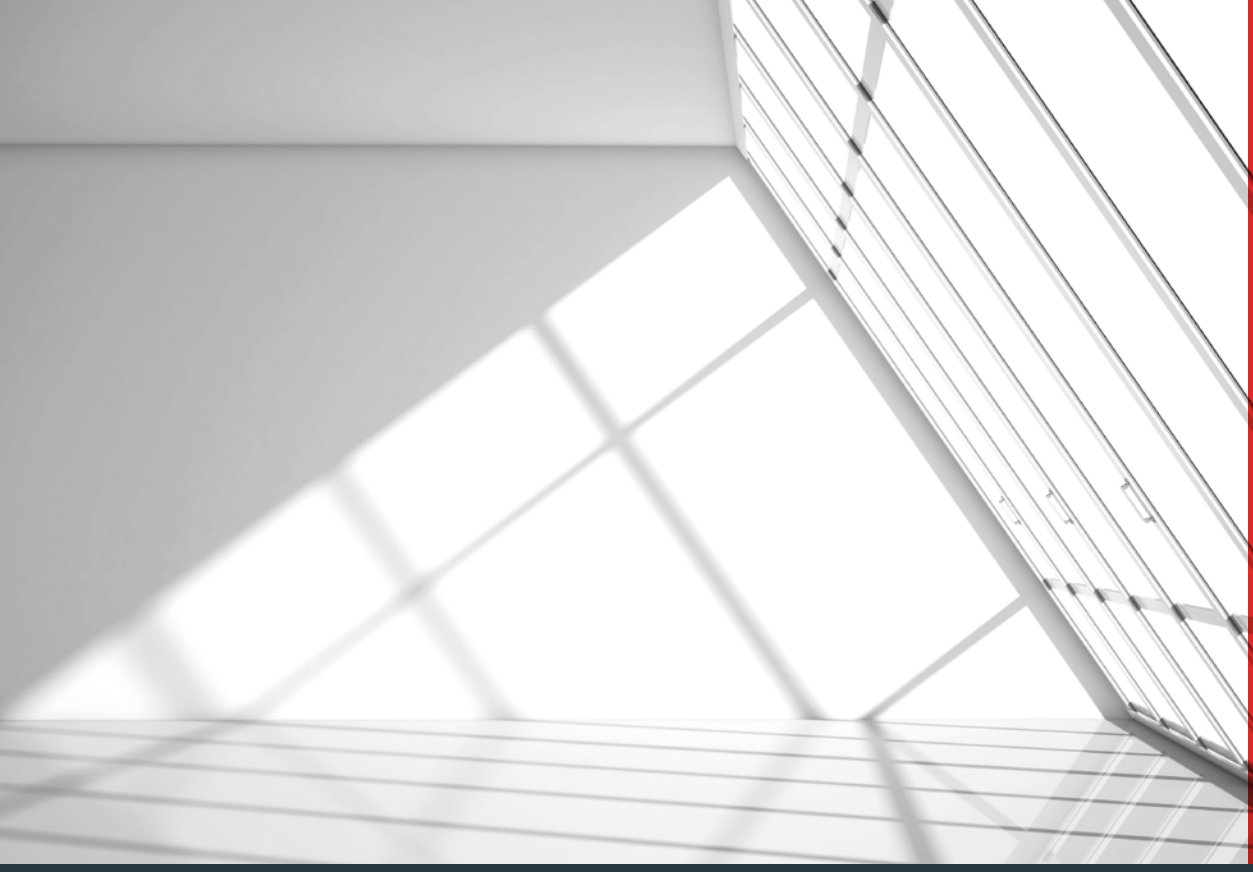

QUI-TAM ACTIONS IN THE BIDEN ERA

NEW LEGISLATION LIKELY SIGNALS A RISE IN QUI TAM ENFORCEMENT ACTIONS & RECOVERIES

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WHAT IS QUI TAM LEGAL ACTION?

A qui tam legal action is where a private individual sues on behalf of the government. In the United States, qui tam actions fall under the False Claims Act. Under the False Claims Act, anyone who defrauds the federal government can be liable for hefty financial penalties. On July 6, 2021, President Biden signed emergency bipartisan legislation to deal with funding issues with the Commodity Futures Trading Commission (*CFTC*) Whistleblower Program which was created in 2010 as part of the Dodd-Frank Act. This new legislation, known as the CFTC Fund Management Act (*"CFTC Act"*), follows a steady decline in the total amount of qui tam related recoveries for the U.S. government during the Trump administration, culminating in 2020 with approximately **$2.2 billion**, the lowest total recovery amount since 2008.

However, recoveries have been steadily on the rise in 2021, with over **$3.75 billion recovered to date this fiscal year**. By comparison, the high watermark for recoveries totaled $6.1 billion in 2014. In addition, the CFTC Act reportedly became necessary to increase the $100 million cap on the fund used to finance the whistleblower program because a former Deutsche Bank AG bank executive who aided the government in a 2015 criminal Libor manipulation scheme resulting in $2.5 billion in settlements could soon potentially collect over $100 million. Such a recovery would almost double the total amount that the fund has awarded to whistleblowers since 2014, $123 million (*currently 15% to 30% of the overall monetary penalties collected by the U.S. government*). In addition to the passage of the CFTC Act and the increase in qui tam related lawsuits and penalties/whistleblower recoveries, we also note that the cost of civil penalties was recently increased to between $10,781 and $21,562 per alleged false claim, which means having 100 false claims can lead to over $1 million in penalties.

WHAT IS QUI TAM LEGAL ACTION?

The CFTC Act creates a special fund specifically for the operations of the CFTC Office of the Whistleblower which is separate from the fund used to pay whistleblower awards, thereby ensuring that the fund will not be fully depleted, even by large awards. Previously, the fund could only be replenished when it fell below $100 million. Under the CFTC Act, the CFTC can now transfer up to $10 million to a separate account at the U.S. Treasury to fund operating and programming expenses (*including CFTC whistleblower office employees' salaries to avoid having to furlough such employees*) when the balance in the fund is insufficient. **After October 1, 2022, any remaining money in this account will be returned to the fund**.

Qui tam lawsuits are most often seen in the healthcare industry. In fact, over **90%** of the **2021** recoveries thus far have been in this space, leaving the defense industry as a distant second. Since 2014, over half of the total annual recoveries have come from healthcare related companies resulting from allegations of unnecessary or inadequate care, paying kickbacks to healthcare providers to induce usage of certain goods and services, including medications, or overcharging for goods and services paid for by Medicare, Medicaid, and other federal healthcare programs.

Even in 2020 when the qui tam related recoveries sharply declined, there were more actions filed overall and this has continued in 2021. In addition to Biden Administration's renewed focus on compensating whistleblowers culminating in the CFTC Act, there is also a stated focus by the U.S. Department of Justice (*DOJ*) on qui tam actions which are seen as one tool used to combat fraudulent schemes related to the array of coronavirus relief programs. This includes efforts to punish companies for their suspected misuse of COVID-19 relief funds granted under the federal CARES Act including misrepresentations, false certifications, and the wrongful retention of funds. In addition, qui tam actions are also likely to be brought against borrowers, including those in the healthcare space, for false statements made in connection with loan applications submitted under the Paycheck Protection Program (*PPP*).

WHAT INSUREDS NEED TO KNOW

With respect to securing insurance coverage for qui tam actions (*and other claims*), it is important to be mindful of your policy's notice provisions and adhere to the timing for noticing claims under your policy. It is imperative that a qui tam action not trigger a policy's definition of claim unless/until the insured is aware of and has received such action. As qui tam matters are filed under seal, it could be years before the insured is aware an action has been filed. For that reason, when a claim is "*deemed made*" cannot be tied to the mere filing of a matter under seal, but rather the insured's actual receipt of such action.

In addition, be aware that a policy's fraud exclusion generally does not preclude coverage for defense costs, but professional services exclusions in directors and officers (*D&O*) insurance policies can present coverage challenges. Likewise, while carriers could potentially argue that qui tam actions seek uninsurable disgorgement, this position should not affect defense costs coverage in most policies. While we are not aware of any statistics which specifically track defense costs for qui tam actions, in general, approximately **$150,000 to $300,000** in defense costs can be expected depending on the nature and length of an investigation, with higher amounts possible. Even if the government ultimately determines there is no liability or there is a low recovery amount, the defense costs can often be more than the ultimate settlements of these cases.

We also note that the lowest recoveries and avoidance of liability are possible where insureds consistently maintain and periodically update their policies and procedures. As most qui tam whistleblowers are former employees, it is imperative to establish an internal reporting and investigation structure so that employees understand where they can report concerns without fear of retaliation and then receive transparent information from the employer on the resulting investigation's findings. Specifically with respect to healthcare industry insureds, policies on quality of care should be regularly updated and processes should exist to make sure that the stated policies are being implemented in a standardized way across all facilities. In addition, not only is it important to have written processes for record-keeping, billing and filing claims including those for detecting and preventing fraud, but to also regularly document that employees have been trained on these procedures. Even better is to have employees provide written acknowledgements following training on compliance programs including that employees will adhere to the law, will report all violations or attempted violations, and that they understand their obligations and reporting duties.

Many employers are also conducting periodic employee compliance interviews to inquire about any potential issues and conducting exit interviews of departing employees, including those who are involuntarily terminated. Employers should be certain that all communications with employees are clear and unambiguous and that conversations are well-documented, especially those that could be subject to different interpretations. The focus of documentation should be on the specific allegations and not the whistleblower's credibility.

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