

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 8

NUMBER 5

May 2022

Editor's Note: Mitigating Risk Victoria Prussen Spears	147
Timing Is Everything: The Impact of Transactions on Pending Bids and Proposals Erin M. Estevez, Jeremy D. Burkhart and Kelsey M. Hayes	149
The 2021 Anti-Kickback Statute Year in Review and 2022 Outlook: What's Old Is New Miranda Hooker and Allison DeLaurentis	155
Pass-Through or Do Not Pass Go: CBCA Lacks Jurisdiction Over Software Company Claim to Enforce License Agreement Kara L. Daniels and Amanda J. Sherwood	169
Senior HHS Official Discusses Role of OIG in FCA Resolutions and Enforcement Priorities for 2022 Matthew Dunn, Krysten Rosen Moller and Tara Carrier	172
The First Circuit's <i>Swift</i> Twist: A New Standard for Government Motions to Dismiss Qui Tam Actions Under the False Claims Act Aime Joo, Murad Hussain and Jennifer Oh	176
ASBCA Denies Contractor Statute of Limitations Defense Against Incurred Cost Submission Based Government Claim Paul E. Pompeo and Amanda J. Sherwood	179

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169
Email: heidi.a.litman@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2015

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

MARY BETH BOSCO

Partner, Holland & Knight LLP

PABLO J. DAVIS

Of Counsel, Dinsmore & Shohl LLP

MERLE M. DELANCEY JR.

Partner, Blank Rome LLP

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFCOAT

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

MARCIA G. MADSEN

Partner, Mayer Brown LLP

KEVIN P. MULLEN

Partner, Morrison & Foerster LLP

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

STUART W. TURNER

Counsel, Arnold & Porter

ERIC WHYTSELL

Partner, Stinson Leonard Street LLP

WALTER A.I. WILSON

Partner Of Counsel, Dinsmore & Shohl LLP

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Senior HHS Official Discusses Role of OIG in FCA Resolutions and Enforcement Priorities for 2022

*By Matthew Dunn, Krysten Rosen Moller and Tara Carrier**

The authors of this article discuss the comments by the Chief Counsel to the Inspector General for the U.S. Department of Health and Human Services Office of Inspector General during a recent qui tam conference.

Gregory E. Demske, Chief Counsel to the Inspector General for the Office of Inspector General for the U.S. Department of Health and Human Services (“OIG”), recently provided opening remarks and answered questions during the Federal Bar Association’s annual qui tam conference. Demske spoke about OIG’s role in False Claims Act (“FCA”) enforcement and resolutions, and discussed enforcement priorities for the year.

OIG’S ROLE IN FCA ENFORCEMENT AND RESOLUTIONS

Throughout his remarks, Demske provided insight into the role OIG plays in deciding which FCA matters to pursue and the enforcement tools that OIG utilizes in FCA matters, such as exclusion.

On the former, Demske provided insight into OIG’s role in the government’s decision whether to move to dismiss a qui tam action under 31 U.S.C. § 3730(c)(2)(A), explaining that OIG reviews cases and makes a recommendation to Department of Justice (“DOJ”) regarding whether the government should decline to intervene and, in declined cases, seek dismissal.

Where the qui tam complaint presents a novel issue, the decision to decline to intervene or seek dismissal is a collective decision, and OIG will meet with other HHS officials to understand the nuances of the complaint before making a recommendation to DOJ. Demske stated that the government does not have any interest in pursuing meritless cases, but noted that the FCA is structured in a manner to allow declined cases to move forward without the government’s involvement.

* Matthew F. Dunn and Krysten Rosen Moller are partners at Covington & Burling LLP and members of the Life Sciences and Investigations practice group. They regularly represent life sciences and health care companies in internal investigations, government investigations, follow-on civil litigation, and engagement with OIG. Tara Carrier is an associate at the firm and a member of the Life Sciences and Investigations and Health Care Regulatory practice groups, and regularly handles a variety of health care compliance matters for life sciences and health care companies. The authors may be reached at mdunn@cov.com, krosenmoller@cov.com, and tcarrier@cov.com, respectively.

On the latter, Demske highlighted OIG's use of its exclusion authority. Approximately 1,000 to 4,000 people are excluded by OIG each year. Many of these exclusions are imposed as the result of convictions or lost licensure. Demske pointed to OIG's formal protocol for prioritizing cases for exclusion and the Office's Fraud Risk Indicator,¹ which provides guidance regarding how OIG assesses the future risk posed by an entity or individual in order to resolve exclusion cases.

Using the risk spectrum, each party in an FCA case is assessed and placed into one of five risk categories based on the potential future risk the party poses to federal health care programs.

At the lowest end of the spectrum, self-disclosure cases are resolved quickly, and OIG will provide a release from potential exclusion without any further requirements.

At the highest end of the spectrum, where OIG determines that the party presents a high risk of fraud, OIG will pursue its administrative remedies and exclude the party from participation in federal health care programs.

In most FCA matters today, Demske explained that OIG will elect not to pursue its own administrative remedies; rather, OIG will provide a release from potential exclusion and participate in the monetary settlement process with DOJ.

Demske also spoke about OIG's practice with respect to corporate integrity agreements ("CIAs"). Historically, OIG sought a CIA for all FCA cases in which it decided not to impose exclusion. Demske explained that this approach was appropriate at the time. But, as more guidance has been issued by OIG, and more entities engage in voluntary compliance efforts, it is not always the best use of resources to negotiate and monitor a CIA when the financial loss is low and there is not a significant risk to patients.

Therefore, as explained in published guidance,² OIG focuses on entering into CIAs where the financial loss is high, there is a high risk to patients' health and safety, and there is recidivism by the parties involved. However, Demske emphasized that, where the decision is made to require a CIA, OIG is focused on ensuring that the agreements contain robust and specific compliance obligations, instead of "cookie cutter" provisions.

¹ <https://oig.hhs.gov/fraud/fraud-risk-indicator/#:-:text=OIG%20assessment%20of%20future%20risk,engaged%20in%20civil%20healthcare%20fraud.&text=OIG%20applies%20published%20criteria%20to,categories%20on%20a%20risk%20spectrum>.

² <https://oig.hhs.gov/exclusions/files/1128b7exclusion-criteria.pdf>.

ENFORCEMENT PRIORITIES FOR 2022

During his remarks, Demske also answered questions from the moderator and audience and spoke on OIG's enforcement priorities going forward in 2022.

- *COVID-19 Fraud*: Demske highlighted COVID-19 fraud as one enforcement priority, explaining that OIG is focusing on two types of fraud that have arisen related to the pandemic: (1) fraud related to the disease itself, such as fake tests, fake vaccines or remedies, and the use of COVID-19 as a hook for identity theft or billing federal health care programs for medically unnecessary services, and (2) fraud related to the response to COVID-19, such as fraud against HHS's Provider Relief Fund and Uninsured Relief Fund. Demske noted that OIG has already settled five CMP cases related to the Provider Relief Fund, arising from allegations of false certifications.

He also pointed to OIG's COVID-19 Portal,³ which contains information about all planned, on-going, and completed audits, evaluations and investigations related to COVID-19, industry guidance and FAQs addressing the application of OIG's enforcement authorities during the pandemic.

- *Telehealth and "Telefraud"*: Referencing a statement issued by OIG's Principal Deputy Inspector General in 2021, Demske confirmed that fraud-related telehealth is an enforcement priority for OIG in 2022. He acknowledged that the COVID-19 pandemic has demonstrated how patients benefit from increased access to health care via telehealth services.

However, to prevent and detect potential abuse, OIG will be conducting audits and evaluations to identify potential vulnerabilities or improvements to help guide programs after the pandemic ends.

In addition, Demske stated that OIG will continue to focus on "telefraud" schemes, which leverage telemarketers to contact patients in order to provide medically unnecessary items or services.

- *Managed Care*: As managed care has become a large and growing part of Federal health care programs, including Medicare and Medicaid, Demske stated that OIG recognizes that risks associated with managed care are different than the risks associated with traditional fee-for-service programs. In this space, OIG is focusing on patient health and

³ <https://oig.hhs.gov/coronavirus/index.asp>.

safety within managed care plans, such as whether plans have adequate provider networks and whether those providers are actually available for patients.

In addition, OIG is focusing on fraud related to managed care, including whether diagnoses are being inflated and the various ways in which diagnoses may have been misrepresented on claims for reimbursement. Demske cited the Sutter Health settlement⁴ in 2021 as an example where inflated diagnoses led to an FCA case.

- *Nursing Home Facilities*: Demske noted that oversight of nursing home facilities is an important focus area for OIG, particularly in light of the impact COVID-19 has had on these facilities during the pandemic. OIG's efforts in this area focus on health care fraud in the nursing home context, as well as working to identify general best practices for the health and safety of patients in nursing homes.
- *Opioids*: Demske stated that opioids continue to be a large focus for OIG.

⁴ <https://www.justice.gov/opa/pr/sutter-health-and-affiliates-pay-90-million-settle-false-claims-act-allegations-mischarging>.