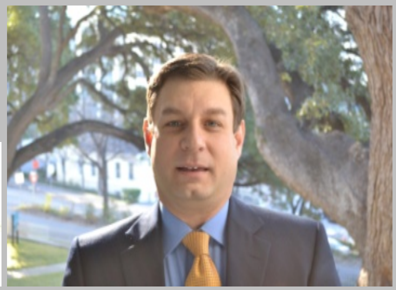

If You See Something: Report Something!

William L. Hurlock[1]

There is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government.[2]

Unfortunately, we live in a world where fraud is rampant. The most significant form of fraud is engaged at the expense of the federal, state and local governments - and ultimately, the citizens themselves. Attorneys are increasingly availing themselves of certain statutes such as the Federal, State and City False Claims Acts, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and the Internal Revenue Service ("IRS") Whistleblower Act as strong resources to prosecute allegations of fraud. However, such actions can never be filed unless and until a witness to the fraud comes forward and is prepared to "blow the whistle" on unlawful activity.

Fraud impacts all segments of our economy. It may be committed with regards to health care, higher education, banking and insurance, financial services and sales of goods and services. No economic sector is immune. Unfortunately, according to many estimates, most of the fraud

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[2] Benjamin Franklin, On Smuggling, The London Chronicle, (Nov. 24, 1767).

goes undetected - or worse – *detected, but unreported*. This article provides a resource to hopefully stop this trend and to start identifying and reporting fraud.

For many, whistleblowing is typified by high-profile cases in which state secrets leaked to the press dominate the news cycle for weeks or months at a time. The story of Katharine Graham's decision to publish sections of the Pentagon Papers in 1971, recently depicted in Steven Spielberg's "The Post" is an oft-repeated manifestation of the Fourth Estate's check on a Democracy.

There is, however, an equally malevolent version of conduct that typically occurs away from the media spotlight, but is no less relevant to the public good: fraud committed against the government at the federal, state and local levels. As fraud continues to intensify, it is crucial that we understand its ramifications, since it has a direct and cascading effect on both the economy and individuals. For that reason, it is incumbent upon individuals to identify and report fraud – *if you see something – report something*.

These fraudulent practices include, but are not limited to: charging for services or products never provided; overcharging or double-billing for services or products; providing inferior products or services; paying kickbacks or other forms of illegal remuneration as incentives and; failing to pay taxes or duties on goods.

These fraudulent practices detrimentally increase the costs associated with all segments of our economy. Fraud increases costs, taxes and places a greater burden on already hard-stretched resources. Increased costs are passed on to everyone in the form of higher prices and/or a lower quality of goods and services. The impact associated with fraud is even more pronounced for individuals - as the associated costs can mean the difference between one's ability to afford much needed goods and services – such as healthcare.

As to healthcare, a review of healthcare claims and prescription drug charges can assist the detection of wasteful and abusive practices. An analysis of paid claims data can uncover instances where a healthcare provider may have engaged in double billing – billing twice for the same procedure or if a provider is upcoding or billing for services never rendered.

A review of prescription plans may uncover instances where prescriptions were filled with invalid or incomplete physician prescriber information, often resulting in abuses. Such things as "shorting" – filling prescriptions with less medication than the amount charged can also be identified.

The False Claims Acts

Defrauding the government is, of course, nothing new. In enacting the False Claims Act in 1863, Congress specifically addressed war profiteers selling inferior products to the Union army during the Civil War. Congress strengthened the law in 1986 during the defense department build-up—remember $500 hammers? After the 2008 recession and the enactment of health care reform, Congress again strengthened the law. As a result, the False Claims Act led to more than $56 billion in settlements and judgments since 1986, according to the Department of Justice ("DOJ").

The statute contains a *qui tam*[3] provision allowing an individual citizen or entity, referred to as a "relator," to file suit, under seal, on behalf of the government. If successful, they receive a percentage of the recovery. The relator may also assert personal employment claims for wrongful termination under the Act. Twenty-nine states, the District of Columbia and certain large metropolitan cities have False Claims Acts. According to DOJ fraud statistics, settlements and

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[3] *Qui tam* is an abbreviation of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur* or "he who brings a case on behalf of our lord the King, as well as for himself."

judgments from *qui tam* lawsuits accounted for more than $40 billion of the $56 billion recovered since 1986.

In fiscal year 2017, the DOJ collected more than $3.7 billion in settlements and judgments. In fiscal year 2016, it recovered more than $4.7 billion, the third highest amount in the history of the Act. From fiscal years 2009 through 2017, the DOJ collected $35 billion, more than 60 percent of the entire recovery amount since 1986.

It may seem logical to assume that the government and its representatives are doing a better job of recovering lost funds in recent years because they are collecting more than they ever have. But assuming detection rates remain relatively static, the government's increased recovery rates may simply mean *more fraud is being committed than ever before*.

Of the monies the United States Government recovered since 2009, $19.3 billion resulted from health care fraud claims. According to a December 2017 DOJ press release, those recovered funds are returned to federally funded programs such as Medicare, Medicaid and TRICARE. In an industry whose expenditures are predicted to eclipse $5.7 trillion by 2026, every dollar that can be channeled back into the public fisc is crucial.

The Dodd-Frank Act and Internal Revenue Service ("IRS") Whistleblower Law

Congress passed the Dodd-Frank Act shortly after the 2008 financial crisis to combat the fraud which was believed to have caused the crisis. This Act enhanced the Government's ability to regulate much of the financial sector. Most importantly, Section 922 of the Act provides that the Securities Exchange Commission ("SEC") shall pay financial awards to whistleblowers who voluntarily provide information of corporate malfeasance which leads to successful actions. The

Act prohibits retaliation by employers against whistleblowers providing them with a private cause of action if wrongfully discharged.

In 2006, Congress passed a whistleblower law enabling individuals to report underpayments of taxes and violations of the Internal Revenue laws. This is important because the False Claims Act does not apply to Internal Revenue Service (“IRS”) claims. The IRS Act also financially rewards whistleblowers reporting allegations of fraud. Both Acts are effective in encouraging individuals to combat corporate fraud.

Conclusion

As the amount of fraud reaches a higher proportion of our overall economy, it is incumbent on people to come forward if they witness illegal activity. It is the only remedy to stop these abusive and expensive practices. As noted in this article, issues surface in a variety of contexts. One must be mindful of the myriad of ways in which issues arise and, more importantly, to pick the correct mechanism to effectively raise them so they are properly adjudicated before a court of law.