically had been exercised sparingly.

In the last two years, the DOJ has moved to dismiss approximately 50 qui tam cases, as compared to approximately 45 cases in the 30-year period pre-Granston. Given the impact of this pronouncement, the open question is whether a Biden DOJ will continue it in force or decide to reevaluate. For now, it is likely that the policy will remain intact and that any decision to de-emphasize it would be gradual, rather than an abrupt shift in policy.

Enforcement Change Is Incremental

This administration change portends more uncertainty than perhaps any in this century or the last. Yet, when it comes to the FCA, the arc of enforcement does not ebb and flow quickly. While a Biden Justice Department will undoubtedly remain committed to FCA enforcement, enforcement policy change is by its nature incremental.

Given this moment is accompanied by a federal stimulus package of unprecedented scale, it will surely drive an increase in FCA enforcement activity for years to come.

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