

False Claims Act Disclosure Checklist

By

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The NDNY-FCBA's CLE Committee

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FALSE CLAIMS ACT CHECKLIST

I. The False Claims Act Complaint

- A. To be filed in court under seal and served on government, not defendants
- B. Which False Claims Acts to use: federal and/or states' acts
- C. Which FCA Causes of Action to Assert
 - 1. Affirmative false claims (§ 3729(a)(1)(A) & (B))
 - 2. "Reverse" false claims (§ 3729(a)(1)(G))
 - 3. Retaining government money or property (§ 3729(a)(1)(D))
 - 4. Conspiracy claim (§ 3729(a)(1)(C))
 - 5. Retaliation claims (§ 3730(h))
- D. Describe the parties
- E. Describe the underlying laws, regulations, contracts or rules that were violated, including how they are connected to government payment or the obligation to pay the government
- F. Describe how the defendants broke the rules, preferably with reference to specific violations
- G. Describe the falsity in defendants' claims, statements or records
- H. Describe the indications that defendants acted with knowledge
- I. Describe how the government was damaged
- J. Describe how defendants retaliated against the relator

II. The Disclosure Statement

- A. Not filed in court; served on the DOJ/USAO/State AG
- B. Legal requirement in the FCA to disclose all material information to the government
- C. An important (and underutilized) opportunity to explain to the government attorneys why the case is attractive and to lay out a clear path toward a resolution or trial end point

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- D. Put yourself in the shoes of the government attorney and ask what information would be useful in conducting the investigation and handling the case if it were assigned to me?
- E. Disclosure statement is confidential and generally protected from disclosure by work product doctrine, joint prosecution privilege and law enforcement privilege
- F. Disclosure statement should not be just a repetition of the complaint (without the paragraph numbers)
- G. Disclosure statement should provide detailed and useful guidance to the government attorneys to assist them in their investigation
- H. Disclosure statement should include exhibits that lay out the evidence that relator has as well as any useful resources (such as copies of relevant laws) that will help the investigation
- I. Key elements in a disclosure statement:
 - 1. **Up Front Summary:** The disclosure statement should tell the government lawyers what the case is about right up front with “elevator conversation” brevity. One way to do this is to mimic the intake form you might expect the government offices to use to capture basic case information. An up-front summary should include bullet point descriptions of the following:
 - a) Defendants’ names
 - b) Relator’s name
 - c) Obligations Violated (*e.g.*, best price obligation in GSA contract, or Anti-Kickback Statute & Stark)
 - d) Relevant Period
 - e) Estimated Damages
 - f) Governmental Victims (*e.g.*, federal or state treasury, specific programs, *etc.*)
 - g) Governmental Agencies with Responsibility for the Conduct at Issue
 - h) False Claims Act Subsections Implicated
 - i) Brief Description of the Allegations

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- j) The Claims for Payment at Issue (if “A” or “B” claims)
 - k) The Statements or Records at Issue (if “B” or “G” claims)
 - l) The Falsity of the Claims/Statements or Records
 - m) Basis for Alleging Knowledge
 - n) Related Actions or Proceedings
2. **Basis for relator’s knowledge of the facts:** Devote a section of the disclosure statement to describing the relator and how he or she came to know about the violations set out in the complaint.
3. **Detailed Description of Defendants:** While the useful information about defendants will vary from case to case, the relator should give a detailed description of relevant facts about the defendants. These may include the following:
- a) Defendants’ organizational structure, leadership, relevant personnel
 - b) Defendants’ ownership (parents, subsidiaries, *etc.*)
 - c) Defendants’ standard operating procedures with respect to the issues or programs at issue
 - d) Defendants’ use of electronic systems to conduct relevant business or to communicate about relevant facts, and the structure of such systems
 - e) Defendants’ document organization systems and document retention and destruction policies
 - f) Any audits, inquiries or enforcement actions previously taken against Defendants
4. **Detailed Description of the Applicable Rules:** Every False Claims Act case is about breaking a set of rules, and the relator has the opportunity in the disclosure statement to give greater context to those rules than they might ordinarily be conveyed in the complaint. As in any False Claims Act case, attention should be paid to explaining how the rules relate to the government paying (or receiving) money. The relator should give citations to the rules, describe any relevant agency (or other) guidance about the rules, and describe any judicial decisions that are relevant to the rules as used in the *qui tam* complaint. If the same type of claims have

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been raised in other cases, particularly *qui tam* cases handled by the same enforcement office, the relator should describe those other cases.

5. **Detailed Description of Defendants' Misconduct:** Without repeating the allegations in the complaint, the relator should provide any additional information that he or she has that demonstrate, or even suggest that the rules were broken. This is an opportunity to provide leads to the government lawyers, including leads that may have not been sufficiently concrete to include in the complaint. It is also an opportunity to identify potential sources of evidence that the government might be able to obtain through its investigative powers.
6. **Description of How the Misconduct Translates into False Claims or False Statements or Records:** In the disclosure statement, the relator has the opportunity to provide information, in addition to what is in the complaint, that describes how the misconduct affected government money. Once again, the disclosure statement presents an opportunity to go beyond the more certain facts and provide leads that may allow for the development of further evidence to satisfy the elements of False Claims Act causes of action.
7. **Damages Methodology & Estimate:** A relator may or may not have sufficient information to make more than a ball-park estimate of damages resulting from defendants' conduct. In any event, he or she can present *how* damages should be calculated, including, *e.g.*, whether and why the case is one where damages should be measured by the entire amount the government paid for something or by determining the difference between what the government paid and the value of what it received. If estimates are made, all of the assumptions used should be spelled out.
8. **Defendants' Ability to Pay a Settlement/Judgment:** Where there may be questions about whether a defendant can pay a settlement or judgment resulting from the False Claims Act case, it is helpful to ascertain and convey to the government the assets that the defendant has.
9. **Suggestions for the Government's Investigation:** The relator can provide substantial assistance to the government lawyers (and thus make their case that much more attractive) by laying out suggestions for the government's investigation. An insider relator, in particular, may have useful information about what information is most useful and where it is. Among the suggestions a relator might make are the following:
 - a) A list of potential witnesses, including for each person whether they are current or former employees of the defendant, their last known contact information, a description of whether they are likely

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to be cooperative or adversarial, and the type of information they are likely to have.

- b) Identification of relevant records, or types of records, that are likely to be in the hands of government agencies, such as specific Medicare/Medicaid records, procurement records, *etc.*
 - c) Identification of third parties who may have relevant records, including, *e.g.*, accountants, service providers, business partners, banks, *etc.*
 - d) A listing of targeted documents, or types of documents, that the government might seek through subpoena, CID or search warrant. The key here is being targeted, as it will not be helpful to suggest that the government seek “all documents related to defendants’ fraud.” This is an opportunity to propose your dream document request using, if available from the relator, the same terminology that the defendants use in conducting their business.
 - e) Any additional useful information, such as a glossary of industry or company lingo, “key words” that might be useful in a search of e-mails, *etc.*
10. **Retaliation Claims:** To the extent the relator has additional facts to what is in the complaint, they should be included in the disclosure statement.
11. **Offer of Assistance:** Offer to be of assistance to the government attorneys in their investigation.