What Justices' Questions Signify For FCA Compliance

By **Holly Butler and Rebecca Fallk** (May 18, 2023)

Holly Butler

Rebecca Fallk

No matter how the U.S. Supreme Court decides U.S. v. SuperValu Inc. and U.S. v. Safeway Inc., the oral arguments in these False Claims Act cases suggest that it may be prudent to integrate compliance improvements now.

Companies should carefully examine existing corporate compliance programs and adapt them to mitigate the risks highlighted by the central issue before the court — whether a defendant's contemporaneous subjective beliefs about the lawfulness of its conduct are relevant to whether it knowingly violated the False Claims Act.

Background

On April 18, the court heard consolidated oral arguments in these key FCA cases. When the court issues its decision before the end of the term in June, attorneys inevitably will argue for many years about the extent to which subjective beliefs amount to a knowing violation of the FCA.

However, no matter the interpretation of the forthcoming decision, the oral arguments made one likely outcome clear: Government contractors should remain vigilant in enhancing their compliance programs.

Key Takeaways

The Supreme Court's questioning in the SuperValu oral arguments highlighted key takeaways for proactive compliance preparations:

Seek Guidance

The justices' questions suggested caution against operating in a vacuum when interpreting regulations, stressing the importance of relying on agency guidance and legal interpretations, as opposed to unsubstantiated inferences.

When making any compliance related decisions, diligently search for such guidance and interpretation. Where none is available, consider proactively seeking agency guidance.

The justices' comments suggest that companies would be well served to contemporaneously document any efforts to obtain advice of counsel, even if it may be necessary to waive privilege later. This may be helpful in demonstrating the prudence and reasonableness of the corporation's subsequent actions.

Show Your Work

When regulations are potentially or arguably ambiguous, or lacking in authoritative interpretation, contemporaneously demonstrate how you are interpreting the regulations to allow opportunity for course correction, or even the possible pursuit of a contractual or administrative resolution, if the agency disagrees.

The qui tam petitioners in Supervalu contended that if the companies had shown their work then "there wouldn't have been anything deceitful." The justices repeatedly revisited this issue, asking a number of questions and hypotheticals surrounding this concept. These comments suggest that if a company has an opportunity to show their work, they should take advantage of such.

Document Intent

The justices' questions highlighted the importance of subjective intent by the companies making claims to the government.

In order to defend against allegations of a subjective intent to commit wrongdoing or to take advantage of vagaries in regulations for self-interest, it is best practice to control and maintain contemporaneous communications that document intent.

Evaluate and Document

The justices' questioning underscored the importance of being proactive. This includes an evaluation of any claims of impropriety, as well as a documented resolution of the same.

Email chatter among employees claiming misconduct that is not elevated through proper reporting channels has less impact when those channels are well known, utilized and a genuine source of compliance monitoring.

Don't Forget the Fundamentals

Beyond the specific highlights discussed above, the SuperValu oral arguments accentuated that an effective compliance program is required.

As a threshold matter, an effective compliance program requires three fundamental features: (1) effective assessment to prioritize risk; (2) implementation of well-written, accessible and readily understood policies, along with training; and (3) periodic measurement as to the effectiveness of the compliance program.

Risk Assessment

Any effective compliance program begins with an initial risk assessment to evaluate the company's priorities and determine applicable policies.

Guidance issued by the U.S. Department of Justice identifies not only the importance of tailoring programs to the company's risk profile, but also the necessity of avoiding a cookie-cutter approach to compliance that merely checks the box.

This initial assessment does not need to be sophisticated or involve expensive outsourcing to third parties. Rather, it is prudent for a company to undertake a thoughtful and purposeful information-gathering exercise as to the necessary areas for the company's focus.

For example, if a company engages in substantial international activity, Foreign Corrupt Practices Act considerations likely require attention. However, if the company is a small U.S. government contractor with no international sourcing or engagement, the False Claims Act is likely more of a priority.

Likewise, a company can use past experience and available internal data to guide best practices, such as evaluating whether anonymous reporting or nonanonymous reporting lead to more reports being made, and therefore which category of reporting should be implemented.

Any assessment should be focused on attaining the "why" behind implementing controls and adopting particular policies and programs.

Operational Policy Implementation

Following a risk assessment, the company should implement well-written, accessible and readily understood policies based on the results of the risk assessment.

A dusty binder of risk assessments that sits on a compliance officer's shelf is insufficient — and, without effective implementation, may create an impression that compliance is not a company priority.

The aim of these policies should be to motivate compliant behavior. It is important to gather employee feedback regarding these policies, including whether employees know about the policies, and whether employees understand and utilize the policies at all levels of the organization.

Periodic Program Management

An effective compliance program goes beyond merely retaining policies in a portal and utilizing a spreadsheet to note whether each policy is deemed effective without any supporting evidence.

The effectiveness of the compliance program should be measured using a multilayered approach, including both routine testing and recurring tracking in various categories.

Hotline

Periodically test to ensure any hotline that is part of the compliance program is operational, and regularly assess the quantity and quality of hotline reports. Investigation should include whether there are reports being made, and if not, why.

Additionally, how many employees know about the hotline and are there any trends as to which company locations use the hotline more than others?

Consideration should be given to adapting the company's compliance program to the results of these hotline related findings, including, but not limited to, more training.

Culture

What is the company's commitment to compliance?

Surveys are helpful, but are not necessarily sufficient alone. The effectiveness of surveys depends on who is sending the survey, what is asked, how the questions are phrased and whether the surveys provide employees with anonymity so that employees feel safe in reporting.

Another mechanism by which a company's culture of compliance may be evaluated is through the use of focus groups. Again, the effectiveness of these groups is largely dependent on factors such as who leads them, what questions are asked, and how the questions are phrased.

It is similarly important to obtain feedback on employees' understanding of policies, and the amount of policy use at all levels of the organization. The company would be prudent to track its communications regarding compliance expectations and policies, including routine follow up with middle management.

Compliance Ambassador

A compliance ambassador can be used to develop compliance positions and their functions, as well as evaluate application rate and turnover. One way that this can be done is through judging employees' interest in applying to internal job openings.

Pattern Analysis

Consider the benefit of using data to test the time and flow of complaints and investigations, such as whether one particular company location is more likely to report suspicions of misconduct, if there are individual employees or management who more often are the focus of or who are tasked to investigate misconduct, or if the number of complaints increases during a particular point of a program management cycle.

Lessons Learned

A Company should go beyond testing its culture and surveying employees, and employ the lessons it has learned — as a result of surveys, through the use of obtained data, past experience and even the experiences of those similarly situated in the same industry — to inform how it will continually adjust and improve its compliance program.

While a company may take comfort in thoughtfully conducting a risk assessment and developing a compliance program, a mere paper program offers no protection.

Vigilant testing and tracking is required to demonstrate the effectiveness of a company's compliance program and adapt in response to identified deficiencies. The Supreme Court's questioning in SuperValu made sure to remind us of that.

Holly Drumheller Butler is a principal and co-leader of the white collar, fraud and government investigations practice Miles & Stockbridge PC.

Rebecca Fallk is an associate at the firm.