

Client Alert

Special Matters & Government Investigations and Appellate Practice Groups

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False Claims Act Update

New Criminal Division Review Process for Qui Tam Complaints Expands Main Justice Involvement and Threatens Greater Criminal Exposure in Whistleblower Investigations

The Assistant Attorney General for the Criminal Division, Leslie Caldwell, announced yesterday on September 17, 2014, that criminal prosecutors at the Justice Department in Washington will automatically review all new *qui tam* (i.e., whistleblower) complaints filed under the civil False Claims Act. In remarks delivered at a meeting of the Taxpayers Against Fraud Education Fund Conference, AAG Caldwell revealed that the Criminal Division recently implemented a procedure so that all new *qui tam* complaints will be shared by the Civil Division with the Criminal Division as soon as the cases are filed. According to AAG Caldwell, “[e]xperienced prosecutors in the Fraud Section are immediately reviewing the *qui tam* cases when we receive them to determine whether to open a parallel criminal investigation. Those prosecutors then coordinate swiftly with the Civil Division and U.S. Attorney’s Offices about the best ways to proceed in the parallel investigations.”

AAG Caldwell advised *qui tam* lawyers attending the conference that the Justice Department “encourage[s] you to reach out to criminal authorities in appropriate cases, even when you are discussing the case with civil authorities. The sooner we on the criminal side learn about potential criminal conduct, the sooner we can investigate. And the earlier we begin our investigation, the more legal tools and investigative techniques we have available to us. We can add real value to the investigation, working either in partnership with a U.S. Attorney’s Office or on our own.” She concluded her remarks by stating, “Working together, and along with our Civil Fraud counterparts, U.S. Attorney’s Offices, and investigating agencies, we can bring more cases and hold more companies and individuals responsible for the crimes they commit.”

Implications of this Development

The Civil Division of the Justice Department has long provided nationwide oversight and coordination of *qui tam* complaints, working closely with civil attorneys in the U.S. Attorney’s Offices. Of course, Civil Division attorneys in Washington and civil Assistant U.S. Attorneys previously coordinated with criminal prosecutors when they believed that the

For more information, contact:

Christopher A. Wray
+1 202 626 5570
cwwray@kslaw.com

Jeffrey S. Bucholtz
+1 202 626 2907
jrbucholtz@kslaw.com

Amelia R. Medina
+1 404 572 3507
amedina@kslaw.com

King & Spalding LLP

Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737

Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600
Fax: +1 404 572 5100

www.kslaw.com

particular circumstances of a matter warranted criminal review, and the U.S. Attorneys' Manual already provides for the Civil Division to contact the Criminal Division about a *qui tam* complaint for purposes other than a review of the merits, such as in order to "determine if the allegations relate[] to a pending criminal investigation." Nevertheless, the decision whether to *open* a parallel criminal investigation into a whistleblower's allegations traditionally has been left to the discretion of the local U.S. Attorney's Office without systematic involvement by prosecutors at Main Justice in Washington.

Now, however, the Criminal Division's new procedure means that there will be a prosecutorial review of *qui tam* complaints in Washington in every instance, in addition to the potential review by prosecutors in U.S. Attorney's Offices. What is more, criminal review of False Claims Act allegations may take place at a much earlier phase of the case. AAG Caldwell specifically noted that the Criminal Division will endeavor to review the complaints "immediately" upon receipt from the Civil Division, and she urged relators and their counsel to consider reaching out to criminal authorities if they are even "thinking of filing a *qui tam* case that alleges conduct that potentially could be criminal."

This new centralized criminal review signals that the criminal—and civil—stakes may be escalating for companies and their executives accused by a whistleblower of defrauding the Government. Now that an early criminal review by Main Justice will be standard operating procedure in every *qui tam* matter—in addition to potentially concurrent review by criminal Assistant U.S. Attorneys in the district where the *qui tam* action is filed—False Claims Act defendants may face a greater threat of prosecution. This threat extends to individuals, such as corporate officers, associated with a defendant named in a *qui tam* action. And with a heightened risk of prosecution comes an intensified risk of the attendant problems that can follow from criminal charges, such as suspension, debarment, or exclusion from Government programs, and a host of other adverse regulatory actions. At a minimum, companies reasonably can anticipate the more frequent appearance in *qui tam* investigations of investigatory techniques once largely reserved for criminal cases. This new layer of systematic criminal review may also lead Government lawyers, as well as relators and their counsel, to believe they have greater leverage in negotiations with defendants even in matters that remain civil.

The leadership of the Justice Department repeatedly has expressed the intention to increase the civil and criminal consequences for companies and executives whom they view as wrongdoers, and AAG Caldwell's announcement is consistent with that promise. A pattern of heightened criminal scrutiny of False Claims Act allegations has been observed in certain specialized contexts for some time—*e.g.*, with respect to allegations of "off-label promotion" of pharmaceutical and medical device products. But military contractors, healthcare companies, and other industries commonly faced with *qui tam* complaints have generally avoided the harshest lens of the Government's criminal microscope to this point. No longer.

Effective immediately, companies that learn they are under investigation for potential False Claims Act violations should move quickly to evaluate their criminal exposure and take appropriate action to mitigate the distinctive challenges that a criminal investigation can pose. Strategic measures may now include early engagement with the Criminal Division and criminal Assistant U.S. Attorneys, as companies seek to counter or even preempt relators' advocacy before the Government with their own advocacy about why a full criminal investigation into the conduct at issue is not warranted. In sum, an adroit defense against False Claims Act complaints is growing more complex, and the shadow cast by Washington grows ever longer.

AAG Caldwell's remarks are attached.



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JUSTICE NEWS

Remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell at the Taxpayers Against Fraud Education Fund Conference

Washington, D.C. ~ Wednesday, September 17, 2014

Thank you, for that kind introduction. And thanks to everyone at Taxpayers Against Fraud for inviting me to speak to you today.

It has been my privilege, over the past several months, to serve as Assistant Attorney General for the Criminal Division of the Department of Justice.

The Criminal Division handles a wide range of cases: from sophisticated financial fraud to global narcotics trafficking, from cybercrime to corruption, and many other matters in between.

We have more than 600 smart, hard-working prosecutors who operate at the cutting edge of criminal law enforcement. When a new fraud scheme evolves from an old scheme, we often are the first to see it, and we often are the first to investigate and prosecute it. When criminals adapt their techniques, we see it, and we too adapt.

Together with our partners in the 94 U.S. Attorney's Offices around the country, as well as our law enforcement partners in the United States and across the globe, we in the Criminal Division are committed to investigating and prosecuting the most challenging types of criminal cases as they arise.

In bringing those cases, we use all of the many tools available to us. Today, I want to announce that we will be stepping up our use of one tool, and that is the fine work done by all of you in investigating and filing cases under the False Claims Act.

Through our Fraud Section, we will be committing more resources to this vital area, so that we can move swiftly and effectively to combat major fraud involving government programs.

To that end, when you are thinking of filing a *qui tam* case that alleges conduct that potentially could be criminal, I encourage you to consider reaching out to criminal authorities, just as you now do with our civil counterparts in the department and the U.S. Attorney's Offices.

We in the Criminal Division have unparalleled experience prosecuting health care fraud, procurement fraud, and financial fraud. We can and we will bring that expertise to bear by increasing our commitment to criminal investigations and prosecutions that stem from allegations in False Claims Act lawsuits.

Fraud Section

Let me tell you a little bit about the Criminal Division's Fraud Section. The section employs approximately 100 attorneys and 70 paralegals and other support staff.

It is divided into specialized units, including a 40 attorney Health Care Fraud Unit – the largest and most prolific unit of criminal prosecutors dedicated solely to health care fraud in the country.

The chief of that unit, Gejaa Gobena, has plenty of False Claims Act experience, as he worked for several years on *qui tam* cases in the department's Civil Fraud Section before joining the Criminal Division.

The Fraud Section also has a team that focuses on government procurement fraud.

And we have renowned experience in corporate and financial fraud cases, including prosecutions of conduct of a global nature, handled by prosecutors in our Securities and Financial Fraud Unit and our Foreign Corrupt Practices Act Unit.

I'd like to talk today in more detail about the work of each of these sections – and I hope that you will see that we have a real opportunity to greatly enhance the effectiveness of our nation's *qui tam* system of fraud prevention.

Medicare Fraud Strike Force

The recent success of the Criminal Division in prosecuting health care fraud has been nothing short of extraordinary. Since 2007, most of our health care fraud cases have been brought through our Medicare Fraud Strike Force.

The strike force is a coordinated team of investigators and prosecutors from the Department of Justice, Health and Human Services, and state and local law enforcement agencies dedicated to fighting Medicare fraud.

The strike force operates in nine cities that are hot spots for Medicare fraud – Baton Rouge, Brooklyn, Chicago, Dallas, Detroit, Houston, Los Angeles, Miami and Tampa. We focus on the worst offenders engaged in the most pervasive fraud in those regions.

In just 2013 alone, the strike force brought health care fraud prosecutions charging 345 individuals, secured 234 guilty pleas, and obtained 46 jury trial convictions, all of which were record numbers.

Since the strike force began operating in 2007, nearly 2,000 people have been charged, who were responsible for approximately \$6 billion in false billings. Of those 2,000 people, approximately 1,400 have already been convicted through strike force prosecutions, including almost 200 at trial. The strike force has an overall conviction rate of 95 percent – a spectacular rate of success especially considering the volume of prosecutions.

And rest assured: the defendants who are being charged are not just the low-hanging fruit. The strike force has charged almost 140 licensed doctors – individuals who have breached the public trust and their professional duties of care, selling out their medical licenses for the lure of easy money, often by preying on vulnerable Medicare beneficiaries.

Just yesterday, a medical doctor in Detroit pleaded guilty to Medicare and other fraud, admitting that he put greed before the health and safety of his patients, and that he made them endure unnecessary chemotherapy and other treatments just so that he could collect additional millions from Medicare.

Cases involving fraud by executives at health care providers such as hospitals are also a high priority for us, and a growing part of our strike force docket.

Those convicted in these strike force cases face real prison time – an average of 52 months for those sentenced in 2013. Some have received far longer sentences, including a 50-year sentence for the owner of a community mental health center called American Therapeutic Corporation, who masterminded a \$205 million fraud.

Notably, that case started with a *qui tam* filing in the Southern District of Florida.

In addition to prison time, we can freeze assets, preventing criminals from enjoying the proceeds of their schemes.

We are determined to root out health care fraud. Increasingly, we use cutting-edge, real-time analysis of data from CMS to stay one step ahead of the criminals – including those engaged in new areas of fraud, such as Medicare Part D schemes.

We also are stepping up our prosecutions of corporations involved in health care fraud. Corporate health care fraud cases are a natural fit for us in light of our health care fraud expertise and our prosecutions of corporate cases in the financial fraud and foreign bribery arenas. We have numerous ongoing corporate health care fraud investigations, and we are determined to bring more.

Defense Procurement

I'd like to turn to defense procurement, which as all of you know, is what gave birth to the False Claims Act during the Civil War.

Since 2009, the Fraud Section has housed a cadre of prosecutors dedicated to pursuing fraud and corruption affecting the United States' operations in Iraq and Afghanistan.

Prosecutors assigned to the Fraud Section by Special Inspector General Offices team up with Trial Attorneys from the Criminal Division's Fraud and Public Integrity Sections to combat fraud against our nation's armed forces.

Since 2009, these prosecutors have charged more than 100 defendants with procurement fraud and corruption. The cases include multi-million dollar bribery conspiracies affecting U.S. military contracts, and the theft of critical military goods, like fuel.

We also are looking at a proliferation of sales to the military of counterfeit intellectual property and technology.

Our procurement fraud cases extend well beyond war zones. For example, we are currently prosecuting a brazen case of fraud on the Navy and bribery by a Navy contractor based in Singapore that lasted for many years. The bribes ranged from free luxury vacations to the services of prostitutes, in return for highly sensitive Navy information on ongoing criminal investigations and other protected Navy information such as classified ship schedules. This global investigation has resulted in charges against the Navy contractor, two of his managers, three Navy officers, and an NCIS agent, and the investigation is ongoing. To date, four of the charged individuals have pleaded guilty.

Financial Fraud and Corruption

In addition to our health care and procurement fraud cases, our prosecutors have deep and broad experience with financial fraud cases of all kinds, from high-profile matters like the ongoing investigation into manipulation of LIBOR, to mortgage fraud, to Ponzi schemes.

They run investigations and bring prosecutions involving foreign bribery and other violations of the Foreign Corrupt Practices Act. The Criminal Division's commitment to fighting sophisticated financial fraud and foreign corruption is demonstrated by our strong record of successful prosecutions on matters involving both individuals and corporations across a variety of industries.

Complexity

Many of these cases are complex and resource-intensive. But our prosecutors are more than up to the challenge. In fact, at the Criminal Division, we seek out the most complex cases – that's what we're here for.

As you know, many engaged in fraud go to extravagant lengths to conceal their schemes, making them difficult to uncover. Many of those schemes involve webs of companies and subsidiaries, and the interplay of numerous bank accounts. Nearly all of our cases involve the analysis of voluminous documents and electronic records.

There are no shortcuts to conducting a full and thorough investigation. But we have many tools at our disposal that help us work more quickly and effectively to uncover the tracks that sophisticated criminals take such great pains to hide.

Advances in technology have made our review of documentary and electronic evidence faster and more accurate. As criminal prosecutors, we can obtain search warrants and wiretaps, make consensual recordings, conduct undercover operations, use confidential informants, and other evidence-gathering tools that might not be available to other enforcement agencies.

These days, more and more of our cases involve evidence overseas and law enforcement agencies and regulators abroad that are also investigating the misconduct. We have developed relationships with foreign government agencies across the globe, and often conduct parallel investigations alongside those agencies.

The Department of Justice has mutual legal assistance treaties in place with countries around the world that enable us to request evidence abroad for our criminal cases, and no one is better able to navigate those waters than the Criminal Division's own Office of International Affairs.

All of these tools, combined with the factual roadmap laid out in your *qui tam* complaints, can help us to investigate and uncover fraud more quickly and efficiently.

New *Qui Tam* Process

The courageous efforts by relators to bring criminal and civil misconduct to light have driven many of the largest and most important health care fraud investigations over the last several decades. And that is thanks to the work of many in this room.

I am here to tell you that the Criminal Division will redouble our efforts to work alongside you. *Qui tam* cases are a vital part of the Criminal Division's future efforts.

I know that you heard yesterday from our new Acting Associate Attorney General Stuart Delery about the Civil Division's ongoing commitment to combating fraud on the government. And I am confident that those efforts will continue in force under new Acting Assistant Attorney General for the Civil Division Joyce Branda.

We in the Criminal Division have recently implemented a procedure so that all new *qui tam* complaints are shared by the Civil Division with the Criminal Division as soon as the cases are filed. Experienced prosecutors in the Fraud Section are immediately

reviewing the *qui tam* cases when we receive them to determine whether to open a parallel criminal investigation.

Those prosecutors then coordinate swiftly with the Civil Division and U.S. Attorney's Offices about the best ways to proceed in the parallel investigations. If a case raises potential criminal issues and needs investigative support, we have ready access to experienced fraud investigators from the FBI, HHS-OIG, the Postal Inspection Service and numerous other law enforcement agencies.

And we have a wealth of experience in successfully bringing parallel investigations. We do this in many contexts, not only with the Civil Fraud section and U.S. Attorney's Offices, but with the SEC and other regulatory agencies, here and abroad. We know how to make it work.

We encourage you to reach out to criminal authorities in appropriate cases, even when you are discussing the case with civil authorities. The sooner we on the criminal side learn about potential criminal conduct, the sooner we can investigate.

And the earlier we begin our investigation, the more legal tools and investigative techniques we have available to us. We can add real value to the investigation, working either in partnership with a U.S. Attorney's Office or on our own.

Relators

We understand what it means for you to represent a relator in a False Claims Act case. When relators come forward, they put a lot at risk – all too often, they have lost their jobs after they raised concerns in their workplace, and may be blacklisted in the industry and unable to find work in that field elsewhere. They invest in their cases their time, their livelihood, and often, their self-worth. And you, as relators' counsel, invest a lot as well.

We want to work with you. We know how much work you do on the front end, when you screen your cases before filing them, and when you obtain information to substantiate your clients' claims. We share your interest in moving investigations along efficiently -- the length of our investigations is often measured in months, not years. And most importantly, we are all interested in bringing wrongdoers to justice.

Working together, and along with our Civil Fraud counterparts, U.S. Attorney's Offices, and investigating agencies, we can bring more cases and hold more companies and individuals responsible for the crimes they commit. I very much look forward to doing just that.

Thank you again for having me.