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**The Use of the False Claims Act
in Government Investigations**

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The purpose of this presentation is to educate and stimulate discussion and reflection on the issues addressed herein. This outline does not constitute legal advice.

Agenda

- Background
- Definitions
- How it works
- Where accountants fit in
- Why you should care
- Questions

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Background – what it was intended for



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Background – how it is used today



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Definitions – what constitutes a violation

31 U.S.C. § 3729. False claims

(a) Liability for certain acts.

- (1) In general. Subject to paragraph (2), any person who—
 - (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
 - (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(G) knowingly conceals or knowingly avoids or decreases an obligation to pay money to the Gov't

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Definitions – what “knowing” means

31 U.S.C. § 3729. False claims

(b) Definitions.

- (1) the terms “knowing” and “knowingly”--
 - (A) mean that a person, with respect to information--
 - (i) has actual knowledge of the information;
 - (ii) acts in deliberate ignorance of the truth or falsity of the information; or
 - (iii) acts in reckless disregard of the truth or falsity of the information; and
 - (B) require no proof of specific intent to defraud;

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Definitions – what a “claim” is

31 U.S.C. § 3729. False claims

(b) Definitions . . .

(2) the term “claim”--

(A) means any request or demand . . . for money or property and whether or not the United States has title to the money or property, that--

(i) is presented to an officer, employee, or agent of the United States; or
(ii) is made to a contractor, . . . if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government--

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor . . . for any portion of the money or property which is requested or demanded; and

(B) [not claims for compensation by Federal employees or beneficiaries]

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Definitions – what an “obligation” is

31 U.S.C. § 3729. False claims

(b) Definitions.

....

(3) the term “obligation” means an established duty, whether or not fixed, arising from an express or implied contractual . . . from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment;

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Definitions – what is “material”

31 U.S.C. § 3729. False claims

(b) Definitions.

....

(4) the term “material” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

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Definitions – takeaway

“Congress wrote [the False Claims Act] expansively, meaning to reach all types of fraud, without qualification, that might result in financial loss to the Government.”

--Cook Cnty., Ill. v. United States ex rel. Chandler, 538 U.S. 119, 129 (2003)
(internal quotation marks omitted)

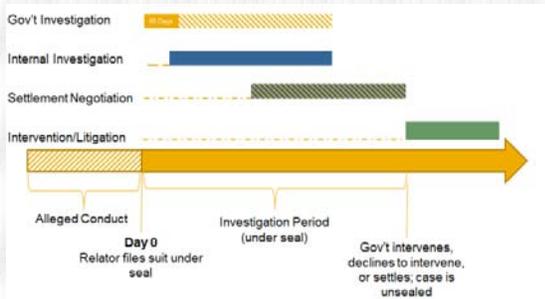
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How it works – overview



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How it works – the beginning (the Relator)



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How it works – the middle

31 U.S.C. § 3733. Civil investigative demands

(a) **In general. (1) Issuance and service.**--Whenever the Attorney General, or a designee . . . has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b), issue in writing and cause to be served upon such person, a civil investigative demand requiring such person--

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

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How it works – the end



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Where accountants fit in – the smoking gun



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Where accountants fit in – Kovel Arrangement



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Where accountants fit in – Kovel Arrangement (cont.)

Things to consider:

- (1) Should a new accountant be brought in to work with the attorney on the response
- (2) How is the relationship structured
- (3) How clearly is the accountant's role defined
- (4) What documentation exists proving the relationship

Bottom line: "What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists."

--United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961)

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Why you should care – draconian consequences

31 U.S.C. § 3729. False claims

(a) Liability for certain acts. --

(1) In general. --Subject to paragraph 2, any person who--[violates the FCA] is liable to the United States Government for civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 . . . , plus 3 times the amount of damages which the Government sustains because of the act of that person.

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Why you should care – Yates Memo

- Goal: Individual Accountability for Corporate Wrongdoing
- Six “key steps” to achieving goal
 - (1) In order to qualify for any cooperation credit, corporations must provide to the Department of Justice all relevant facts relating to the individuals responsible for the misconduct;
 - (2) Criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
 - (3) Criminal and civil attorneys handling corporate investigations should be in routine communication with one another

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Why you should care – Yates Memo

- (4) Absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation
- (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and
- (6) Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual based on considerations beyond that individual's ability to pay.

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Contact Information

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