Historically, the health care and defense industries have been the targets for most False Claims Act investigations. But that is changing. Such probes are now becoming routine in other industries like technology and telecom. In this BNA Insight, Wiley Rein LLP’s Mark B. Sweet, Eve Klindera Reed, and Joshua S. Turner explain what communications companies should do to avoid running afoul of the statute.

How Companies Can Violate the False Claims Act—And What to Do About It

By Mark B. Sweet, Eve Klindera Reed, and Joshua S. Turner

The False Claims Act has become one of the federal government’s most effective tools for enforcement in the world of government contracts and programs.

After years of success against the health care and defense industries, the government is now turning its attention to industries like communications and technology. And that means whistleblowers are, too.

With heavy penalties and light evidentiary thresholds, the False Claims Act can force companies to settle government investigations for hundreds of millions of dollars. At the same time, by empowering whistleblowers to collect up to 30 percent of the government’s recovery, the False Claims Act is an invitation to disgruntled employees or competitors to bypass corporate compliance offices and take their concerns directly to the government.

Communications companies that do business with the government or participate in government-funded programs should be familiar with the False Claims Act and give serious thought to preventing or minimizing the prospect of future liability.

**What is the False Claims Act?** The civil False Claims Act is the federal government’s primary litigation tool for recovering losses resulting from fraud. It prohibits companies or individuals from presenting false information or using a false statement or record to get a government contract paid or reimbursed. A “claim” can be any type of request for money or property, such as an invoice, contract bid, grant application, or request for reimbursement. The claim can be presented directly to a federal agency or to a government contractor or program administrator.

The most common ways to incur liability are by misrepresenting qualifications for a government program or contract, overbilling the government for goods or services, billing for goods or services that were not actually provided, incorrectly certifying compliance with certain standards or regulations governing the program or contract, or seeking reimbursement for more expenses than were actually incurred.

A unique feature of the civil False Claims Act is that it entitles a whistleblower to bring a lawsuit on behalf of the federal government. In these “qui tam suits,” whistleblowers (commonly referred to as “relators”) file a complaint under seal. The Department of Justice then investigates the allegations and decides whether to intervene in and take over the litigation. During that time, the defendants named in the complaint may have no idea the complaint is pending. If the government declines to intervene, the qui tam relator can pursue the case on his or her own. A whistleblower is eligible for a share of 10 percent to 30 percent of any money recovered in a successful False Claims Act case, depending on his or her contribution to the enforcement action.

**Why Does the Government Like the False Claims Act as an Enforcement Tool?** Recoveries under the False Claims Act have exploded in recent years. In fiscal year 2013, the Department of Justice collected $3.8 billion from settlements and judgments in cases across all industries. In the last five years, the government has recovered $17 billion, double what it collected the previous five years.

This statute is attractive for enforcement officials and whistleblowers because recoveries can be massive and...
liability is comparatively easy to establish. Violations of the False Claims Act result in damages equal to three times the government’s loss, plus civil penalties of between $5,500 and $11,000 per false claim. In some situations, the government will assert that its loss equals all of the money paid to a company, setting up a potentially enormous damages model for litigation.

Unlike traditional concepts of “fraud,” however, the civil False Claims Act does not require proof that a defendant had a specific intent to defraud the government. The plaintiff merely has to show that the defendant “knowingly” made a false statement to get a claim paid. That means a violation occurs not only where a company actually knows a claim is based on false information but also where a statement or certification is made simply with reckless disregard or deliberate ignorance of the truth or falsity of its contents. In other words, a company can be accused of “fraud” by the United States government—and face triple damages plus penalties for a huge sum of money—without even being aware that it submitted incorrect information to the government.

Some of the amounts paid by defendants in recent cases have been staggering. In November 2013, a drug manufacturer paid the government $1.2 billion to settle federal civil allegations—plus hundreds of millions more for related state allegations—that it caused false claims to be submitted to government health care programs such as Medicare and Medicaid. The whistleblowers in that case collected $168 million. In June 2013, the government won a judgment for $664 million against a defense contractor for overstating costs in a price proposal for fighter jet engines. The cases set records for the most money ever recovered in a False Claims Act settlement and trial, respectively.

How Does the False Claims Act Affect the Communications Industry? Historically, the health care and defense industries have been targets for most False Claims Act investigations. But that is changing thanks to the recent success of the government in other areas and amendments to the statute that make it easier for whistleblowers to bring suit. False claims allegations are becoming routine in other industries, like communications and technology. In the last two years, the Department of Justice has recovered over $2 billion in settlements and judgments outside health care and defense, with more than 500 new matters arising in the form of new referrals from federal agencies, investigations, and whistleblower complaints.

The communications industry has had its share of large settlements. In one of the largest False Claims Act settlements outside the health care industry, a Wall Street money manager paid $130 million to settle allegations that he took advantage of Federal Communications Commission set-asides for small businesses in wireless spectrum auctions. In a recent settlement, a large common carrier paid almost $100 million to resolve allegations that it overcharged the government for voice and data telecommunications services.

The FCC Office of Inspector General has actively investigated false claims as well. For several years, the FCC Inspector General has investigated violations of the E-Rate program, which provides funding for schools and libraries to access the Internet. Whistleblowers alleged that companies provided illegal gratuities and inducements to school officials while the companies were bidding on school contracts that were funded by E-Rate. The FCC Inspector General investigations led to False Claims Act settlements with a publicly traded computer manufacturer, a large common carrier, two school districts, and others. The whistleblowers received over $2 million from the settlements.

When Are Communications Companies Exposed to the False Claims Act? Anytime a company does business with the government or participates in a government-funded program, it is subject to the False Claims Act. While there are a variety of ways to become exposed to liability under the statute, a few cases illustrate the particular risks that communications companies face:

- **Making representations in a bid or application.** The Wall Street money manager who settled with the government for $130 million was alleged to have used friends and associates to qualify as small businesses that were eligible to bid on set-aside wireless spectrum. The allegations were first raised by counsel for a losing bidder, and the case was widely covered by the news media. Not all False Claims Act cases are so sensational, though. In 2009, under a program funded by the government stimulus, one Midwestern telecommunications company applied for a grant from the National Telecommunications and Information Administration (NTIA) to build a broadband network in rural areas. A few years later, a disgruntled former employee filed a qui tam lawsuit alleging that, to qualify for the grant, the company had misrepresented that certain geographic areas were “underserved” and that the company was otherwise qualified for the grant. The parties are still litigating the matter.

- **Billing for ineligible products or services.** The FCC reimburses companies for certain expenses, such as providing Telecommunications Relay Services, which allow speech- and hearing-impaired people in the United States to communicate with hearing individuals. In 2012, the Department of Justice intervened in a qui tam suit by a former employee alleging that one major provider had not adequately verified its relay calls were originating from the United States. As a result, the government argued, the company had knowingly facilitated fraudulent calls and billed the government for ineligible services. After two years of litigation, the company settled for $3.5 million. Similarly, as part of the upcoming auction of broadcast television spectrum, the government plans to reimburse broadcasters, cable operators, and DBS providers for certain eligible relocation costs. Companies seeking reimbursement from the government will need to ensure the accuracy of their requests in order to avoid potential liability under the False Claims Act.

- **Certifying incorrectly that products or services meet standards required by the contract.** A French telecommunications company, for example, had a contract with the U.S. Army to build a first responder communications system in Iraq. After the company’s contract manager filed a whistleblower suit, the company paid $4 million to the government to settle allegations that it had submitted invoices inaccurately certifying that it had tested radio transmission sites and validated the network to ensure proper operation.

- **Passing on costs to the government that are not allowed under the contract.** In a recent large settle-
ment, the government alleged that a publicly traded telecommunications company had submitted claims for reimbursement of property taxes, common carrier recovery charges, and non-allowable surcharges that were not directly reimbursable under the contract with the General Services Administration. Another major carrier settled allegations in 2006 that it improperly passed along Presubscribed Interexchange Carrier Charges (long distance fees paid to local telephone companies) to the federal government.

Finally, companies should keep in mind that most states have their own false claims statutes as well. Although most are similar to the federal version, some are more expansive. New York, for example, recently added knowing violations of state tax law as a basis for false claims liability (something the federal False Claims Act still excludes). As a result, the state can pursue disputes over tax payments more aggressively under its False Claims Act, which allows for triple damages.

In the test case for this new provision, New York accused a large wireless services provider of knowingly filing false tax returns because it did not collect or pay state sales tax on interstate calls made by customers on monthly wireless plans. New York claimed that the company had dodged about $100 million in taxes, and that the statutory damages were $300 million. A state court allowed most of the complaint to survive a motion to dismiss in June 2013. The company has appealed the ruling.

**How Can False Claims Liability Be Prevented or Minimized?** The best ways to prevent false claims liability are (i) understanding how False Claims Act liability arises and what aspects of your operation present risks; (ii) implementing a robust compliance program that sets out clear policies for handling situations that could lead to liability; (iii) training employees who work on government contracts, programs, or applications to recognize these situations and follow company policy; (iv) providing employees a hotline and other internal channels for reporting potential fraud; and (v) investigating possible instances of fraud and taking corrective action when necessary. Counsel with expertise in the False Claims Act can help identify risks, develop compliance and training programs, and investigate allegations before the government gets involved.

Even when using best practices, though, companies sometimes find themselves subject to FCA investigations and lawsuits. If a civil investigative demand or inspector general subpoena arrives on your doorstep, it is time to take immediate action. Counsel with expertise in government investigations can negotiate manageable requests and coordinate the collection and production of relevant documents, while at the same time conducting an internal investigation to assess exposure and determine any disclosure obligations.

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