

The Mind of a Whistleblower: The Civil False Claims Act and its *Qui Tam* Provisions

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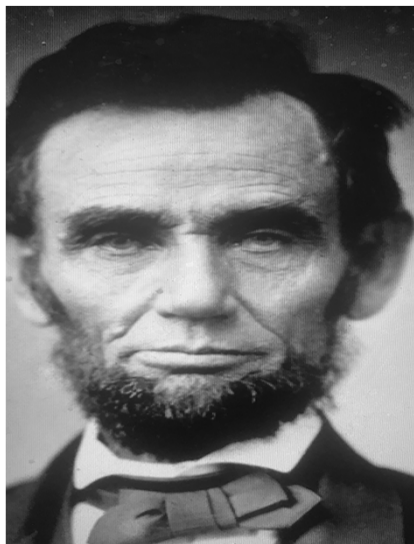
Outline

1. Summary of the Civil False Claims Act and Its Whistleblower Provisions
2. Whistleblowers' Motivations
3. How Organizations Respond to Whistleblowers
4. Ideas for Compliance Professionals

Federal and State

- The (federal, civil) False Claims Act,
31 U.S.C. § 3729 *et seq.*
- There are 31 state False Claims Acts,
including a Florida False Claims Act.

“the Lincoln law”



“The Atomic Bomb of Lawsuits”

Damages & Penalties:

- Treble damages
(3 x loss)
- \$11,463-\$22,927
per false claim
- Attorney's Fees



Civil Penalties

- That means at least \$1.146 million in civil penalties alone for every 100 false claims.



Largest FCA Recoveries

- \$2B GlaxoSmithKline (2012)
- \$1.72B Johnson & Johnson (2013)
- \$1.2B Wells Fargo (2016)
- \$1B Pfizer (2009)
- \$1B Bank of America (2014)
- \$900M Tenet (2016)
- \$800M Abbott Labs (2013)
- **About 80 more over \$125M**

“Knowledge” requirement
is light: EITHER...

- (1) actual knowledge;
- (2) acting in deliberate ignorance (head in the ground); or
- (3) acting with reckless disregard.



“Qui tam”

- Basically means “for the King”;
i.e., “for the Government”



Statute of Limitations

The LONGER of either **6 years** from the date the violation is committed or **3 years** from when the material facts are known or should have been known by the Government, but in no event more than **10 years** after the violation is committed.



Whistleblower Rewards

- **15 - 25%** of the Government's recovery if the Gov. takes over the *qui tam* suit
- **25 - 30%** if the Gov. doesn't take it over and the relator pushes it to a recovery
- **0 - 10%** if the Relator's info was publicly disclosed and the Relator isn't an original source thereof, or if the Relator was a significant perpetrator of the fraud

Average Whistleblower Reward

\$1.7 M

Whistleblower Protections

If retaliated
against:

- > Reinstatement
- > 2 x's Back Pay
- > Special Damages
- > Attorney's Fees



Florida False Claims Act

Very similar to the federal FCA, except:

- > Deals with Fla. funds
- > Also covers fraudulent tax returns
(Fla. tax revenues)
- > “innocent mistake” defense

What Makes a Good FCA case

- Large damages
- Public safety element (e.g., patient harm)
- A whistleblower who
 - is a true insider and knows details;
 - has proof of the fraud;
 - yet isn't a perpetrator;
 - knows the financial effects of the fraud;
 - is grounded and doesn't exaggerate;
 - isn't a serial plaintiff;
 - isn't trying to capitalize on info already in the public domain; and
 - listens to the sound advice of counsel.

Who Can Serve as Whistleblowers?

- Individuals, including present and former employees and contractors
- Companies, including competitors
- Patients
- Data miners

**How NOT to Treat An Employee
Who Reports “Non-Compliance”**

- > Don't make him the problem.
- > Thank her. Consider promoting her.
- > Promptly and seriously investigate.
- > Keep him apprised of the progress of the investigation.
- > Keep her realistic about the amt. of time need to investigate.
- > Don't start writing him up.

**How to Treat An Employee
Who “Reports” Bogus
Non-Compliance**

- > Contact outside compliance counsel to verify compliance.
- > Explain to employee how the company is actually in compliance.
- > Don't fire or demote her.
- > Contact employment defense counsel.
- > Beware: the employee could have a winning wrongful retaliation suit even if he is wrong. Not likely, but possible.

Planning Ahead

- Employee arbitration agreements
- Document substandard employee conduct.
- Compliance programs that are “inclusive” of the employee who reports non-compliance
- Train managers to avoid even minor actions that could isolate or alienate the would-be whistleblower.

Thank you!

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