

# Reading the Tea Leaves: False Claims Act Enforcement under the Biden-Harris Administration

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## FCA Enforcement During the Trump Administration

Just a few days before the Biden Administration took the helm of the federal government, the U.S. Department of Justice (DOJ) issued its Fiscal Year 2020 False Claims Act (FCA) statistics.<sup>1</sup> As expected, the DOJ's total recoveries were down as compared to prior years, in large part due to the interruption caused by the ongoing COVID-19 pandemic. That being said, the DOJ's total FCA recoveries for Fiscal Year 2020 still exceeded \$2 billion, with over \$1.8 billion (90 percent) of that total coming from businesses and individuals in the healthcare industry.

Although white collar prosecutions were down overall under the Trump Administration (even as compared to prior Republican administrations), prior to the COVID-19 pandemic FCA recoveries were at an all-time high; nearly \$5 billion was collected in 2016; nearly \$3.5 billion in 2017; and approximately \$3 billion in both 2018 and 2019.<sup>2</sup> Moreover, an average of 668 new *qui tam* (whistleblower) matters were filed in each of those years. In 2020 alone, 672 new *qui tam* matters were filed. The majority of that FCA activity was in the healthcare industry.

## President Biden, Vice President Harris, and Attorney General Garland's History of Support for the FCA and other Whistleblower Laws

Although the COVID-19 pandemic is still going strong and is bound to continue to affect fraud and abuse enforcement well into 2021, if not longer, all indications are that FCA enforcement under the Biden-Harris Administration promises to be significant. In his more than 45 years as a federal elected official, President Biden has played a role in some of the most significant fraud-fighting and whistleblower-protecting pieces of legislation in history.

### Biden as Senator

While serving in the Senate, then-Senator Biden served on the Senate Judiciary Committee. In 1986, Biden participated in hearings to discuss certain major FCA amendments introduced by Senator Chuck Grassley (R-Iowa), which passed in October 1986.<sup>3</sup> These amendments substantially strengthened the FCA, including creating a cause of action for "reverse false claims,"<sup>4</sup> adding an anti-retaliation provision, increasing damages

and penalties, increasing the maximum *qui tam* whistleblower award, and adding other important definitions and provisions.

### **Biden as Vice President**

President Biden himself has shown his strong support for whistleblowers in general. In 2010, then-Vice President Biden was a strong supporter of another major whistleblower law, the Dodd-Frank Act, which contained provisions entitling Securities and Exchange Commission (SEC) whistleblowers to awards between 10 and 30 percent of the government's total recovery of over \$1 million. In a policy document uploaded to his campaign website in August 2020 while running for President, President Biden promised to "strengthen and enforce" the Dodd-Frank Act.<sup>5</sup> Biden's support of this separate whistleblower statute demonstrates his commitment to fighting financial fraud and strengthening whistleblower protections for bringing fraud to the government's attention.

The Obama-Biden administration also signed into law the Fraud Enforcement and Recovery Act of 2009 (FERA).<sup>6</sup> That statute contained various provisions which strengthened the FCA, including broader authority to issue Civil Investigative Demands (CIDs); strengthening the reverse false claims provision by defining the term "obligation" to include the retention of an overpayment; limiting the "presentment" requirement by allowing FCA claims in situations where claims were made to third parties instead of directly to the government; and strengthening whistleblower protections. The following year, the Obama-Biden Administration signed into law the Patient Protection and Affordable Care Act (PPACA), which also contained several provisions strengthening the FCA, including removing the jurisdictional bar for allegations based on publicly disclosed information; relaxing the "original source" exception to the public disclosure bar by removing the requirement that the whistleblower had to have "direct and independent" knowledge of the information contained in the FCA complaint; and creating the "60-day rule," which created liability for healthcare providers who knowingly retained overpayments for more than 60 days.

### **Harris as California Attorney General**

Vice President Harris also has a history of strong support for fraud enforcement. In 2011, while serving as Attorney General for the State of California, Harris oversaw what was then the largest settlement in the history of California's state False Claims Act when Quest Diagnostics agreed to pay \$241 million to resolve a whistleblower suit alleging that Quest overcharged the state Medi-Cal program.<sup>7</sup> In announcing the Quest settlement, then-Attorney General Harris stated: "Medi-Cal providers and others who try to cheat the state through false claims and illegal kickbacks should know that my office is watching and will prosecute."<sup>8</sup> The following year, Harris announced a \$323 million settlement with health maintenance organization SCAN, resolving allegations that SCAN failed to provide contractually required financial information to the state's Department of Health Care Services.<sup>9</sup>

Vice President Harris' strong support for the FCA and whistleblowers was noted by the Chairman of the Board

of the Directors of the National Whistleblower Center, who issued a statement stating that Harris “has the strongest record of supporting *qui tam* whistleblowers of any major party candidate ever nominated for President or Vice President.”<sup>10</sup>

### **Merrick Garland on the FCA**

Unlike former Attorney General William Barr, who had previously expressed his belief that the *qui tam* provisions of the FCA were unconstitutional,<sup>11</sup> Judge Merrick Garland, President Biden’s newly-confirmed Attorney General, has hinted at his support for a robust FCA in at least one dissenting opinion he authored as a judge on the D.C. Court of Appeals. In 2004, the D.C. Circuit issued a decision (authored by now-Chief Justice John Roberts) in *United States ex rel. Totten v. Bombardier Corporation*.<sup>12</sup> The majority of the court in *Totten* held that a false claim that is presented to a federal grantee as opposed to the federal government itself is not actionable under the FCA (this was before the FERA amendments of 2009 discussed above).

In his dissent in *Totten*, Judge Garland criticized the majority’s opinion, which he said “leaves ‘vast sums of federal monies’ without [FCA] protection.” Judge Garland held that the majority’s opinion would “significantly restrict the reach of the [FCA] in a manner tha[t] Congress did not intend, withdrawing [FCA] protection with respect to a broad swath of false claims inflicting injury on the federal fisc.”

### **The Future of FCA Enforcement Under the Biden Administration**

Given the support that President Biden, Vice President Harris, and Attorney General Garland have previously demonstrated for the FCA, businesses (particularly those in the healthcare industry) and FCA legal practitioners can expect a healthy FCA enforcement environment for the coming years. Some of the expected areas of FCA scrutiny include:

#### **Pandemic and CARES Act-Related Fraud**

Since President Trump signed the CARES Act<sup>13</sup> into law in March 2020, the federal government has paid out hundreds of billions of dollars in pandemic-related relief, including through the Payroll Protection Program (PPP), designed to provide loans and grants to businesses affected by the pandemic, as well as the Provider Relief Fund, designed to provide relief directly to healthcare providers.<sup>14</sup> While there have already been a number of criminal prosecutions related to allegations of PPP fraud, in January 2021 the DOJ announced the first civil FCA settlement related to alleged PPP fraud.<sup>15</sup> In that case, an internet retail company and its chief executive officer agreed to pay \$100,000 to resolve allegations that they made false statements to federally insured banks that the company was not in bankruptcy in order to get approved for a PPP loan. Given the fact that the federal government has paid out over \$500 billion in PPP loans, and many businesses are currently in the process of applying for “second draw” PPP loans,<sup>16</sup> it is highly likely that the DOJ will continue to pursue many more FCA enforcement actions related to allegations of PPP fraud in the months and years to come.

Moreover, healthcare providers who received funds from the Provider Relief Fund, by simply retaining those funds, agreed to certain “terms and conditions” related to their receipt and use of those funds.<sup>17</sup> As with any receipt of federal funds, it is expected that the federal government will follow up with audits of those recipient-providers, and FCA enforcement actions where there are allegations that the provider knowingly failed to comply with those terms and conditions.

## Healthcare Fraud

As discussed above, healthcare fraud has been the main focus of FCA enforcement for many years, and that trend will almost certainly continue throughout the Biden Administration. This will likely include a continued focus on the use of telemedicine technology, which has expanded tremendously throughout the ongoing COVID-19 pandemic; arrangements that implicate the Stark Law<sup>18</sup> and the Anti-Kickback Statute,<sup>19</sup> including hospital-physician relationships, as well as relationships between pharmaceutical and device manufacturers and physicians; and overprescribing of opioids.

## Focus on Individuals

Under the Obama Administration, the DOJ increased its focus on individual liability, including in FCA matters. Specifically, in 2015 then-Deputy Attorney General Sally Yates issued a Memo entitled “Individual Accountability for Corporate Wrongdoing,” known colloquially as the “Yates Memo.”<sup>20</sup> That Memo discussed the DOJ’s commitment to fighting financial fraud, and stated that “[o]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.”<sup>21</sup> In 2018, the DOJ updated the Justice Manual (the DOJ’s main policy manual)<sup>22</sup> to include the principles contained in the Yates Memo. It is likely that the Biden Administration will continue, if not increase, its focus on individual responsibility and liability in connection with FCA matters given President Biden’s and Vice President Harris’ history of fighting financial fraud in their previous roles.

## Conclusion

While the federal government’s focus on the ongoing COVID-19 pandemic will continue to affect its fraud and abuse enforcement priorities for some time to come, the past actions of, and views expressed by, President Biden, Vice President Harris, and Attorney General Garland all indicate that the Biden-Harris Administration will continue, and likely expand, FCA enforcement over the next four years, particularly in areas such as pandemic-related fraud and in the healthcare industry. Any business that receives federal funds would be wise to increase its compliance-related measures so as to hopefully avoid scrutiny in the months and years ahead.

1 <https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020>.

- 2 <https://www.justice.gov/opa/press-release/file/1354316/download>.
- 3 P.L. 99-562, 100 Stat. 3153 (1986).
- 4 The “reverse false claims” provision of the FCA imposes liability for knowingly making, using, or causing to be made or used, “a false record or statement material to an obligation to pay or transmit money or property to the Government,” or knowingly concealing or knowingly and improperly avoiding an overpayment obligation. 31 U.S.C. § 3729(a)(1)(G).
- 5 [https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf?fbclid=IwAR32i7dt\\_olBbxPxyctmGP5MX40kH7t-oydlRaCxaoVZLEiG6aFtic9IoQ](https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf?fbclid=IwAR32i7dt_olBbxPxyctmGP5MX40kH7t-oydlRaCxaoVZLEiG6aFtic9IoQ).
- 6 P.L. 111-21, 123 Stat. 1617 (2009).
- 7 <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-241-million-settlement-quest#:~:text=Harris%20today%20announced%20a%20%24241,medical%20program%20for%20the%20poor>.
- 8 *Id.*
- 9 <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-largest-medical-settlement>.
- 10 <https://whistleblowersblog.org/2020/08/articles/featured-story/kamala-harris-strong-record-protecting-taxpayers-against-fraud/>.
- 11 [https://www.justice.gov/sites/default/files/olc/opinions/1989/07/31/op-olc-v013-p0207\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/1989/07/31/op-olc-v013-p0207_0.pdf).
- 12 380 F.3d 488 (DC. Cir. 2004).
- 13 Pub. L. 116-136.
- 14 For more information on PPP, visit <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>. For more information on the Provider Relief Fund, visit <https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/index.html>.
- 15 <https://www.justice.gov/usao-edca/pr/eastern-district-california-obtains-nation-s-first-civil-settlement-fraud-cares-act>.
- 16 <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program/second-draw-ppp-loans>.
- 17 The Terms and Conditions can be found at <https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/for-providers/index.html#terms-and-conditions>.

18 42 U.S.C. § 1395nn.

19 42 U.S.C. § 1320a-7b(b).

20 <https://www.justice.gov/archives/dag/file/769036/download>.

21 *Id.*

22 <https://www.justice.gov/jm/justice-manual>.

## About the Author

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