GIBSON DUNN

False Claims Act Update February 4, 2025

New Risks for Private Equity: Understanding Recent Amendments to Massachusetts' False Claims Act

Recent amendments to Massachusetts' FCA mark a dramatic expansion of potential civil fraud liability for private equity firms and their investors.

I. Introduction

In a significant development for private equity firms that operate in the health care and life science spaces, lawmakers in Massachusetts greatly expanded the state's civil fraud enforcement powers against private equity firms and other investors. On January 8, 2025, Massachusetts Governor Maura Healey signed House Bill 5159, "An Act Enhancing the Market Review Process" (the Act), into law. In addition to expanding reporting requirements for private equity transactions, the Act amends the Massachusetts False Claims Act (the MA FCA) to impose civil liability on any entity that "has an ownership or investment interest" in an entity that violates the MA FCA and fails to disclose that violation to the Commonwealth "within 60 days of identifying the violation."[1]

The Act represents a dramatic expansion of potential civil liability for private equity firms and other investors (regardless of their location) whose companies do business with the Massachusetts government. The impetus for the Act appears to be increased concerns by state lawmakers over the patient care implications of private equity investment in the health care industry, but the Act sweeps broadly to cover investors in all industries. The Act also comes on

the heels of ever-growing scrutiny of private equity firms by the U.S. Department of Justice, which has made clear during each of the last two administrations that enforcement of the federal False Claims Act (the federal FCA) against private equity firms is a DOJ priority.[2]

II. Overview of the MA FCA

The MA FCA prohibits various types of fraudulent conduct against the state and its political subdivisions.[3] Similar to the federal FCA, the MA FCA prohibits the knowing presentment of false or fraudulent claims for payment and the knowing use of material false records or statements in the submission of claims.[4] The MA FCA also contains a “reverse” provision, which, like its federal counterpart, prohibits the knowing use of a false or fraudulent statement that is material to an obligation to pay money to the Commonwealth, as well as the knowing concealment or improper avoidance of an obligation to pay money to the Commonwealth.[5]

Unlike the federal FCA, the MA FCA also imposes liability on any “beneficiary” of an “inadvertent submission of a false claim” to the Commonwealth or of “an overpayment from” the Commonwealth who “discovers the falsity of the claim or the receipt of overpayment” and does not disclose the claim or overpayment within 60 days of the date on which the beneficiary “identifie[s]” either one.[6]

The MA FCA applies to any person, whether or not a resident of Massachusetts, who engages in covered conduct as to claims for payment made to the Commonwealth, its political subdivisions, officers, employees, agents, representatives, and contractors, and/or as to funds the person receives or retains to which they are not entitled.[7] Like the federal FCA, the statute imposes treble damages and per-violation civil penalties.[8]

III. The Act’s Amendments to the MA FCA

The Act, which is set to go into effect on April 8 of this year, expands the scope of existing “beneficiary” liability under the MA FCA to apply explicitly to private equity firms and other investors. The Act amends the MA FCA to impose liability on any person who:

> [i] has an ownership or investment interest in any person who violates [the MA FCA];
>
> [ii] knows about the violation; and
>
> [iii] fails to disclose the violation to the commonwealth or a political subdivision thereof within 60 days of identifying the violation.[9]

The Act defines “ownership or investment interest” as any:

> (1) direct or indirect possession of equity in the capital, stock or profits totaling more than 10 per cent of an entity;

(2) interest held by an investor or group of investors who engages in the raising or returning of capital and who invests, develops or disposes of specified assets; or

(3) interest held by a pool of funds by investors, including a pool of funds managed or controlled by private limited partnerships, if those investors or the management of that pool or private limited partnership employ investment strategies of any kind to earn a return on that pool of funds.[10]

The Act thus appears to extend MA FCA liability to (1) private equity firms, (2) private equity managed funds, and (3) investors holding at least a 10% stake, directly or indirectly, in a company that has violated the MA FCA. Moreover, that liability is not for the submission of false claims or for any other violation of the MA FCA actually committed by a private equity firm—but instead for the failure to disclose to the Commonwealth a known violation of the MA FCA "within 60 days of identifying the violation."

This is a dramatic departure from what is required to establish liability under the federal FCA, which, at minimum, requires a showing that a party "cause[d]" the submission of false claims.[11] In the private equity context, this typically requires proof that the private equity firm or its investors exercised control over the portfolio company and then ratified the company's alleged violation of the FCA after becoming aware of it,[12] or was more actively involved in the company's alleged misconduct—such as by approving or funding the alleged scheme.[13]

The liability risks under the MA FCA to private equity firms and investors are heightened even further by a number of ambiguities in the amended statute, including what it means to "identify" a violation that triggers the 60-day notice requirement. The term is not defined in the statute, but is used seemingly interchangeably with the term "knowing," which is defined as "actual knowledge," "deliberate ignorance," or "reckless disregard" with "no proof of specific intent to defraud" required.[14] It is not clear whether this definition is meant to also define "identifying" or if that term is meant to have its own separate meaning. This is an issue that will likely be litigated under the statute, as a similar issue was in the federal context before the Centers for Medicare and Medicaid Services attempted to resolve it in a final rule issued this last November. We covered that rule and its implications for the health care industry in a client alert following the rule's publication.

IV. Implications for Due Diligence and Compliance Controls

The Act's amendments to the MA FCA underscore the importance of private equity firms conducting robust diligence in transactions involving companies that receive funds from the Commonwealth, particularly Medicaid funds and government contract monies. At the same time, especially given the ambiguity around the meaning of the term "identifying," it remains to be seen whether the Commonwealth treats pre-closing knowledge of a potential FCA violation as sufficient to start the running of the 60-day disclosure clock. Pre-closing diligence should be robust enough to identify risk areas and areas for rapid, efficient post-closing diligence—but should stop short of the sort of detailed investigation into specific government interactions or payments that is more appropriate for post-closing diligence and that risks being mis-interpreted later as having imbued the acquiring firm with knowledge of an FCA violation. In parallel, private

equity firms should consider seeking commercial terms that offset the risk of subsequent regulatory scrutiny borne of the Act's broad sweep.

Post-closing, private equity firms should conduct thorough diligence into any FCA risk areas identified during pre-closing diligence. Post-closing efforts should be swift, given the Act's short window for reporting violations following their "identif[ication]." While each set of facts and circumstances will be unique, if a potential FCA violation is discovered, firms should strongly consider proactive disclosure to the Commonwealth. Private equity firms must also remain vigilant in monitoring portfolio companies for any potential MA FCA violations. And, of course, firms should ensure that their portfolio companies have strong compliance programs, including mechanisms for conducting regular audits and risk assessments, as well as robust processes for ongoing monitoring and reporting so that violations can be identified early and dealt with appropriately and efficiently.

[1] Mass. Gen. Laws ch. 12 § 5B(a)(11), as amended by H.5159 § 29.

[2] *See, e.g.,* Statement of Ethan Davis, Deputy Assistant Attorney General, DOJ's Civil Division (June 2020) (Trump Administration) ("Where a private equity firm takes an active role in illegal conduct by the acquired company, it can expose itself to False Claims Act liability.") (available at https://www.justice.gov/civil/speech/principal-deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims); Statement of Brian Boynton, Principal Deputy Assistant Attorney General, DOJ's Civil Division (Feb. 2024) (Biden Administration) ("We have already had a few cases involving private equity firms. And given the significant role that private equity is increasingly playing in the healthcare field, we anticipate that their impact on healthcare billings will continue to grow as well.") (available at https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-brian-m-boynton-delivers-remarks-2024).

[3] Mass. Gen. Laws ch. 12 § 5A.

[4] Mass. Gen. Laws ch. 12 § 5B(a)(1)–(2).

[5] *Compare* Mass. Gen. Laws ch. 12 § 5B(a)(9) *with* 31 U.S.C. § 3729(a)(1)(G).

[6] Mass. Gen. Laws ch. 12 § 5B(a)(10).

[7] *See* Mass. Gen. Laws ch. 12 §§ 5A, 5B.

[8] Mass. Gen. Laws ch. 12 § 5B(a).

[9] Mass. Gen. Laws ch. 12 § 5B(a)(11), as amended by H.5159 § 29.

[10] Mass. Gen. Laws ch. 12 § 5A, as amended by H.5159 § 27.

[11] 31 U.S. Code § 3729(a)(1)(A), (B).

[12] *See, e.g.*, *United States ex rel. Martino-Fleming v. S. Bay Mental Health Ctrs.,* 540 F. Supp. 3d 103, 130 (D. Mass. 2021) (private equity firm's "knowing ratification of 'the prior policy of

submitting false claims by rejecting recommendations to bring South Bay into regulatory compliance constitutes sufficient participation in the claims process to trigger [False Claims Act] liability'" (citation omitted) (alteration in original)); *cf. United States ex rel. Schagrin v. LDR Indus., LLC*, 2018 WL 6064699, at *6 (N.D. Ill. Nov. 20, 2018) ("if the Greenspons knew that LDR—the company they owned and managed—was not paying customs duties, they can be liable under the False Claims Act for failing to rectify the situation").

[13] *United States ex rel. Carmen Medrano v. Diabetic Care RX, LLC*, 2018 WL 6978633, at *11 (S.D. Fla. Nov. 30, 2018) (denying dismissal of claims against private equity firm because the complaint alleged that the firm "(i) approved of PCA's decision to use marketers to generate referrals; (ii) knew that TRICARE was the source of the majority of PCA's revenue; (iii) received monthly financial statements, which reported the monthly compounding revenue and the commission paid to the Marketers; and (iv) RLH funded $2 million in commissions to the Marketers in January 2015").

[14] Mass. Gen. Laws ch. 12 § 5A.

The following Gibson Dunn lawyers prepared this update: Jake Shields, Winston Chan, Jonathan Phillips, Michael Dziuban, Danilo Risteski, and Nell Tooley.

Gibson Dunn lawyers regularly counsel clients on the False Claims Act issues and are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any leader or member of the firm's False Claims Act/Qui Tam Defense practice group:

Washington, D.C.
Jonathan M. Phillips – Co-Chair (+1 202.887.3546, jphillips@gibsondunn.com)
Stuart F. Delery (+1 202.955.8515,sdelery@gibsondunn.com)
F. Joseph Warin (+1 202.887.3609, fwarin@gibsondunn.com)
Jake M. Shields (+1 202.955.8201, jmshields@gibsondunn.com)
Gustav W. Eyler (+1 202.955.8610, geyler@gibsondunn.com)
Lindsay M. Paulin (+1 202.887.3701, lpaulin@gibsondunn.com)
Geoffrey M. Sigler (+1 202.887.3752, gsigler@gibsondunn.com)
Joseph D. West (+1 202.955.8658, jwest@gibsondunn.com)

San Francisco
Winston Y. Chan – Co-Chair (+1 415.393.8362, wchan@gibsondunn.com)
Charles J. Stevens (+1 415.393.8391, cstevens@gibsondunn.com)

New York
Reed Brodsky (+1 212.351.5334, rbrodsky@gibsondunn.com)
Mylan Denerstein (+1 212.351.3850, mdenerstein@gibsondunn.com)

Denver
John D.W. Partridge (+1 303.298.5931, jpartridge@gibsondunn.com)
Ryan T. Bergsieker (+1 303.298.5774, rbergsieker@gibsondunn.com)
Monica K. Loseman (+1 303.298.5784, mloseman@gibsondunn.com)

Dallas
Andrew LeGrand (+1 214.698.3405, alegrand@gibsondunn.com)

Los Angeles
James L. Zelenay Jr. (+1 213.229.7449, jzelenay@gibsondunn.com)
Nicola T. Hanna (+1 213.229.7269, nhanna@gibsondunn.com)
Jeremy S. Smith (+1 213.229.7973, jssmith@gibsondunn.com)
Deborah L. Stein (+1 213.229.7164, dstein@gibsondunn.com)
Dhananjay S. Manthripragada (+1 213.229.7366, dmanthripragada@gibsondunn.com)

Palo Alto
Benjamin Wagner (+1 650.849.5395, bwagner@gibsondunn.com)

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