

ReedSmith

Navigating Remote Compliance and Virtual Investigations

Dan Herbst and Andrew Lu

May 4, 2022

ReedSmith
Driving progress
through partnership

Disclaimer

This presentation is not intended to provide legal advice to be used in a specific fact situation

The contents are for information purposes only

Welcome and Agenda

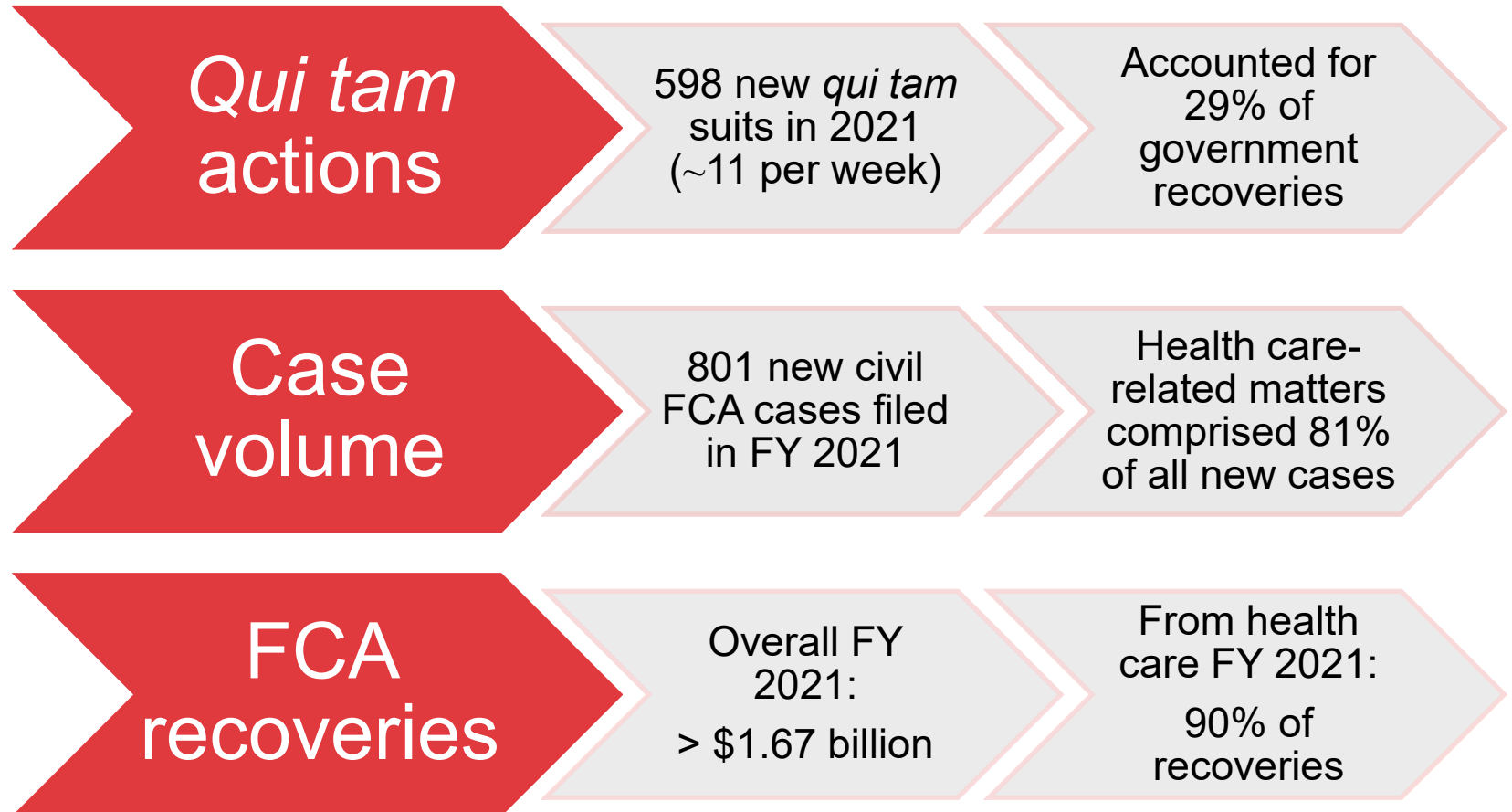
- False Claims Act primer
- Issues arising from investigating employee concerns in remote environments
 - Investigating those concerns
 - Conducting telephone and Zoom interviews
 - Completing the investigation in a timely manner
 - Ensuring that remedial measures are put in place
- Key risk areas for internal investigations



False Claims Act 101

False Claims Act Enforcement

“Busy practice area” is an understatement



How an FCA Case Works

Steps:

1. Relator files the case under seal
2. Government investigates
3. Government decides if it will prosecute the case
4. Relator may continue to prosecute even if government declines
5. Complaint is unsealed and litigation begins

Active litigation of declined *qui tam* cases by sophisticated private law firms is one of the most significant enforcement trends in the last several years



Damages for an FCA Violation

- A civil penalty **for each false claim** of up to over \$22,000
- Plus up to **three times** the amount of damages
- Reasonable costs, expenses and attorneys' fees that relators pay or incur in successfully prosecuting *qui tam* actions
- May lead to **exclusion** from participation in government programs (e.g., Medicare)
- Enormous financial pressure to resolve these cases



Remote Investigations: COVID and Beyond



Access and confidentiality for employees to raise concerns with compliance officer and team



Response to concerns:

- Investigating those concerns
- Conducting telephone and Zoom interviews
- Completing the investigation in a timely manner
- Ensuring that remedial measures are put in place

Taking Your Investigations Online

Virtual witness interviews

Pros

- Need for speed
- No travel necessary
- Quickly address employee concerns
- Faster self-reporting and response

Cons

- Employee anxiety
- Harder to build rapport, read the person
- Technical issues
- Information compromise

Use Case

Company A provides health services to beneficiaries under federal health programs

- You get a complaint about billing
- You have to investigate in a remote work environment
- What do you do

Step 1: Considering the risks & rewards



Information
compromise

Risk. Employees might take screen shots of shared documents.



Employee
anxiety

Risk. Virtual barrier to reassurance and empathy with a distressed employee.



Observation

Risk. Difficulties sharing documents and managing technology.



Feed the
need for speed

Reward. Virtual interviews allow quick access to employees without travel.



Employee
assurance.

Reward. Quickly address employee concerns.



Rapid regulator
response

Reward. Faster self-reporting and response to requests.

Step 2: Selecting your tech



Breakout rooms

Can be useful if an interviewee needs to liaise with a representative or attorney.



Chat functions

Consider whether to allow private messaging during the meeting.



Recording

Will you record, if so where will you save – cloud/local?



Employee capabilities

Can the interviewee use the platform. Do they have bandwidth limitations.



Documents

Functionality for sharing and highlighting documents.

Step 3: Ensuring security



Encryption

Check your platform has end to end encryption throughout the meeting.



Interview room integrity

Set ground rules. Ensure the witness is alone unless authorised.



Access

Use a secure link, password protect and admit from waiting room.



Data protection compliance

Check document share will comply with local data regulations.

Step 4: Planning & testing



Employee representatives

Does the interviewee need a representative/attorney assistance.



Legal attendees

Consider additional lawyers to assist observation and legal compliance.



Ground rules

Set in advance with interviewee/manage expectations.



Legal

Ensure compliance with local employment law/contractual rights.



Technical assistance

Identify who will resolve technical issues.



Test call

It's a no brainer.

Step 5: What to do on the day



Smart questioning

Anticipate response time lags, observe micro expressions.



Keep it brief

Video interviews can be more tiring for all concerned.



Avoid information overload

Concentrate on key documents, highlighted in advance.



Technical issues

Keep calm, troubleshoot, engage technical assistance if required.

What's Likely Here to Stay?

- Continuing to do more with less
- Incorporating technology and remote practices for the long term
- Adapting to work-from-home when conducting internal investigations
- Ensuring flexibility in responding to both external and internal concerns



Key Risk Areas for Internal Investigations

Risk Areas Include . . .

- Areas highlighted in OIG Work Plan
- Potential non-compliance with Stark Law or Anti-Kickback Statute, including excessive physician compensation
- Representations to the government to obtain federal funds
- DOJ's priorities for FCA cases, which may result in CIDs:
 - Pandemic-related fraud
 - Fraud targeting seniors
 - Electronic Health Records
 - Telehealth
 - Cybersecurity
 - Opioids



OIG & False Claims Act Scrutiny

Key Risk Areas for Internal Investigations

OIG Work Plan & Recent Additions

- Tells you what OIG will be auditing and, thus, what you should be looking at, including for internal investigations
- Regularly updated at: <https://oig.hhs.gov/reports-and-publications/workplan/updates.asp>
- Active items listed at: <https://oig.hhs.gov/reports-and-publications/workplan/active-item-table.asp>
- Active items include:
 - COVID-19 Vaccination Status of Nursing Home Staff
 - Audit of CARES Act Provider Relief Funds—Payments to Health Care Providers That Applied for General Distribution Under Phases 1, 2, and 3



The CARES Act

Key Risk Areas for Internal Investigations

The CARES Act

Coronavirus Aid, Relief, & Economic Security (CARES)

- Billions of dollars in relief to support health care-related expenses or lost revenue due to COVID-19 and testing/treatment
- Both general and targeted allocations (high impact areas, treatment of uninsured, etc.)
- These are payments, not loans with forgiveness criteria, but retaining the payments requires compliance with Terms & Conditions
- T&C warning: Any deliberate omission, misrepresentation, or falsification of information in application or future reports can result in criminal, civil, or administrative penalties
 - T&C state that a provider's "commitment to full compliance with all Terms and Conditions is material to the Secretary's decision to disburse these funds to you"

CARES Act

Example Terms & Conditions

- Cannot be used to reimburse expenses/losses that have been reimbursed from other sources, or which other sources are obligated to reimburse
 - **E.g.:** Insurance policy subsequently reimburses expenses, must repay funds from HHS
- Funds cannot be used for certain purposes
 - **E.g.:** Excessive executive pay, gun control advocacy, abortion, lobbying, embryo research, promotion of legalization of controlled substances, pornography, human trafficking, and more

CARES Act

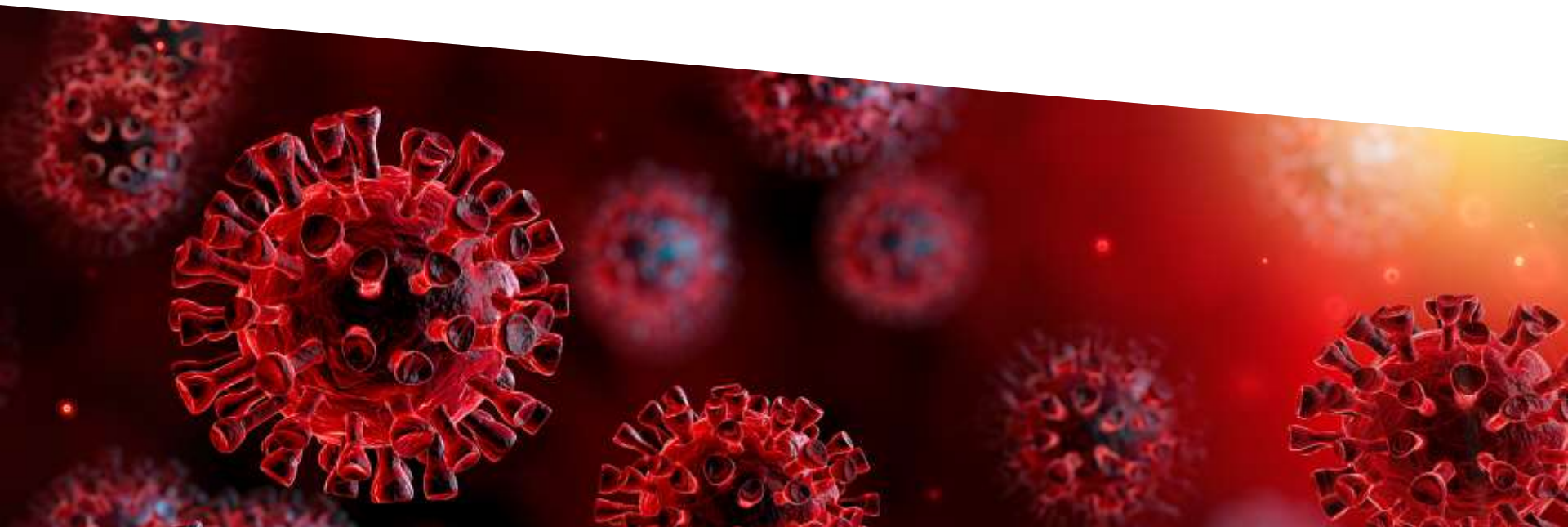
Warnings and Purported Effect

- T&C warning: Any deliberate omission, misrepresentation, or falsification of information in application or future reports can result in criminal civil, or administrative penalties
- The T&C expressly state that a provider’s “commitment to full compliance with all Terms and Conditions is material to the Secretary’s decision to disburse these funds to you.”
 - Government’s attempt to shore up “materiality” argument for future FCA litigation; uncertain success

CARES Act

Enforcement

- Special Inspector General for Pandemic Recovery (SIGPR)
 - Modeled after SIGTARP following 2008 financial collapse
 - SIGTARP investigations resulted in 380 convictions (97 percent conviction rate) and recovery of > \$11 billion
- Attorney General Merrick Garland announced the COVID-19 Fraud Enforcement Task Force on May 17, 2021
 - “The Department of Justice will use every available federal tool – including criminal, civil, and administrative actions – to combat and prevent COVID-19 related fraud. . . to bring to justice those who seek to profit unlawfully from the pandemic.”
 - Task Force includes DOJ Criminal and Civil Divisions, Executive Office for the U.S. Attorneys, FBI, the Departments of Labor, Treasury, and Homeland Security, SIGPR, SBA, and Pandemic Response Accountability Committee



Takeaways

Heightened Scrutiny

Examples

- **May 2020 – Stavelly/Sanborn and Butziger:** Criminal charges brought against two persons seeking half a million dollars in PPP and EIDL loans to pay employees of businesses where no employees worked
- **April 2021 – Walia Professional Medical Corporation:** Settled with the DOJ for receiving funds under multiple PPP applications under the first round of loan funds under the CARES Act and for falsely certifying it had only received one loan; repaid most of the PPP funds
- **April 2022 – Too Many to List:** Criminal charges brought against nearly twenty persons across the nation for various fraud schemes related to the COVID-19 pandemic – from overcharging for medical services to selling fake vaccination cards – that amounted to about \$150 million in improper government claims

The Biggest Risk of All

Motivated whistleblowers

- Strategies for mitigating whistleblower risk
 - Now is the time for an active compliance program
 - Listen to your employees' concerns
 - Exit interview strategies (especially for laid off or furloughed employees)

Contact Us



Dan Herbst

Counsel

Washington, D.C.

+1 202 414 9232

dherbst@reedsmith.com



Andrew Lu

Associate

Washington, D.C.

+1 202 414 9279

andrew.lu@reedsmith.com

ABU DHABI
ATHENS
AUSTIN
BEIJING
BRUSSELS
CENTURY CITY
CHICAGO
DALLAS
DUBAI
FRANKFURT
HONG KONG
HOUSTON
KAZAKHSTAN
LONDON
LOS ANGELES
MIAMI
MUNICH
NEW YORK
PARIS
PHILADELPHIA
PITTSBURGH
PRINCETON
RICHMOND
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TYSONS
WASHINGTON, D.C.
WILMINGTON

Reed Smith is a dynamic international law firm, dedicated to helping clients move their businesses forward.

Our belief is that by delivering smarter and more creative legal services, we will not only enrich our clients' experiences with us, but also support them in achieving their business goals.

Our long-standing relationships, international outlook, and collaborative structure make us the go-to partner for the speedy resolution of complex disputes, transactions, and regulatory matters.

For further information, please visit [reedsmith.com](https://www.reedsmith.com)



This document is not intended to provide legal advice to be used in a specific fact situation; the contents are for informational purposes only. "Reed Smith" refers to Reed Smith LLP and related entities. © Reed Smith LLP 2020

[reedsmith.com](https://www.reedsmith.com)

ReedSmith
Driving progress
through partnership