

Articles

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Record Civil False Claims Act Recoveries: The Implications for Nonprofits

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Nonprofit organizations featured prominently in cases leading to the U.S. Department of Justice's December 4, 2012 press conference announcing a record recovery in fiscal year 2012 of nearly \$5 billion in False Claims Act (FCA) settlements and judgments. The implications from this second straight year of "highest-ever" False Claims Act recapture of government money are clear: If you receive payments from the government, or make payments to it, you are subject to DOJ's greatly enhanced civil fraud recovery program.

In the four years ending September 30, 2012, Justice obtained \$13.3 billion through FCA cases, the largest four-year total in the Department's history. Acting Associate Attorney General Tony West emphasized that DOJ will continue to support the Civil Division's Fraud Unit and expand its partnerships with U.S. attorneys and other government agencies across the country. On this point, Principal Deputy Assistant Attorney General Stuart Delery underscored that civil fraud cases have a very human face; the Department is committed to protecting seniors, children, homeowners, parents, patients, and "our men and women in uniform."

With the government on the hunt for cost reductions, "fraud, waste and abuse" campaigns are standard. The two largest areas of recovery in FY 2012 – health care and housing and mortgage fraud – demonstrate this. For the first time in one year, health care fraud recoveries were over \$3 billion and housing fraud added \$1.4 billion to the total.

A large number of these recoveries involved nonprofit entities. These included organizations providing services to veterans' organizations, state-chartered development organizations, community and senior citizen service corporations, hospitals, and hospices.

Before turning to specific action items, two points jumped out at the press conference. The first is that \$3.3 billion of the \$5 billion in recoveries came from a record 647 whistleblower (or *qui tam*) suits brought by private citizens (with the whistleblower receiving up to 30% of the recovery). Every nonprofit engaged with the federal government should take this to heart. Repeated studies show that organizations that foster internal complaint resolution have fewer whistleblower cases. Rather than look at every employee as a possible agent of the U.S. Government, make sure that your organization's employees are comfortable raising questions, and particularly that they are protected from reprisals for reporting potentially improper actions.

The second is that both the number and size of Justice's False Claim Act cases continue to increase year after year. Fiscal year 2012 recoveries exceeded those for FY 2011 by \$1.7 billion. Announced recoveries through December 7, 2012 (the fiscal year started on October 1) exceed \$226 million. This does not include cases either still in the pipeline from last year or filed already this year.

In short, as the government's fiscal year begins and the calendar year winds down, now is the time to review your organization's internal controls to protect yourself from inquiries, particularly those that begin from within. These are the type of questions that your nonprofit should be asking:

- Does your organization have a well-structured program to ensure compliance with all grant or contract terms and conditions?

Is the program in writing and reviewed annually?

Does your organization provide regular training to ensure that appropriate individuals know their responsibilities?

AUTHORS

D. E. Wilson, Jr.
Dismas Locaria
James Y. Boland

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Depending on your size and number of agreements, does your internal and/or external audit include these internal controls in the audit programs?

- . Are you certain that all submissions and certifications made to the government (e.g., invoices, Byrd anti-lobbying certification, cost and pricing data, etc.) are correct?
- . Is your code of conduct up to standard? Are reviews of the code and compliance with it part of an internal or external audit cycle?
- . Do your organization's policies and procedures encourage internal reporting of compliance concerns?

Studies show that employees generally prefer to report concerns internally. However, if they fear reprisal or that their concerns are not taken seriously, they may be driven to seek whistleblower counsel or go directly to government investigators.

Employees want to be part of an organization that takes pride in doing the job right. Fostering effective internal communications encourages better compliance and pays dividends in every aspect of the organization's operations.

As every grant holder or contractor knows, when a disaffected employee files a whistleblower action and an Inspector General representative or government auditor knocks on the door, it is too late to start asking these questions.

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***D.E. Wilson, Jr.** is a partner in the Government Division of Venable's Washington, D.C. office. While in government service, he was in charge of contracting at the Executive Office of the President and the U.S. Treasury. **Dismas Locaria** and **James Y. Boland** are associates in Venable's Government Contracts group, based in the firm's Washington, D.C., and Tysons Corner, VA, respectively.*

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