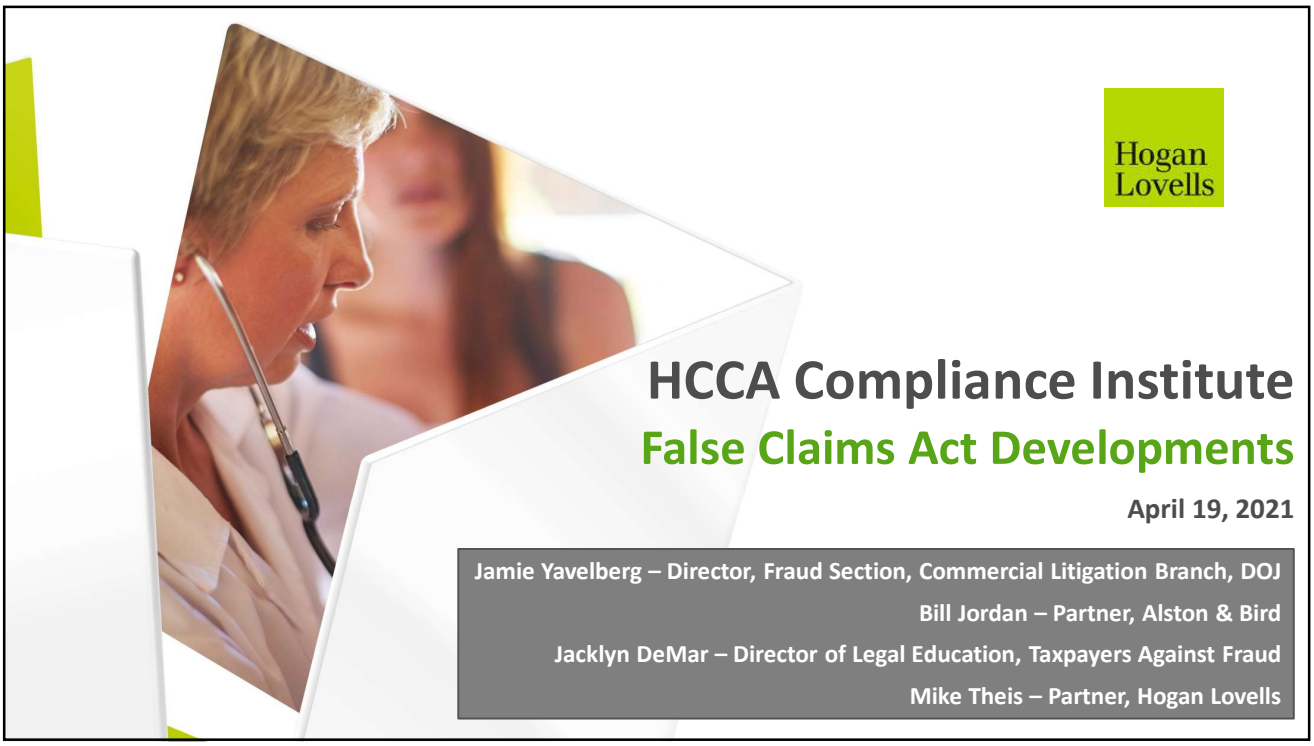

Hogan Lovells

HCCA Compliance Institute

False Claims Act Developments

April 19, 2021

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Agenda

- **Part 1 – Overview of the False Claims Act:**
  - The Federal False Claims Act
  - Key Elements and Definitions
  - "Falsity" Under the Act
  - Falsity – Medical Necessity and Clinical Decision-making
  - "Materiality" Under the Act
  - Development of Materiality Case Law
- **Part 2 – Application of the Act, Policy and Priorities:**
  - Disclosure, Cooperation and Remediation
  - DOJ Enforcement Priorities
  - DOJ Policy on Dismissal of Declined *Qui Tam* Suits

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The Federal False Claims Act

Imposes liability on 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;
>
> (C) conspires to commit a violation of subparagraph (A), (B), . . . or (G) . . .
>
> (G) knowingly makes, uses, or causes 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 conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government … .

Defendant is liable for three times the loss caused by the violation plus penalties. Penalties adjust annually for inflation: currently $11,665 to $23,331 per violation.

Act has included, since enactment in 1863, *qui tam* provisions that allow filing on behalf of the United States by private citizen "relators," who share in the proceeds of the action.

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Key Elements and Definitions

"Knowingly" - § 3729(b)(1)

> Actual knowledge, deliberate ignorance or reckless disregard; no proof of specific intent required.

"Claim" - § 3729(b)(2)

> Any request for government money or property, even if the government doesn't hold title.

"Obligation" - § 3729(b)(3)

> "[E]stablished duty, whether or not fixed, arising from an express or implied… relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment."

"Material" - § 3729(b)(4)

> "[A] natural tendency to influence or be capable of influencing."

"False or Fraudulent"

> No statutory definition; courts turn to common law.

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Falsity Under the Act

- **Factual Falsity:**
  - A factually false claim is one that "is untrue on its face"
  - Includes an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided.
  - *E.g.*, billing for services not rendered, or for a higher level of service than was delivered.
- **Legal Falsity:**
  - Express false certification: claimant expressly certifies compliance with a statute, regulation, or contractual term, but in fact has not complied.
  - Implied false certification: can be a basis for liability at least where the claimant "makes specific representations about the goods or services provided; and … [the] failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."
    - *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2001 (2016).

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Falsity – Medical Necessity and Clinical Decision-making

- "Objective falsity"
- How does a clinical opinion that items or services are "reasonable and necessary" become a basis for liability under the FCA?
- **Recent Case Law**
  - *U.S. ex rel. Druding v. Care Alternatives* (3d Cir. 2020) (cert. denied 2/22/21)
  - *Winter ex rel. U.S. v. Gardens Regional Hospital* (9th Cir. 2020)
  - *U.S. v. AseraCare, Inc.* (11th Cir. 2020)
  - *U.S. ex rel. Polukoff v. St. Mark's Hosp.* (10th Cir. 2018)
  - *See also U.S. v. Paulus* (6th Cir. 2018) (false statement about extent of arterial blockage is a factual matter which can give rise to a conviction for criminal fraud, reversing judgment of acquittal which held such to be a medical opinion not subject to prosecution).

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"Materiality" Under the Act

- In *Universal Health Services v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016), the Supreme Court rejected the proposition that non-compliance must relate to an "express condition of payment" in favor of enforcing a "rigorous" and "demanding" materiality standard.
  - FCA liability can arise from violation of a legal requirement only if the non-compliance with that requirement would matter to the government's decision to pay: "[U]nder any understanding of the concept, materiality 'looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'"
  - The False Claims Act is not "an all-purpose antifraud statute" or "a vehicle for punishing garden-variety breaches of contract or regulatory violations."
  - Materiality "cannot be found where noncompliance is minor or insubstantial."

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Development of Materiality Case Law

- *U.S. ex rel. Janssen v. Lawrence Mem'l Hosp.*, (10th Cir. 2020)
  - False statements about patient arrival times at hospital and in certification of compliance with Deficit Reduction Act were not material to government's decision to pay Medicare claims
- *U.S. ex rel. Ruckh v. Salus Rehab., LLC*, (11th Cir. 2020)
  - "Upcoding" and "ramping" were material to Medicare; failure to prepare and maintain comprehensive care plans for residents was not material to Medicaid
- Significance of continued government payment
- Influence on pleading
- Impact on discovery and proof
- Declined cases
  - Significance of government election to decline intervention
  - Defendant's ability to discover evidence of government action in the "mine run of cases"

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Disclosure, Cooperation and Remediation

- Justice Manual § 4-4.112: Guidelines for taking disclosure, cooperation, and remediation into account in False Claims Act matters
- Credit given for:
  - Timely voluntary disclosure
  - Other forms of cooperation
  - Remedial Measures
    - Thorough analysis of cause of underlying conduct and remediation to address the root cause
    - Implementing or improving an effective compliance program to prevent recurrence
    - Appropriate discipline for those responsible for the misconduct
    - Additional steps demonstrating recognition of seriousness of misconduct and acceptance of responsibility

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DOJ Enforcement Priorities

- COVID-19 Stimulus Funding
  - PPP
  - CARES Act
  - CMS loans
- Opioids
- Exploitation of Senior Citizens
- Electronic Health Records
- Telehealth/Cybersecurity
- Medicare Claims Data Analytics

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DOJ Policy on Dismissal of Declined *Qui Tam* Suits

- **31 U.S.C. § 3730(c)(2)(A)**
  - "[DOJ] may dismiss the action notwithstanding the objections of the [Relator] if the [Relator] has been notified by [DOJ] of the filing of the motion and the court has provided the [Relator] with an opportunity for a hearing on the motion."
- **Justice Manual § 4-4.111 – a/k/a the "Granston Memo"**
- **Courts diverge on degree of deference to DOJ**
  - *U.S. ex rel. Thrower v. Academy Mortgage,* (9th Cir. 2020) (applying *Sequoia Orange Co.,* DOJ must show a "valid government purpose" rationally related to dismissal)
  - *Swift v. United States* (D.C. Cir. 2003) (deference to prosecutorial discretion gives DOJ nearly "unfettered right" to dismiss)
  - *U.S. ex rel. CIMZNHCA v. UCB, Inc.*, (7th Cir. 2020) (voluntary dismissal under Rule 41—very little oversight by the court)
  - *U.S. ex rel. Polansky v. Exec. Health Resources, Inc.* (3d Cir., argued 11/18/2020)

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