# Risky Business of the False Claims Act: A Business Person's Guide

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Lance Armstrong, cycling through France on his many Tours de France, probably never gave a moment's thought to the False Claims Act (FCA). In that he is no different than many government contractors, subcontractors, grantees, health care providers, financial services providers or others which touch federal (or state) funds and are therefore subject to the FCA's terms (or a state equivalent). Armstrong and businesses primarily focus on achieving their immediate and long term business goals which infrequently include strategies for addressing what appears to be an unlikely occurrence. Today, however, Armstrong is embroiled in very expensive FCA litigation against the government and his former teammate turned *qui tam* relator. In that, he shares the experience of all too many who have been caught up by the ever-expanding efforts of government pursuing traditional and innovative FCA theories and ever-more aggressive relators seeking their statutory FCA bounty.

One need not be expert in the FCA's details, but a prudent business person should appreciate why the FCA is important to one's business, know the FCA's parameters, know how one might reduce the likelihood and consequences of an encounter, and know what to do if your company becomes exposed to the FCA. In coming articles, we will endeavor to provide a common-sense analysis of and answers to these topics. First, some context.

**How did we get where we are?**

At a basic level, the FCA is the primary civil statute (among a suite of laws) by which the government seeks redress against those who would deceive it into paying out taxpayer dollars. The FCA's origins date to the civil war when Union troops discovered that contractors had delivered boxes of rocks and sand to the front lines instead of weapons and munitions. Unfortunately, the willingness of some to cheat the government has continued unabated since then as evidenced by characters like Armstrong and "Fat Leonard". Starting in the 1980s, the government increasingly opened the contracting doors to what are now hundreds of thousands of companies supplying every conceivable product and service across the globe, many of whom were and remain inadequately knowledgeable about doing business with the government. This has been matched by massive growth in the health care and financial serves

industries. At the same time, in response to notable fraud scandals and pressure from government, and with little effective lobbying to resist, Congress has modified the FCA to make it ever easier to assert FCA claims, encouraged private parties to assert FCA claims as *qui tam* relators, and raised the penalties and damages for those found to have violated the law.

**Why is the FCA important to a business person?**

Company personnel, on occasion, make mistakes, take risks and exercise poor judgment. Almost every company encounters a disgruntled employee or one who may have hit on hard times. Many companies face a government audit. And, every company eventually has competitors. The adage that those who do business with the government for long enough are likely to encounter a government investigation is not too far off the mark. That can occasionally involve a brush with the FCA. In the last three fiscal years, the Justice Department has recovered some $13.9 billion in FCA judgments and settlements. During that period, some 2,040 private party *qui tam* whistleblower suits launched by current or former employees, advisors, competitors and the like – have led to the recovery of $9.7 billion. These actions have focused primarily on the health care, financial services and government contracts industries. And, these figures do not account for the many investigations and *qui tam* actions that eventually are dropped, but at substantial cost for the target company and its personnel to extricate themselves.

As we will discuss, the government is entitled to recover up to treble the damages it suffers in an FCA matter. For culpable conduct after November 2015, the potential penalties have been essentially doubled for each claim. And, based upon Justice Department's policy in the "Yates" memorandum, companies seeking favorable treatment in a settlement are expected to cooperate by, among other things, reporting those of its personnel who are responsible for the alleged wrongdoing. Separate from the civil exposure, those caught up in an FCA matter face the added administrative challenge of potential suspension/debarment and termination of one's contract. In relatively rare circumstances, one may face criminal exposure of some sort. In short, an FCA encounter is expensive, distracting, a drain on resources and potentially devastating to a company and/or some of its personnel caught up in the matter.

**So, what's to be done?**

First, many companies do not become subject to an FCA case. That said, understanding the basics of the FCA as they pertain to one's business operations affords a company the opportunity to build protective measures into the overall company's compliance planning and crisis management efforts. Or, for those yet to develop a compliance plan or work towards developing a culture of compliance, it affords an incentive to start. The cost and effort of developing, implementing and maintaining such measures is generally far less than the costs and disruption of an FCA investigation, proceeding or settlement and should lead to a stronger and healthier company.

**What's next?**

In the coming articles, we will cover the basics of the FCA in terms of what it is and what types of situations can lead to an FCA investigation. We also will suggest methods to protect one's business against such an eventuality. We also will suggest what to do when confronted with a potential or actual FCA situation. Although we cannot promise that any company will escape becoming involved in an FCA matter, those which have addressed compliance matters proactively should fare better than those which do not.

## Related People


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