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Practical Guidance For Minimizing FCA Exposure After SuperValu and Polansky

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February 13, 2024

The Supreme Court decided a pair of False Claims Act cases last year that collectively expand both the corporate risks of FCA liability and the opportunities to defeat potential FCA litigation. In *United States ex rel. Schutte v. SuperValu,* the Court held that scienter under the FCA turns on the defendant's "subjective beliefs—not [on] what an objectively reasonable person may have known or believed." 598 U.S. 739, 749 (2023). In *United States ex rel. Polansky v. Executive Health Resources, Inc.*, the Court reaffirmed the government's broad discretion to seek dismissal of FCA claims filed by relators where it concludes that *qui tam* litigation is not in the government's interest. 599 U.S. 419 (2023). Taken together, the cases underscore the importance of ensuring that companies who participate in federal programs giving rise to FCA exposure develop contemporaneous factual records that support their good-faith compliance, particularly when facing ambiguous legal requirements. That requires attention to both the *internal* record, as litigation will likely focus on whether non-privileged documentation reflects a sincere effort to comply, and the *external* record, as contemporaneous disclosure of the company's interpretation of ambiguous regulatory requirements to the government can help defeat any FCA claims that are made.

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U.S. Supreme Court building in Washington, D.C.

Establishing A Scienter Defense After *SuperValu* Without Waiving Privilege

The Court's holding in *SuperValu* that FCA liability turns on a defendant's subjective intent is most relevant to the lowest of the FCA's three scienter standards, which captures defendants who act in "reckless disregard" of their obligations. (The other two scienter

standards, "actual knowledge" and "deliberate ignorance," were already understood to turn on a defendant's subjective intent.) In *SuperValu*, the Court rejected the Seventh Circuit's view that an objectively reasonable interpretation of an ambiguous legal requirement could not be legally "reckless"—holding instead that "'reckless disregard' … captures defendants who are *conscious of a substantial and unjustifiable risk that their claims are false*, but submit the claims anyway." 598 U.S. at 751 (emphasis added).

This standard presents important practical challenges for FCA litigation, particularly for cases involving ambiguous legal requirements. Plaintiffs must establish defendants' reckless disregard to carry their burden of proof, while defendants must defend their good-faith subjective intent—ideally without waiving privilege in the process. Defendants can no longer rely on a regulatory requirement's "facial ambiguity alone" to preclude a finding that they knew their claims were false, nor can they point to objectively reasonable "*post hoc* interpretations" of the requirement. *Id*. at 749, 752. Instead, litigation over the FCA's scienter requirement will turn on what the defendants *actually believed* when presenting the claim. Yet when liability turns on the contemporaneous knowledge of ambiguous regulatory requirements, the relevant record could easily implicate privileged communications with counsel; at the same time, non-privileged communications could indicate awareness of an important regulatory ambiguity without any corresponding effort to resolve it. To address the challenges posed by this dynamic, companies facing any meaningful FCA exposure should consider the following:

- *Instruct non-legal personnel to seek legal guidance on the interpretation of ambiguous regulatory requirements rather than create a non-privileged record of such interpretations.* As in any case, the contemporaneous record surrounding the conduct at issue is critical. Where the conduct turns on compliance with an ambiguous contractual or regulatory requirement, the risks posed by non-lawyers hashing out an interpretation they perceive to be favorable to the company can be substantial: a non-privileged record of carelessly worded, ill-informed, or overly definitive communications among non-lawyers could be dispositive. To minimize such risks, corporate counsel advising business units with meaningful FCA exposure should instruct business personnel to seek legal advice as soon as ambiguities arise—and to avoid opining on a position without the benefit of the attorney-client privilege.
- *Formalize the company's considered position in non-privileged internal communications to the relevant corporate personnel.* Once the company and its counsel have settled on a considered position regarding the best interpretation of ambiguous requirements on government-facing programs, the position should be memorialized for the relevant personnel in a non-privileged manner. The documentation should explain the position sufficiently to survive FCA scrutiny of whether the company was "conscious of a substantial and unjustifiable risk" that a contrary interpretation would prevail. Relevant

considerations include: (i) ensuring that the position is objectively reasonable, and (ii) justifying the company's position by reference to the relevant bodies of law, guidance, legislative or regulatory history, industry practice, and/or prior course of dealing with the government. Even if the company's position is ultimately determined to be incorrect, a carefully documented contemporaneous analysis should go a long way to rebutting any suggestion that the company acted in "reckless disregard" of its obligations in arriving at such a position.

- *Externalize the company's position by disclosing it to the government during the course of performance or with the submission of any resulting claims*. In an ideal setting, a party confronting an ambiguous legal requirement on a government program could simply *ask* the relevant agency for clarification. For example, clients submitting claims for reimbursement by Medicare could consider seeking an Advisory Opinion from the Health and Human Services Office of the Inspector General under the procedure set out at 42 C.F.R. § 1008, *et seq*. However, doing so is frequently impractical, as there may be little prospect of receiving a timely, definitive, and authoritative response. Accordingly, the next best option is to *disclose* the company's position to the relevant personnel with decision-making authority at the government counterparty in the course of performance or with the submission of any resulting claims for payment. At a minimum, a cooperative, transparent course of dealing with the government should reduce the risk that the government itself would bring an FCA action. The resulting record also should help defeat any FCA claims brought by a relator—as disclosure to the government can defeat both scienter under *SuperValu* and materiality under the Supreme Court's 2016 *Escobar* decision, which establishes that continued payment by the government after it becomes aware of an issue is "very strong evidence" that the issue was not material. *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 195 (2016). Moreover, by externalizing the company's interpretation through communications with the government, the company develops a highly relevant, non-privileged record that can be produced without any waiver of privileged internal communications.

While company counsel will have to balance the risks in each setting, the risk of documenting the company's subjective awareness of an important ambiguity will often be outweighed by clear evidence that the company squarely addressed the risk and sought to act consistent with a good-faith interpretation.

Making the Case for Dismissal After *Polansky*

While *SuperValu* is the more consequential of the Supreme Court's recent FCA decisions, *Polansky* also warrants careful attention, as it underscores the very broad discretion the government has in exercising its statutory authority under 31 U.S.C. § 3730(c)(2)(A) to seek dismissal of *qui tam* cases—even over the relator's objection—and the deference that

courts must give to the government's choice to seek dismissal. As the Court explained, courts should grant the government's motions to dismiss "in all but the most exceptional cases." *Polansky*, 599 U.S. at 437.

As detailed in DOJ's Justice Manual, the considerations that inform the government's decision to seek dismissal include the government's interests in: curbing meritless *qui tam* suits; preventing parasitic or opportunistic *qui tam* litigation; preventing interference with agency programs; controlling litigation brought on behalf of the government; safeguarding classified information; addressing egregious procedural errors; and "[p]reserving government resources, particularly where the government's costs … are likely to exceed any expected gain." U.S. Dep't of Justice, Justice Manual § 4-4.111.

This last consideration is especially relevant to cases where litigation beyond the pleadings would necessitate taking discovery from the government. Such discovery has always been a prospect in FCA litigation, but the need for it has increased since 2016 in light of *Escobar*'s materiality standard, and it could increase still further under *SuperValu*—as litigants seek to establish whether the defendant's position had affirmative support within the government (which can be relevant to objective reasonableness) or whether the government otherwise acquiesced to, or simply failed to respond to, the defendant's disclosed practices (which can be relevant to subjective intent).

In any event, a common consideration in the government's exercise of its dismissal authority is whether a *qui tam* suit lacks merit. The recommendations above regarding the management and documentation of corporate decision-making in the face of ambiguous regulatory requirements on government programs are intended to establish a record—both internal and external—that would support (if not compel) the conclusion that any FCA suit would fail, and that the government's cost in litigating it would exceed any potential recovery.

Conclusion

While the post-*SuperValu* caselaw is still developing, it is never too soon for companies participating in any government programs facing meaningful FCA exposure to take a fresh look at their compliance regimes to minimize the risks posed under that decision by consolidating and formalizing the decision-making regarding how to address questions about ambiguous legal requirements on such programs.

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