

# The False Claims Act and Internal Investigations

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## Pertinent Cases Related to False Claims Act Liability

The False Claims Act is the Department of Justice's (DOJ) main tool for combatting fraud in order "to ensure that taxpayer dollars are spent as intended."<sup>1</sup> This paper addresses the risks contractors face in complying with the False Claims Act and how to mitigate that risk when potential violations arise through the targeted use of internal investigations. Below are some recent and noteworthy examples of cases in which contractors, entities and individuals faced False Claims Act liability for their attempts to defraud the government.

### Subsidiaries Knowingly Providing False Products to the Government

In February 2021, a civil engineering contractor settled civil and criminal False Claims Act allegations related to selling the U.S. Navy substandard concrete used to construct airfields in the Republic of Djibouti.<sup>2</sup> COLAS Djibouti SARL (Colas Djibouti), a wholly owned subsidiary of the Colas SA company headquartered in France, violated the False Claims Act when it "knowingly" provided the government with contractually noncompliant concrete, which contained "excessive alkali-silica reactive material and contained elevated chloride content."<sup>3</sup> The DOJ noted that the chemical composition of the concrete could potentially corrode steel embedded in the concrete, causing significant impairment to its long-term durability.<sup>4</sup>

Specifically, Colas Djibouti knowingly provided false product data when it submitted an analysis of "bottled water," instead of an analysis of the water used for mixing the concrete.<sup>5</sup> Moreover, Colas Djibouti falsified its concrete mix design and authorized its laboratory staff "to provide the misleading water analysis."<sup>6</sup> Colas Djibouti settled its civil False Claims Act allegations for \$3.9 million.<sup>7</sup> It separately resolved criminal False Claims Act allegations in a Deferred Prosecution Agreement with the U.S. Attorney for the Southern District of California, agreeing to forfeit \$8 million, pay restitution of \$10,042,002 to the U.S. Navy, and a criminal fine of \$2,500,000.<sup>8</sup>

Acting Secretary of the Navy Thomas W. Harker remarked, "This outcome demonstrates that the Department of the Navy will continue to *insist that our contractors must meet our high standards*. This global settlement demonstrates the strong cooperation between the Department of the Navy and the Department of Justice in preventing fraud, *no matter where in the world it happens*."<sup>9</sup>

### Buy American Act Fraud Against the Government

Novum Structures LLC (Novum), a Wisconsin-based architectural firm, agreed to a \$3 million settlement and entered a guilty plea to resolve civil and criminal False Claims Act allegations that it improperly used foreign materials on federal construction projects.<sup>10</sup> Novum

<sup>1</sup>Press Release, Civil Division, U.S., Dep't of Just., Principal Deputy Assistant Attorney General Ethan P. Davis delivers remarks on the False Claims Act at the U.S. Chamber of Commerce's Institute for Legal Reform (June 26, 2020), <https://www.justice.gov/civil/speech/principal-deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims>.

<sup>2</sup>Press Release, Office of Pub. Affairs, U.S., Dep't of Just., Concrete Contractor Agrees to Settle False Claims Act Allegations for \$3.9 Million (Feb. 17, 2021), <https://www.justice.gov/opa/pr/concrete-contractor-agrees-settle-false-claims-act-allegations-39-million>.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*United States v. Colas Djibouti, LLC, No. 3:21-cr-00280-WQH (S.D. Cal. Feb. 17, 2021)*.

<sup>6</sup>*United States v. Colas Djibouti, LLC, No. 3:21-cr-00280-WQH, at \*16 (S.D. Cal. Feb. 17, 2021)*.

<sup>7</sup>Press Release, Office of Pub. Affairs, U.S., Dep't of Just., Concrete Contractor Agrees to Settle False Claims Act Allegations for \$3.9 Million (Feb. 17, 2021), <https://www.justice.gov/opa/pr/concrete-contractor-agrees-settle-false-claims-act-allegations-39-million>.

<sup>8</sup>*United States v. Colas Djibouti, LLC, No. 3:21-cr-00280-WQH, at \*5 (S.D. Cal. Feb. 17, 2021)*.

<sup>9</sup>See Press Release, Office of Pub. Affairs, U.S., Dep't of Justice, Concrete Contractor Agrees to Settle False Claims Act Allegations for \$3.9 Million (Feb. 17, 2021), <https://www.justice.gov/opa/pr/concrete-contractor-agrees-settle-false-claims-act-allegations-39-million> (emphasis added).

<sup>10</sup>See Press Release, Office of Pub. Affairs, U.S., Dep't of Justice, Wisconsin Architectural Firm to Plead Guilty and Pay \$3 Million to Resolve Criminal and Civil Claims (Jan. 5, 2016), <https://www.justice.gov/opa/pr/wisconsin-architectural-firm-plead-guilty-and-pay-3-million-resolve-criminal-and-civil-claims>.



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specializes in the design and construction of glass space frames and performed federal contracts related to the construction of federal buildings and transit projects.<sup>11</sup>

Novum pled guilty in 2016 to concealing a material fact under 18 U.S.C. §1001 when it “repackaged materials and falsified documents” related to federally funded construction projects “in order to hide that it was using noncompliant foreign materials.”<sup>12</sup> As part of its plea deal, Novum was ordered to pay a \$500,000 criminal fine.<sup>13</sup> In addition, Novum agreed to pay \$2.5 million to resolve civil False Claims Act allegations in connection with submitting false claims for payment on federal contracts from January 1, 2004, through July 11, 2013.<sup>14</sup>

A whistleblower initiated the civil suit against Novum under the qui tam provisions of the False Claim Act and received \$400,000 as her share of Novum’s civil settlement.<sup>15</sup>

## Misappropriating CARES Act Covid-19 Relief Fund

Congress enacted the Coronavirus Aid, Relief and Economic Security (CARES) Act in March 2020, intending to provide emergency financial aid to relieve economic losses related to Covid-19.<sup>16</sup> The Act included \$2.2 trillion to provide economic relief to Americans and their businesses.<sup>17</sup>

As part of the Act, Congress authorized the Paycheck Protection Program (PPP), providing funds to be in use for payroll costs, rent, utilities and interest on mortgages.<sup>18</sup>

On June 26, 2020, Principal Deputy Assistant Attorney General, Ethan P. Davis, remarked that the Civil Division of the DOJ will focus its investigations on the False Claims Act violation related to the CARES Act.<sup>19</sup> On May, 17, 2021, the DOJ announced the establishment of a COVID-19 Fraud Enforcement Task Force to bolster its investigative efforts into fraud associated with exploitation of CARES Act and PPP funds.<sup>20</sup> The DOJ assured that it will be careful not to discourage companies from “accessing *in good faith* the important resources that Congress made available in the CARES Act.”<sup>21</sup> The DOJ noted that the False Claims Act applies “only to knowing violations...that are material to the government’s payment decisions,” and indicated that it would “not pursue companies that made immaterial or inadvertent technical mistakes in processing paperwork, or that simply and honestly misunderstood the rules.”<sup>22</sup>

As of March 2021, nearly 500 individuals have been charged with making allegedly fraudulent claims in connection with the COVID-19 relief fraud.<sup>23</sup> The DOJ charged more than 120 defendants with defrauding the PPP program and more than 140 defendants with alleged unemployment fraud since the start of the COVID-19 pandemic in March 2020.<sup>24</sup>

In one particularly egregious case, an individual was sentenced to more than 11 years for wire fraud and money laundering for submitting 15 fraudulent applications for PPP loans amounting to roughly \$24.8 million in

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> CARES Act: Higher Education Emergency Relief Fund, U.S. DEPT OF EDUC., <https://www2.ed.gov/about/offices/list/ope/caresact.html> (last visited Oct. 18, 2021).

<sup>17</sup> *Id.*

<sup>18</sup> Preliminary Analysis of Paycheck Protection Program Data, Memorandum to the Members of the Select Subcommittee on the Coronavirus Crisis, 116 Cong. H.R. Rep (Sept. 1, 2020), <https://>

[coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2020-09-01\\_PPP%20Interim%20Report.pdf](https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2020-09-01_PPP%20Interim%20Report.pdf).

<sup>19</sup> See Press Release, Civil Division, U.S., Dep’t of Just., Principal Deputy Assistant Attorney General Ethan P. Davis delivers remarks on the False Claims Act at the U.S. Chamber of Commerce’s Institute for Legal Reform (June 26, 2020), <https://www.justice.gov/civil/speech/principal-deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims>.

<sup>20</sup> See Press Release, Civil Division, U.S., Dep’t of Just., Attorney General Announces Task Force to Combat COVID-19 Fraud (May 17, 2021), <https://www.justice.gov/opa/pr/attorney-general-announces-task-force-combat-covid-19-fraud>.

<sup>21</sup> See Press Release, Civil Division, U.S., Dep’t of Just., Principal Deputy Assistant Attorney General Ethan P. Davis Delivers Remarks on the False Claims Act at the U.S. Chamber of Commerce’s Institute for Legal Reform (June 26, 2020), <https://www.justice.gov/civil/speech/principal-deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims> (emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> See LAW360, DOJ Says Hundreds Charged With COVID-19 Fraud So Far (March 26, 2021), <https://www.law360.com/whitcollar/articles/1369224/doj-says-hundreds-charged-with-covid-19-fraud-so-far>.

<sup>24</sup> *Id.*





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federal funds.<sup>25</sup> Dinesh Sah submitted these fraudulent loan applications to eight different lenders, using the names of businesses he claimed to control and claiming these businesses employed numerous employees requiring hundreds of thousands in payroll expenses.<sup>26</sup> Sah received \$17 million in PPP loan funds, which he used for his personal benefit to purchase multiple homes in Texas, make international money transfers, pay off mortgages on other homes in California and “buy a fleet of luxury cars,” including a Bentley, a Corvette and a Porsche.<sup>27</sup> In addition to his prison term, Sah agreed to forfeit over \$9 million in fraudulent proceeds and must pay \$17,284,649.79 in restitution to the U.S. government.<sup>28</sup>

More recently, on October 13, 2021, an individual from Georgia was sentenced to 18 months in prison for fraudulently obtaining a PPP loan.<sup>29</sup> Dennes Garcia obtained a PPP loan of \$285,742 for his company, Dhanda Corporation, “based on false information about the company’s number of employees and average payroll, and based on false supporting tax documents.”<sup>30</sup> Garcia wrote a \$100,000 check to himself from the PPP loan funds and paid more than \$71,000 to an alleged co-conspirator, James Stote, as a kickback for helping prepare and submit the fraudulent loan application.<sup>31</sup> In addition to his prison sentence, Garcia was ordered to pay \$285,742 in restitution to the U.S. government and forfeit the \$285,742 he fraudulently obtained from the PPP loan.

Stote was also involved as a co-conspirator in another PPP loan fraud case in the Southern District of Florida, where his case remains pending.<sup>32</sup> Stote allegedly assisted Cindi Denton in preparing a fraudulent PPP loan application for \$491,310 based on false employee and payroll information for Denton’s company, Emerald Jade Solutions, Inc.<sup>33</sup> Denton admitted to wiring herself \$150,000 from the PPP loan funds and paying Stote more than \$98,000 for his assistance in preparing the falsified documents.<sup>34</sup> Denton was sentenced to six months in prison and 12 months of house arrest, was ordered to pay \$377,883.91 in restitution to the U.S. government and had to forfeit \$377,883.91 in fraudulently obtained funds.<sup>35</sup>

## Legal Background of the False Claims Act

The False Claims Act, 31 U.S.C. §§3729-3733, was enacted in 1863 to prevent contractors from defrauding the Army in the Civil War. The False Claims Act has evolved from its wartime roots to become the government’s primary litigation tool for recovering fraud losses. In 2020, the DOJ recovered over \$2.2 billion from False Claims Act cases, with total recoveries since the Act was amended in 1986 of more than \$64 billion.<sup>36</sup> DOJ’s recoveries in 2019 were \$3 billion,<sup>37</sup> \$2.8 billion in 2018 and \$3.7 billion in 2017.<sup>39</sup>

False Claims Act liability involves a contractor that “knowingly presents, or causes to be presented, a false or

<sup>25</sup>Press Release, Dep’t of Just., Texas Man Sentenced for \$24 Million COVID-19 Relief Fraud Scheme (July 28, 2021), Texas Man Sentenced for \$24 Million COVID-19 Relief Fraud Scheme | OPA | Department of Justice.

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>See Press Release, Office of Pub. Affairs, U.S., Dep’t of Justice, Two Individuals Sentenced for COVID-19 Relief Fraud (Oct. 13, 2021), <https://www.justice.gov/opa/pr/two-individuals-sentenced-covid-19-relief-fraud>.

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>See Press Release, Office of Pub. Affairs, U.S., Dep’t of Just., Justice Department Recovers Over \$2.2 Billion from False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021), <https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020>.

<sup>37</sup>See Press Release, Office of Pub. Affairs, U.S., Dep’t of Just., Justice Department Recovers over \$3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), [https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-](https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019)

[claims-act-cases-fiscal-year-2019](https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018).

<sup>38</sup>See Press Release, Office of Pub. Affairs, U.S., Dep’t of Just., Justice Department Recovers Over \$2.8 Billion from False Claims Act Cases in Fiscal Year 2018 (Dec. 21, 2018), <https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018>.

<sup>39</sup>See Press Release, Office of Pub. Affairs, U.S., Dep’t of Just., Justice Department Recovers Over \$3.7 Billion From False Claims Act Cases in Fiscal Year 2017 (Dec. 21, 2017), <https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017>

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fraudulent claim for payment or approval” or “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.”<sup>40</sup>

The False Claims Act also prohibits what is known as a “reverse false claim”—knowingly making a false record in connection with an obligation to pay the government,<sup>41</sup> or conspiring to do so.<sup>42</sup>

While not commonly raised, a contractor may also be liable for:

- Knowingly delivering less than all of the government’s property or money;<sup>43</sup>
- Intending to defraud the government by making or delivering a document certifying receipt of property used, or to be used, by the government, without knowing whether the information on the receipt is true;<sup>44</sup> or
- Knowingly buying, or receiving as a pledge of an obligation or debt, public property from an officer or employee of the government, or a member of the Armed Forces, who lawfully may not sell or pledge property.<sup>45</sup>

## Definitions

- The False Claims Act defines the term “knowingly” as (1) having actual knowledge of information; (2) acting in deliberate ignorance of the truth or falsity of information; or (3) acting in reckless disregard of the truth and falsity of information.<sup>46</sup> The statute does not require a proof of specific intent to defraud.<sup>47</sup>
- The term “claim” means any request or demand for money or property made directly to the government

(or to a contractor, if the money is to be spent on the government’s behalf).<sup>48</sup>

## Examples of Actions That May Amount to False Claims Act Violations:

- Inflating material costs;
- Inflating/mischarging personnel costs;
- Improperly allocating costs;
- Using nonconforming materials, parts or work;
- Making unapproved product substitutions;
- Falsifying testing records or not complying with testing protocols;
- Concealing defective work;
- Using counterfeit parts;
- Violating Buy American Act or sourcing requirements; and
- Violating trade and export compliance statutes (ITAR/EAR).

## Penalties and Damages

A contractor in violation of the False Claims Act can face various penalties and damages, including potential suspension and debarment.

### *Civil Penalties*

A contractor in violation of the False Claims Act is liable for a monetary civil penalty per false claim, plus three times the amount of the damages the government sustained.<sup>49</sup>

The civil penalty amounts are adjusted annually, with 2021 amounting to a minimum of \$11,803 and a maximum of \$23,607 per false claim.<sup>50</sup> Moreover, the individual or

<sup>40</sup>31 U.S.C. § 3729(a)(1)(A), (B).

<sup>41</sup>31 U.S.C. § 3729(a)(1)(G).

<sup>42</sup>31 U.S.C. § 3729(a)(1)(C).

<sup>43</sup>31 U.S.C. § 3729(a)(1)(D).

<sup>44</sup>31 U.S.C. § 3729(a)(1)(E).

<sup>45</sup>31 U.S.C. § 3729(a)(1)(F).

<sup>46</sup>31 U.S.C. § 3729(b)(1)(A).

<sup>47</sup>31 U.S.C. § 3729(b)(1)(B).

<sup>48</sup>31 U.S.C. § 3729(b)(2).

<sup>49</sup>31 U.S.C. § 3729(a)(1).

<sup>50</sup>See 15 CFR 6.3(a)(3).



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entity is also liable for the costs of a civil action brought to recover any such penalty or damages.<sup>51</sup> Because each invoice or claim for payment a contractor submits can be the subject of a false claim, a contractor can quickly face significant civil penalties for repeated False Claims Act violations.

## *Penalties for Retaliatory Actions*

The amendments to the False Claims Act incentivize whistleblowers, or “relators,” to come forward with fraud allegations against current or former employers. In order to foster this reporting, the False Claims Act incorporates whistleblower protections against retaliatory actions taken in connection with whistleblower’s relating potential false claims to the government.

For example, a contractor employer that takes retaliatory actions against a whistleblower employee may be subject to damages including reinstatement, back pay, and attorneys’ fees incurred by the whistleblower.<sup>52</sup> As such, it is critical that a contractor consult with counsel before taking any action concerning a whistleblower, including interviewing the whistleblower.

## *Reduced False Claims Act Damages*

A court may reduce False Claims Act penalties not less than two times the amount of damages sustained by the government if it finds the following:

- The contractor furnished the government with all information about the violation within 30 days of obtaining such information;<sup>53</sup>

- The contractor fully cooperated with any government investigation;<sup>54</sup> and
- At the time the contractor self-disclosed, no criminal prosecution, civil action or administrative action had been commenced with respect to the alleged violation, and the contractor did not have actual knowledge of a government investigation into an alleged violation.<sup>55</sup>

## **The Criminal False Claims Act**

In addition to the civil False Claims Act, 31 U.S.C. §§3729-3733, the criminal False Claims Act, 18 U.S.C. §287, establishes criminal liability, including imprisonment and a fine, for a contractor that

[M]akes or presents to any person or officer in the civil, military or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent...”

Contractors subject to civil False Claim Act liability may also be personally and criminally liable for making false claims. For example, a software engineering firm settled civil False Claims Act allegations by agreeing to pay nearly \$38 million in restitution for allegedly engaging in a scheme to bribe military contracting officials to obtain federal contracts.<sup>56</sup> The firm’s owner separately paid \$500,000 in settlement with DOJ to resolve personal False Claims Act liability.<sup>57</sup> The firm simultaneously entered into a plea deal with the Western District of Texas to resolve its criminal False Claims Act liability by pleading guilty to

<sup>51</sup>31 U.S.C. § 3729(a)(3).

<sup>52</sup>31 U.S.C. § 3730(h).

<sup>53</sup>31 U.S.C. § 3729(a)(2)(A).

<sup>54</sup>31 U.S.C. § 3729(a)(2)(B).

<sup>55</sup>31 U.S.C. § 3729(a)(2)(C).

<sup>56</sup>Press Release, Dep’t of Just., Quantadyn Corporation and Owner Settle False Claims Act Allegations of Bribery to Obtain Government Contracts for Simulators (Sept. 15, 2020), [Quantadyn Corporation and Owner Settle False Claims Act Allegations of Bribery To Obtain Government Contracts For Simulators | OPA | Department of Justice](#).

<sup>57</sup>*Id.*



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conspiracy to commit wire fraud.<sup>58</sup> In all, the firm agreed to serve a five-year probation term, pay \$37,757,713.91 in restitution, a criminal fine of \$6.3 million and a forfeiture of \$7,099,863.77 for civil and criminal False Claim Act allegations.<sup>59</sup>

## How To Prevent or Mitigate False Claims Act Risk: Internal Investigations

Internal investigations are a useful tool to help businesses prevent and/or mitigate potential False Claims Act violations. Engaging in an internal investigation is important for many reasons, including compliance with FAR disclosure requirements, maintaining oversight of contractor personnel when allegations are made and to demonstrate a good faith effort that allegations of False Claims Act violations are taken seriously. A contractor may engage counsel to conduct an internal investigation before or after the DOJ has put the contractor on notice that it may be in violation of the False Claims Act.

There is a great value to conducting internal investigations early on, once a contractor becomes aware of potential allegations and before the DOJ gets involved. In these instances, the contractor is in the best position to take control of a potentially bad situation and remedy improper practices or remove misbehaving employees before serious claims are brought by a whistleblower or otherwise. It is far more pleasant to hire counsel to conduct an internal investigation into a limited scope of alleged wrongdoing than it is to turn over any and all documents and data the DOJ may demand in a formal agency investigation.

## FAR Mandatory Disclosures and Voluntary Disclosures to the DOJ

The Federal Acquisition Regulation (FAR) requires contractors to “timely disclose” in writing whenever the contractor has “credible evidence” that a principal, agent, employee or subcontractor has:

- violated federal criminal law with respect to fraud, bribery or gratuity prohibitions found in Title 18 of the U.S. Code; or
- committed a violation of the civil False Claims Act.<sup>60</sup>

A contractor may face suspension and/or debarment for a “knowing failure” to timely disclose credible evidence of a violation of such federal criminal law or the civil False Claims Act.<sup>61</sup> The obligation to make a mandatory disclosure extends until three years after the government makes final payment on a contract.<sup>62</sup> The FAR also requires contractors to “exercise due diligence to prevent and detect criminal conduct” and promote “an organizational culture that encourages ethical conduct.”<sup>63</sup>

Internal investigations into potential violations can be used to determine whether mandatory disclosure of wrongdoing is necessary and how to bring a company back into regulatory compliance. The contractor and attorney may work together to determine the scope of the investigation, set benchmarks and map the progress of the investigation. And, if a mandatory disclosure is required, the contractor is in a position to take control of the narrative and take preemptive action. Such preemptive disclosures of False Claims Act violations may even be rewarded by the DOJ. According to the DOJ's manual on civil fraud litigation,

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> FAR 52.203-13(b)(3)(i). This mandatory disclosure requirement is incorporated into federal contracts valued at more than \$5 million and likely to take more than 120 days to complete.

<sup>61</sup> FAR 3.1003(a)(2).

<sup>62</sup> FAR 3.1003(a)(2).

<sup>63</sup> FAR 52.203-13(b)(2).

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“[e]ntities or individuals that make proactive, timely and voluntary self-disclosure to the Department about misconduct will receive credit during the resolution of a [False Claims Act] case.”<sup>64</sup>

An internal investigation may also reveal facts and circumstances that the contractor may voluntarily disclose to earn “cooperation credit” from the DOJ when the contractor is subject to government investigation. The DOJ will take into account non-mandatory contractor measures including:

- Identifying individuals substantially involved in or responsible for misconduct;
- Preserving, collecting and disclosing relevant documents;
- Identifying knowledgeable individuals within the company;
- Admitting liability or accepting some responsibility for False Claims Act violations; and
- Assisting in the determination of government losses caused by the contractor’s misconduct.<sup>65</sup>

Finally, internal investigations are useful to develop remedial measures to correct False Claims Act violations and ensure future compliance. The DOJ also considers whether a company has taken remedial measures in response to a False Claims Act violation when determining whether a company will receive cooperation credit when resolving a claim. These remedial actions may include:

- Demonstrating a thorough analysis of the root cause of misconduct and remedying that root cause when appropriate;
- Implementing or improving internal compliance programs; or

- Taking appropriate disciplinary action against wrongdoers within the company.<sup>66</sup>

Even when a company is subject to a DOJ investigation, conducting an internal investigation may nonetheless prove beneficial to identify the cause of the violation and take appropriate action earn cooperation credit.

## The Benefit of Attorney-Client Privilege

A major benefit to internal investigations is the attorney-client privilege that attaches to discussions between contractor personnel and counsel performing the investigation. Internal investigations involve a series of interviews between the attorney and contractor personnel to gather facts and determine whether a violation has occurred. The company that hired the attorney, as the client, holds the privilege over the matters discussed during these fact-gathering interviews and may generally assert this privilege to prevent the discovery or disclosure of interview discussions to the government or otherwise. This privilege protection also extends to documents produced to counsel during an internal investigation.<sup>67</sup>

Internal investigations may be conducted by outside counsel or the company’s in-house counsel and maintain attorney-client privilege, as long as a significant purpose is of the internal investigation is to seek or provide legal advice.<sup>68</sup> FAR 52.203-13 states that full cooperation with disclosure requirements does not mean a contractor must “waive its attorney-client privilege or the protections afforded by the attorney work product doctrine,” nor does it prevent a contractor from “conducting an internal investigation.”

<sup>64</sup>DEPT OF JUST., JUSTICE MANUAL § 4-4.112 (2019)

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>In re: Kellogg Brown & Root, 756 F.3d 754, 756 (D.C. Cir. 2014) (holding documents produced through a company’s internal investigation were privileged and not subject to discovery by the employee whistleblower bringing a False Claims Act suit).

<sup>68</sup>*Id.* at 760. (“In the context of an organization’s internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy.”).

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## Summarizing the Key Benefits of Internal Investigation

- The control to set the scope of the investigation and develop the narrative
- Attorney-client privilege
- Preventative self-disclosure
- Safely certify compliance on future invoices and other required certifications

## What Is on the Horizon: Cybersecurity Measures and the False Claims Act

On October 6, 2021, the DOJ announced its new civil cyberfraud initiative that will utilize the False Claims Act “to pursue cybersecurity related fraud by government contractors and grant recipients.”<sup>69</sup> Specifically, the new initiative will hold accountable those that put U.S. information or systems at risk by “knowingly providing deficient cybersecurity products or services, knowingly misrepresenting their cybersecurity practices or protocols or knowingly violating obligations to monitor and report cybersecurity incidents and breaches.”<sup>70</sup>

Aside from this recent press release, the DOJ has not provided further guidance on what these new measures will entail. However, a recent case may shed some light on the kind of activities the DOJ will investigate under its new cyberfraud initiative. Just few days before the new

initiative's release, a former Army contractor in South Korea was sentenced to 151 months in prison for stealing the personal identifying information (PII) of more than 3,300 military members through by taking digital photographs of PII on his computer screen while logged into military health databases.<sup>71</sup>

Fredrick Brown stole Social Security information, military ID numbers, dates of birth and contact information.<sup>72</sup> He then provided this stolen information to a Philippines-based co-conspirator to use the information “to access DOD and Veterans Affairs benefits sites and steal millions of dollars.”<sup>73</sup> The Cyber Field Office of the Department of Defense's Office of Inspector General conducted the investigation,<sup>74</sup> suggesting this kind of misuse of government technology may be the kind of cyberfraud the DOJ seeks to investigate with its new initiative. Time will tell what the precise scope of this cyber-fraud initiative will be and how it will be implemented in federal regulations.

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<sup>69</sup>*Id.*

<sup>70</sup>*Id.*

<sup>71</sup>See Press Release, Office of Pub. Affairs, U.S., Dep't of Just., Former Army Contractor Receives 151-Month Sentence for Fraud Scheme Targeting Thousands of U.S. Servicemembers and Veterans (Oct. 1, 2021), <https://www.justice.gov/opa/pr/former-army-contractor-receives-151-month-sentence-fraud-scheme-targeting-thousands-us>.

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

<sup>74</sup>*Id.*