The False Claims Act – 2019 Mid-Year Update

Government Contracting

October 1, 2019

Today's Presenters

Jonathan Phillips is a partner in the Washington, D.C. office. He regularly defends government contractors and their affiliates in government investigations under the False Claims Act and in related whistleblower litigation. Previously, he served as a Trial Attorney in DOJ's Civil Division, Fraud Section, where he investigated and prosecuted allegations of fraud under the FCA and related statutes.

Erin Rankin is an associate in the Washington, D.C. office. She represents clients in government contracts matters relating to contract claims and terminations, suspension and debarment proceedings, internal investigations, and due diligence.

Andrew Tulumello is a partner in the Washington, D.C. office and has represented clients in a broad spectrum of complex litigation at the trial and appellate levels. In recent years, he has handled a number of high-profile class action and antitrust matters in the food and beverage, transportation, biotechnology, defense, and financial sectors. He also has represented several government contractors in investigations and suits under the False Claims Act.

James Zelenay is a partner in the Los Angeles office and a member of the firm's Litigation Department. He is experienced in federal and state FCA matters and whistleblower litigation, in which he has represented a breadth of industries and clients.

MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance in four weeks following the webcast
- Virginia Bar Association members should anticipate receiving their certificate of attendance in six weeks following the webcast
- All questions regarding MCLE Information should be directed to Jeanine McKeown (National Training Administrator) at 213–229-7140 or jmckeown@gibsondunn.com

Today's Agenda

- False Claims Act Overview, Including Recent Jurisprudence
- Enforcement & Policy Updates
- Continuing & Emerging Considerations for Federal Contractors
- Best Practices for False Claims Act Compliance

We encourage your questions throughout this presentation

False Claims Act Overview

The False Claims Act (FCA)

- The FCA, 31 U.S.C. §§ 3729-3733, is the federal government's ***primary weapon to redress fraud*** against government agencies and programs

- The FCA provides for recovery of ***treble damages*** and ***civil penalties*** from any "person" (natural or corporate entity) who knowingly submits or causes the submission of a false or fraudulent claim to the United States for money or property

- DOJ attorneys (Civil Division, as well as U.S. Attorneys' Offices) investigate and pursue FCA cases

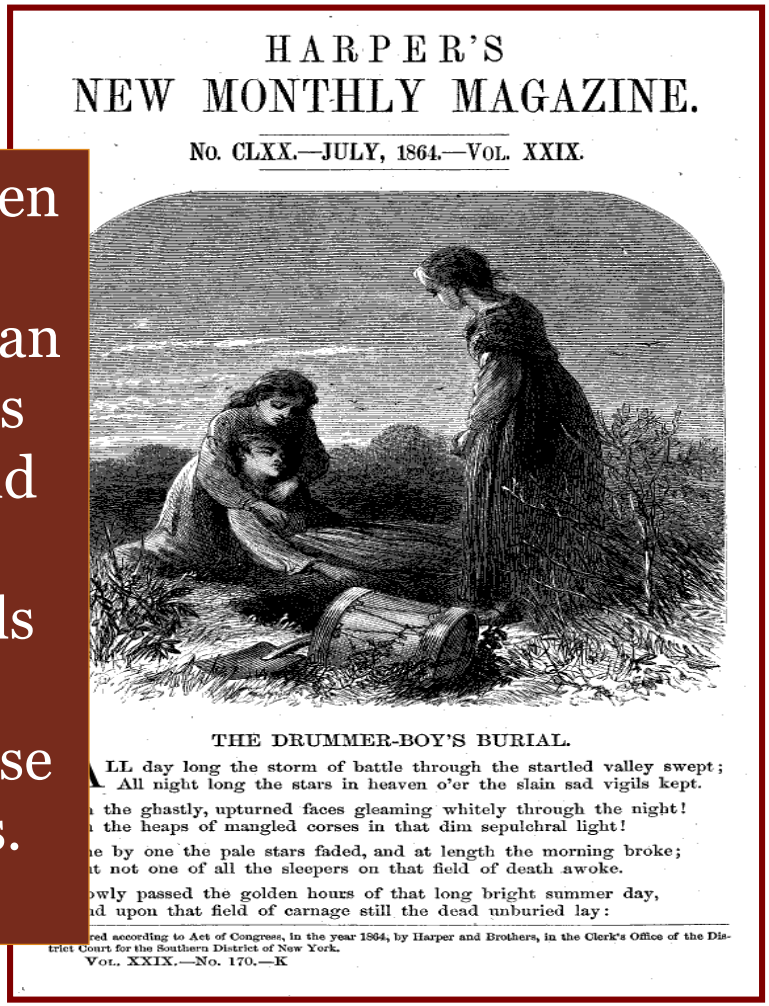
- DOJ is devoting more and more resources to pursuing FCA cases—and increasingly considering whether *qui tam* cases merit parallel criminal investigations

"It seems quite clear that the objective of Congress was broadly ***to protect the funds and property of the Government from fraudulent claims*** …."
Rainwater v. United States, 356 U.S. 590 (1958)

False Claims Act History

- Civil War profiteering prompted enactment of the "Lincoln Law" in 1863

For sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols the experimental failures of sanguine inventors, or the refuse of shops and foreign armories.



HARPER'S
NEW MONTHLY MAGAZINE.

No. CLXX.—JULY, 1864.—Vol. XXIX.

THE DRUMMER-BOY'S BURIAL.

LL day long the storm of battle through the startled valley swept;
All night long the stars in heaven o'er the slain sad vigils kept.
the ghastly, upturned faces gleaming whitely through the night!
the heaps of mangled corses in that dim sepulchral light!
e by one the pale stars faded, and at length the morning broke;
t not one of all the sleepers on that field of death awoke.
wly passed the golden hours of that long bright summer day,
d upon that field of carnage still the dead unburied lay:

red according to Act of Congress, in the year 1864, by Harper and Brothers, in the Clerk's Office of the District Court for the Southern District of New York.

Vol. XXIX.—No. 170.—K

R. Tomes, *The Fortunes of War*, Harper's New Monthly Magazine 228 (July 1864).

Key Provisions

31 U.S.C. § 3729(a)(1)	Statutory Prohibition	Summary
(A)	Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval	False/Fraudulent Claim
(B)	Knowingly makes, uses or causes to be made or used, a false record or statement material to a false or fraudulent claim	False Record/Statement
(G)	Knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government	"Reverse" False Claim
(C)	Conspires to violate a liability provision of the FCA	Conspiracy

Scienter

- "Knowingly" requires scienter and is defined as:
  - Actual knowledge;
  - Deliberate ignorance; or
  - Reckless disregard
- Negligence is not actionable
- Specific intent to defraud is not required

Overview of Key False Claims Act Theories

Factual Falsity

- False billing (*e.g.*, services not provided)
- Overbilling (*e.g.*, labor misclassification)

Legal Falsity / False Certification

- Certification of compliance with legal requirements
- Submission of claim with representations rendered misleading as to goods / services provided

Promissory Fraud / Fraud in the Inducement

- Obtaining a contract through false statements or fraudulent conduct
- *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (claims made by contractors who colluded on bids)

Reverse False Claims

- Improper avoidance of obligation to pay money to the government
- Retention of government overpayment

Damages and Penalties

Simple Damages Calculation

- Treble damages are traditionally calculated by multiplying the government's loss by three (e.g., if defendant charged government $100 for goods not received, damages would be $300)

Complex, Contested Damages Calculation

- Calculations are more complicated (and less certain) when the government receives goods or services it considers deficient or when there is a "false certification" or "promissory fraud"

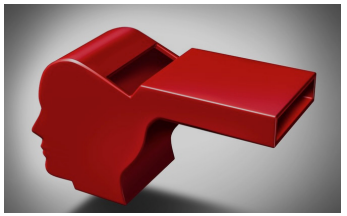
Civil Penalty Per Claim

- Previously $5,500 to $11,000
- Increased by interim rule in 2016, with later adjustment for inflation in 2018 to range of $11,181 to $22,363 per violation (no rule issued yet in 2019 increasing penalties)
- Interim rule was finalized in April 2019
- Final rule does not require DOJ to seek maximum number or amount of penalties available in any particular case
- Penalties are ***in addition to*** treble damages

Qui Tam Provisions

***Qui Tam* Provisions**

- Enable so-called "relators" to bring cases in the government's name and recover **as much as 30%** of favorable judgment or recovery
- Allow government to intervene
  - An increasing number of whistleblower cases are pursued **without government intervention** (but often with government statement of interest)
- DOJ has broad dismissal authority
  - We will cover ongoing developments in DOJ's use of this power shortly



"In short, sir, I have based the [*qui tam* provision] upon the old-fashioned idea of holding out a temptation and '**setting a rogue to catch a rogue**,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice."

Statement of Senator Howard, Cong. Globe, 37th Cong. 955-56 (1863)

Statute of Limitations

- The FCA has two limitations periods:
  - **6 years** from the alleged FCA violation; or
  - 3 years from the date the facts material to the FCA claim are known or reasonably should have been known by a government official, but **no more than 10 years** from the alleged violation
  - The longer period applies

Cochise Consultancy, Inc. v. United States ex rel. Hunt, 139 S. Ct. 1507 (2019)

- Resolving a circuit split, the Supreme Court held that the extended limitations period of **up to 10 years** applies in all FCA cases, whether the government has intervened or not
- The Court held that courts must look to the government official's knowledge (not the relator's), as the trigger for the additional 3-year period
- Following *Cochise*, ***relators can now employ the extended limitations period even in cases where the government has declined to intervene***

Public Disclosure Bar

- The **public disclosure bar** provides that a relator's *qui tam* complaint cannot be "substantially the same" as allegations publicly disclosed in certain enumerated sources such as public hearings, government audits or reports, or the news media
  - *"Original source" exception*: A relator may proceed on publicly disclosed allegations if he is an "original source" of the allegations, meaning he ***voluntarily disclosed*** them before filing and has knowledge that is **"*independent of and materially adds to*"** the public disclosures
  - *2010 Amendments*: The public disclosure provisions were amended to the current language in 2010; previously, the bar contained slight differences in the public disclosure and original source provisions

Original Source Exception – Recent Jurisprudence

***U.S. ex rel. Reed v. KeyPoint Gov't Solutions*, 923 F.3d 729 (10th Cir. 2019)**

- A relator satisfies the materially-adds requirement when she "discloses new information that is sufficiently significant or important that ***it would be capable of" influencing the government's behavior***, as contrasted with a relator who provides only background information or details about a previously disclosed fraud
- A relator who merely identifies a new specific actor engaged in fraud usually would *not* materially add to public disclosures of alleged widespread fraud in an industry with only a few companies
- The court found the relator here did materially add to the public disclosures about a specific program at her company
- Remanded on whether her knowledge was "independent" and whether her claims should otherwise survive scrutiny under Rule 12(b)(6) and Rule 9(b)

First-to-File Rule

- The **first-to-file rule** provides that, when a *qui tam* action is "***pending,***" "***no person*** other than the Government ***may intervene or bring a related action based on the [same] facts***"

***U.S. ex rel. McGuire et al. v. Millennium Labs., Inc.*, 923 F.3d 240 (1st Cir. 2019)**

- The First Circuit, reversing its prior precedent, joined the D.C. Circuit and the Second Circuit in holding that ***the FCA's first-to-file bar is not jurisdictional, such that arguments under the first-to-file bar do not implicate the court's subject matter jurisdiction***, even if they are a cause for dismissal
- This distinction can affect how, and when, arguments under the first-to-file bar may be made, and also the standard of review a court applies
- The case is currently on appeal

Estoppel and the False Claims Act

- As DOJ increasingly pursues parallel criminal and civil investigations in cases involving fraud on the government, the interplay between criminal and FCA charges becomes increasingly important

***United States v. Whyte*, 918 F.3d 339 (4th Cir. 2019)**

- Defendant owned a company that supplied armored vehicles to multinational forces in Iraq, and was indicted for criminal fraud in July 2012
- In October 2012, a relator filed a civil FCA suit against the defendant, in which the government declined to intervene
- The defendant ultimately prevailed at trial in his FCA civil suit, but then, over two years later, a jury convicted the defendant in the criminal case
- The Fourth Circuit held that the government is not collaterally estopped from pursuing its own criminal case by a prior *qui tam* FCA action in which it did not intervene

Whistleblower Protections & Retaliation

- Under the FCA
  - Employees and others (e.g., contract workers) are protected from retaliation
  - Relief may include double back pay and interest on back pay; reinstatement (at seniority level); and/or costs and attorneys' fees

- Employees of federal contractors and subcontractors may not be retaliated against for disclosing (41 U.S.C. § 4712):
  - gross mismanagement of a Federal contract or grant,
  - a gross waste of Federal funds,
  - an abuse of authority relating to a Federal contract or grant,
  - a substantial and specific danger to public health or safety, or
  - a violation of law, rule, or regulation related to a Federal contract or grant
- Federal contractors and subcontractors must inform their employees in writing of whistleblower rights (FAR 52.203-17)

Retaliation – Recent Jurisprudence

***Guilfoile v. Shields*, 913 F.3d 178 (1st Cir. 2019)**

- FCA retaliation claims need not meet Rule 9(b)'s particularity requirement, plead the submission of false claims, or plead that compliance with the Anti-Kickback Statute was material
- Instead, FCA retaliation plaintiffs "need only plead that their actions in reporting or raising concerns about their employer's conduct 'reasonably could lead to an FCA action'"

***U.S. ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190 (4th Cir. 2018)**

- Prior Fourth Circuit precedent held that employees engage "in protected activity when 'litigation is a *distinct possibility*, when the conduct reasonably could lead to a viable FCA action, or when . . . litigation is a reasonable possibility'"
- The court rejected the "distinct possibility" standard for "other efforts to stop 1 or more" FCA violations, and instead adopted an "***objective reasonableness***" standard: "an act constitutes protected activity where it is motivated by an *objectively reasonable* belief that the employer is violating, or soon will violate, the FCA"

***U.S. ex rel. Reed v. KeyPoint Gov't Solutions*, 923 F.3d 729 (10th Cir. 2019)**

- Because the relator was a compliance officer, she must plead facts to overcome the presumption that she was just doing her job in reporting fraud internally to her employer—that she took actions beyond what was required to fulfill her compliance job duties
- The relator did not adequately allege that her employer was on notice she was trying to stop FCA violations, and the court affirmed the dismissal of her retaliation claim

Implied (False) Certification & Materiality

Courts continue to wrestle with the implications of the Supreme Court's decision in ***Universal Health Services v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016)**, which held that implied certification theory can provide a basis for FCA liability, "at least where two conditions are satisfied":

- "the claim does not merely request payment, but also makes specific representations about the goods or services provided," and
- "the defendant's failure to disclose noncompliance with ***material*** statutory, regulatory, or contractual requirements makes those representations misleading half-truths"

- To determine materiality under *Escobar*, courts consider:
  - Government's payment of the "particular claim," or practice of paying "particular type of claims," with "actual knowledge" of violation of certain requirements, is "strong evidence" that those requirements are not material
  - Proof can include, but is not limited to, "evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory or contractual requirement"
  - Must be more than an allegation that the government had the right to refuse payment based on the noncompliance
  - Must be more than a minor or insubstantial noncompliance; the government may not require "contractors to aver their compliance with the entire U.S. Code and [CFR]," then deem all violations material

Post-*Escobar* Materiality – When Does Government Knowledge Defeat Materiality?

***U.S. ex rel. Lemon v. Nurses To Go, Inc.*, 924 F.3d 155 (5th Cir. 2019)**

- The relators alleged that a hospice provider submitted claims affirming it had complied with various Medicare statutory and regulatory requirements, despite allegedly violating several requirements related to certifications, face-to-face physician patient encounters, and writing plans of care
- Reversed the district court's 12(b) dismissal, concluding that the allegedly violated regulatory requirements were conditions of payment
- The court articulated three non-exhaustive "factors" for determining materiality:
  - whether the government expressly conditioned payment on meeting the statutory or regulatory requirements at issue
  - whether the government would have denied payment if it had known of the violations (i.e., the "government enforcement" factor)
  - whether the defendant's noncompliance was substantial or minor
- The Court held that ***generalized allegations that the government had taken enforcement actions for similar violations against other companies in the past was sufficient*** for the pleadings stage, observing that it did "not expect Relators to know precisely the Government's prosecutorial practices without the benefit of discovery"

Post-*Escobar* Materiality – When Does Government Knowledge Defeat Materiality?

***U.S. ex rel. Berg v. Honeywell Intern., Inc.*, 740 Fed. Appx. 535 (9th Cir. 2018) *cert. denied*, 139 S. Ct. 1456 (2019)**

- Relators alleged that the contractor falsely promised the amount of energy savings that could be achieved in the contractor's Energy Savings Performance Contracts, and then falsely represented the actual amount of energy savings
- The court upheld summary judgment for the contractor because (among other things) the relators could not show materiality
- The contractor had disclosed to the Army in its proposal the assumptions and calculations underlying its estimated savings
- The Army had paid the contractor's claims for at least 5 years during which time the Army was aware of the allegations and had conducted its own audit
- The court held that the relators therefore "failed to raise a triable issue as to the element of materiality on the '***demanding***' standard established in *Escobar*"

Relationship between Rule 9(b) and Materiality

***U.S. ex rel. Mateski v. Raytheon Co.*, 745 F. App'x 49 (9th Cir. 2018), *cert. denied sub nom. Mateski v. Raytheon Co.*, 139 S. Ct. 2039 (2019)**

- Relator had alleged that the company engaged in a fraudulent scheme to cover up its alleged noncompliance with contractual testing specifications in a subcontract for developing satellite technology
- Court dismissed under Rule 9(b), because the relator failed, in a fifth amended complaint, to allege with particularity which parts, which tests, whether the tests were never done or whether they were instead done incompletely, as well as failing to name approximate dates of these tests
- Without these details, the court held that the defendant did not have enough information to defend against the claims, and so the complaint failed to meet Rule 9(b)'s particularity requirement
- The Ninth Circuit also concluded that because of this lack of particularity regarding the alleged false claims, the complaint also inadequately pleaded the materiality requirement
- Noting that the materiality requirement is a "demanding" standard pursuant to *Escobar*, the court found itself unable to assess whether the noncompliance was material or minor because of the lack of particularity about the nature of the alleged violations

Recent Jurisprudence – Rule 9(b)

***U.S. ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190 (4th Cir. 2018)**

- United Airlines was a sub-sub-contractor providing engine maintenance services for military transport aircraft
- Relator was a former technician for United Airlines, and alleged that the company: (1) certified uncompleted work as completed; (2) certified repairs performed by uncalibrated and uncertified tools, in violation of the subcontract's requirements; and (3) allowed inspectors to continue certifying repairs after their training and eye exams had expired
- Relator failed to meet Rule 9(b)'s particularity requirement where his complaint alleged a fraudulent scheme without detailing the billing and payment structure
- Because the complaint alleged only an umbrella payment without describing the billing or payment structure (how the invoices were presented and paid), the complaint left open the possibility that no payments were ever made
- Alleging a link between the false claims and government payment is especially necessary to meet Rule 9(b)'s requirements where, as here, the defendant is several levels removed from a claim to the government because it is a sub-sub-contractor

Enforcement & Policy Updates

Government Players

Department of Justice

DOJ is devoting more and more resources to pursuing FCA cases—and considering whether *qui tam* cases merit criminal investigation

Contracting & Support Agencies

Contracting agencies and support agencies (such as DCAA) increasingly view contract disputes as false claims

Cooperation

Inspectors General

Department of Defense IG

General Services Administration IG

Contracting Agency IG

By the Numbers: 2018 Federal Fiscal Year

$2.9 billion

Civil Settlements and Judgments Under the FCA

767

New FCA Cases Filed

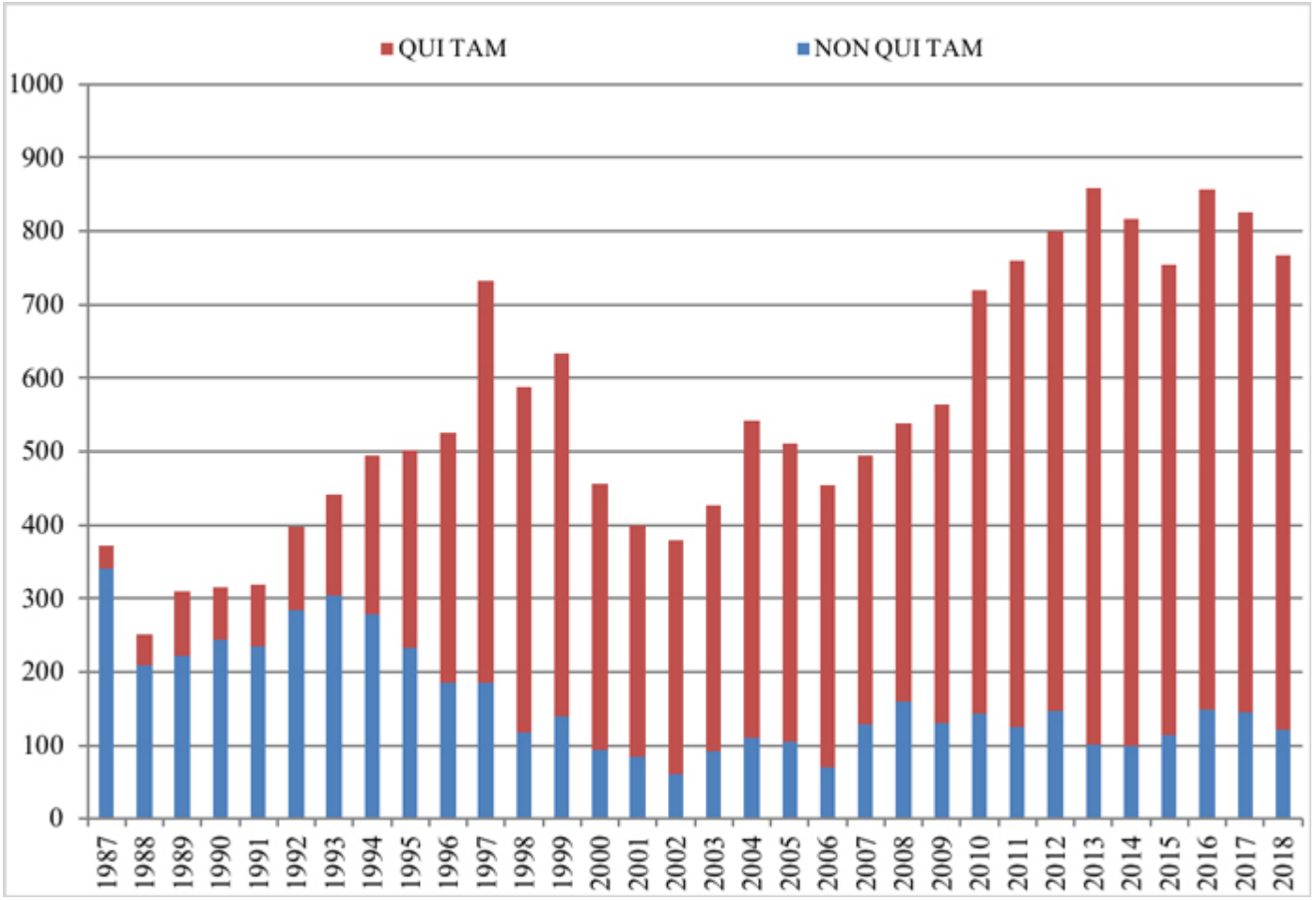
84 percent

Percentage of New FCA Cases Initiated by a Whistleblower

96 percent

Percentage of Overall Federal Recovery from Cases in which the Government Intervened

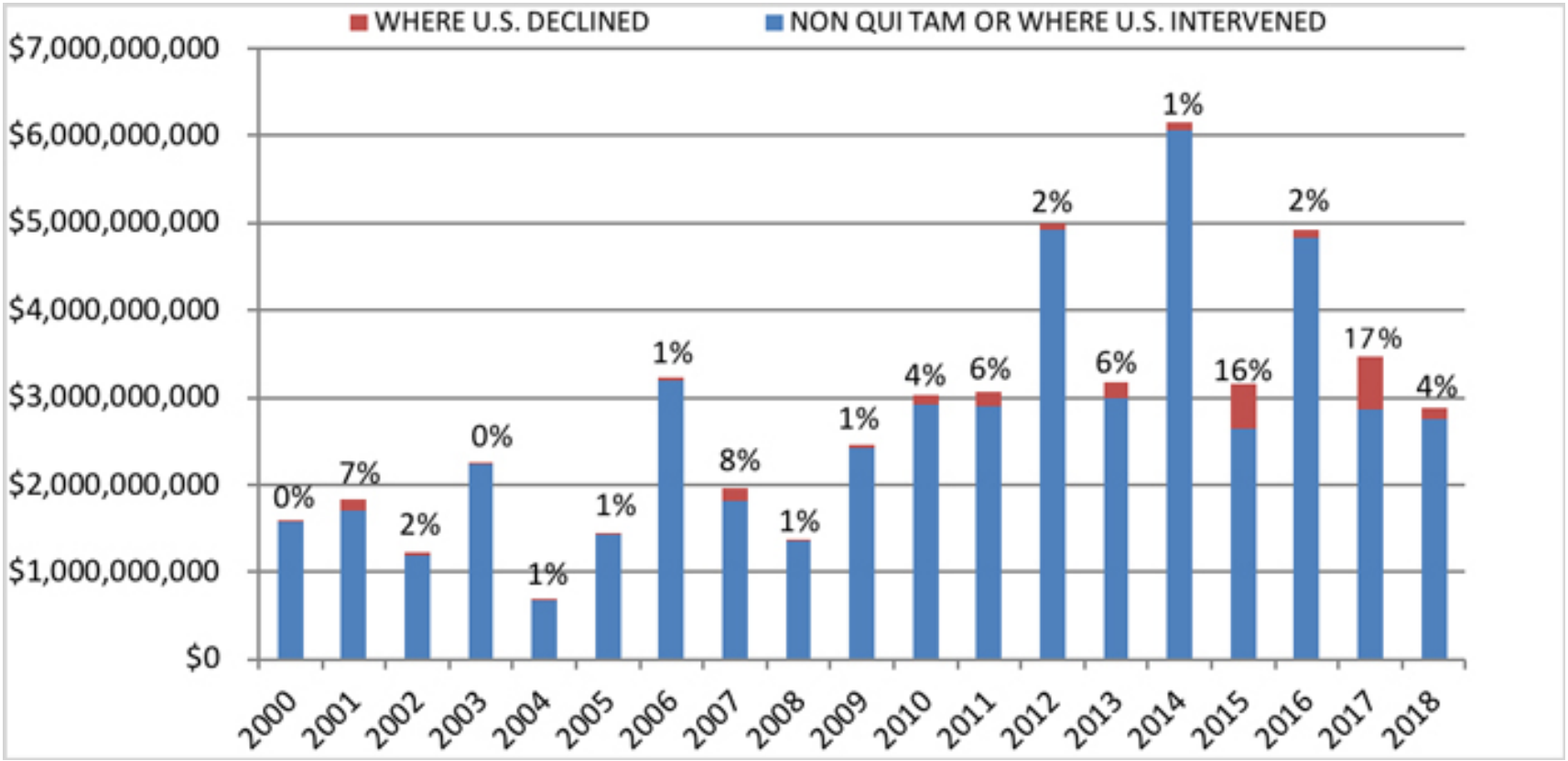
Number of New FCA Suits (1987-2018 Federal Fiscal Years)



767 new cases in 2018 FFY:

- 645 *qui tam* cases
- 122 non-*qui tam* cases

Declined Cases in FCA Settlements / Judgments (2000–2018 Federal Fiscal Years)



Source: DOJ "Fraud Statistics – Overview" (Dec. 21, 2018)

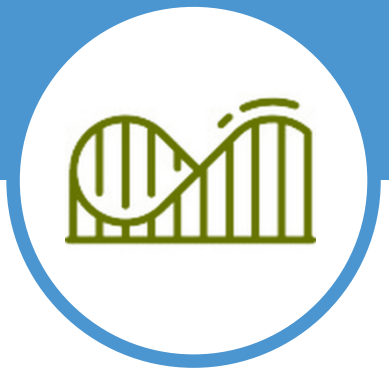
By the Numbers: Mid-Year 2019

>$750 million

FCA recoveries from ***settlements*** in the first half of 2019, according to Gibson Dunn calculations

>$139 million

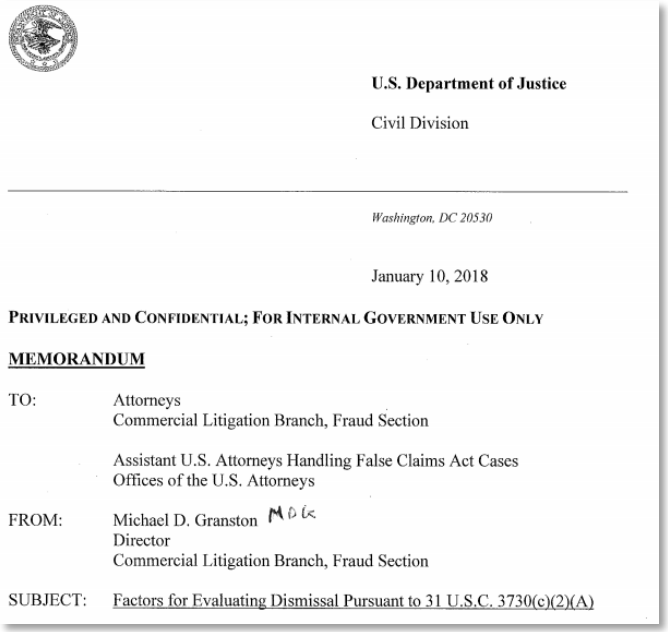
from ***settlements*** involving government contractors in the first half of 2019, according to Gibson Dunn calculations



2nd?

2019 on pace to match dip in 2018 as only year in the past 10 with ***below $3 billion*** in FCA recoveries

The Granston Memo (Jan. 10, 2018)



U.S. Department of Justice

Civil Division

Washington, DC 20530

January 10, 2018

PRIVILEGED AND CONFIDENTIAL; FOR INTERNAL GOVERNMENT USE ONLY

MEMORANDUM

TO: Attorneys
Commercial Litigation Branch, Fraud Section

Assistant U.S. Attorneys Handling False Claims Act Cases
Offices of the U.S. Attorneys

FROM: Michael D. Granston MDG
Director
Commercial Litigation Branch, Fraud Section

SUBJECT: Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)

- This internal memo focuses on DOJ's use of its dismissal authority (31 U.S.C. § 3730(c)(2)(A))
- Responding to "record increases in *qui tam* actions" and acknowledging that its "rate of intervention has remained relatively static," DOJ underscored that dismissal is "an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent"
- DOJ attorneys should consider dismissal for:
  - Facially meritless or duplicative *qui tam* suits;
  - Cases that agencies view as interfering with policies / agency programs;
  - Suits that threaten DOJ's litigation positions;
  - Cases that might reveal classified information;
  - Low expected-value suits; and
  - Actions that frustrate the government's investigative efforts
- Principles in Granston Memo incorporated into DOJ Justice Manual at Section 4-4.111 in September 2018

Application of the Granston Memo (2019)

- In a March 2019 speech at the Federal Bar Association's FCA Conference, ***DOJ Civil Fraud Section Director Michael Granston*** explained DOJ's approach under the memo, stating "dismissal will remain the exception rather than the rule"
  - He expanded that the government's cost-benefit analysis will focus on the likelihood that the relator can prove the allegations
  - DOJ will not dismiss *qui tam* actions based solely on prospective discovery obligations, so pursuing excessive discovery may not help get a case dismissed
  - But DOJ referenced discovery burden in a recent case urging the Supreme Court to deny certiorari, so that the case could be dismissed
- In remarks in January 2019 at the American Conference Institute's Advanced Forum on False Claims Act Enforcement, ***Deputy Associate Attorney General Stephen Cox*** acknowledged DOJ's use of its dismissal authority has increased since 2017
  - Mr. Cox stated that while DOJ "will remain judicious," it "will use this tool more consistently to preserve our resources for cases that are in the United States' interests," noting DOJ plays "a gatekeeping role" in the "partnership" between *qui tam* relators and the government

Application of the Granston Memo (2019) (cont.)

- ***Sequoia* test**: government may dismiss if: (1) it identifies a valid government purpose; and (2) a rational relation exists between the dismissal and accomplishment of that purpose; unless (3) dismissal is fraudulent, arbitrary and capricious, or illegal. *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998)

- ***Swift* test**: government has "an unfettered right to dismiss" FCA actions under 3730(c)(2)(A), and so dismissals are "unreviewable" with a possible exception for dismissals constituting "fraud on the court." *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003)

Application of The Granston Memo (2019) (cont.)

- ***United States v. EMD Serono, Inc.*** (E.D. Pa. 2019): Pennsylvania district court judge, following *Sequoia*, agreed with DOJ that allegations lacked merit, and pursuing case would be too costly and contrary to the public interest, and dismissed the case

- ***United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*** (S.D. Ill. 2019): following *Sequoia*, Court denied DOJ motion to dismiss and ruled that the government had not sufficiently investigated to move for dismissal

- District court judges in Minnesota, Mississippi, and Texas agreed with the *Swift* standard, but observed that the government would still be entitled to dismissal even under *Sequoia*; in all three cases the court granted the government's motion to dismiss

Apparent Shift in Yates Memo Policy

- In November 2018, then-Deputy Attorney General Rod Rosenstein announced a set of policy changes to "restore" discretion to DOJ attorneys
- DOJ will give cooperation credit to companies that identify every individual who was "***substantially involved in or responsible for*** the criminal conduct" under investigation in white collar investigations
- An apparent shift from the Yates Memo requirement that corporations provide "all relevant facts" about individuals involved in misconduct regardless of the significance of those individuals' involvement
- DOJ attorneys will also be "permitted to negotiate civil releases for individuals who do not warrant additional investigation in corporate civil settlement agreements"
- Policy shift may allow companies to tailor their investigations and advocacy efforts more closely to those individuals most likely to face criminal prosecution
- Although focused primarily on the Foreign Corrupt Practices Act, Deputy Attorney General Rosenstein also remarked on the impact the new standard could have on companies facing civil FCA liability

Cooperation Credit Guidance (May 7, 2019)

- DOJ's formal policy identifying the type of cooperation eligible for credit, included in Justice Manual Section 4-4.112
- Guidance is the latest chapter in effort to scale back "all or nothing" approach to cooperation credit in 2015 Yates Memo and to describe the bases for cooperation credit
- Driven by belief that all or nothing approach had been counterproductive in civil cases because it deprived DOJ of the "flexibility" it needed "to accept settlements that remedy the harm and deter future violations"
- Guidance provides clarity regarding DOJ's overall approach and flexible standards provide opportunities for defendants to formulate creative negotiation and litigation strategies
- On the other hand, the guidance lacks specificity regarding several critical issues (e.g., what constitutes cooperation and how to assess the value that cooperation provides to DOJ)

Cooperation Credit Guidance (cont.)

- Under the Guidance, defendants may receive varying levels of cooperation credit depending on their efforts in cooperation categories including:
  - "[i]dentifying individuals substantially involved in or responsible for the misconduct";
  - making individuals available who have "relevant information";
  - "[a]dmitting liability or accepting responsibility for the relevant conduct"; and
  - "[a]ssisting in the determination or recovery" of losses
- Guidance notes that cooperation must have value for DOJ, measured by:
  - "timeliness and voluntariness" of cooperation
  - "truthfulness, completeness, and reliability" of information provided
  - "nature and extent" of the cooperation
  - "significance and usefulness of the cooperation" to DOJ
- Full credit requires self-disclosure of all those involved in misconduct, full investigation cooperation, and remedial steps to prevent and detect similar wrongdoing
- Unlike criminal case cooperation guidance, no percentage reductions in penalties or damages; instead, DOJ may reduce the multiple sought

Continuing and Emerging Considerations for Federal Contractors

Mandatory Disclosure of "Credible Evidence" of FCA Violations

FAR 52.203-13 & FAR 3.1003

- A contractor ***must timely disclose*** to the relevant Agency Inspector General and Contracting Officer, in writing, ***credible evidence*** that a principal, employee, agent or subcontractor has committed –
  - a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations in Title 18 of the United States Code;
  - a ***violation of the civil False Claims Act***; or
  - significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments

  in connection with the award, performance, or closeout of the contract or a subcontract thereunder
- *All contractors* are subject to this requirement, as knowing failure to disclose may result in ***suspension or debarment*** under FAR 3.1003(a)

What is "Credible Evidence"?

- "Credible evidence" is not defined in the FAR
- DFARS 252.246-7003 defines "credible information" in a different context (safety issues) as ***"information that, considering its source and the surrounding circumstances, supports a reasonable belief that an event has occurred or will occur"***
- The "credible evidence" standard should permit contractors reasonably adequate time to investigate the suspected misconduct
- For purposes of mandatory disclosure considerations, credibility determinations are made by the contractor, leaving open the possibility that the determination will be "second guessed" if a decision is made not to disclose and the government otherwise becomes aware of it

- Internal investigations leading to "no credible evidence" findings should be ***well documented***, including the steps taken, evidence gathered, and remedial actions implemented in response
- Findings of "credible evidence" should be disclosed promptly

Responsibility Determinations

- The FAR requires contracting officers to make an affirmative determination of responsibility of an offeror before awarding a contract (FAR 9.103(b))
- Factors for determining responsibility include that the offeror "[h]ave a satisfactory record of integrity and business ethics" (FAR 9.104-1(d))

***Total Home Health*, B-417283; B-471283.2, 2019 CPD ¶ 166 (April 26, 2019)**

- The awardee of a contract issued by the VA had entered into a settlement agreement with DOJ in 2018 relating to False Claims Act allegations for improper billing to Medicare patients
- GAO held that this fact did not make the contracting officer's determination that the offeror was responsible unreasonable, so long as the CO was aware of and considered it in making the determination
- CO's determination emphasized that the awardee took corrective actions by issuing refunds and paying a fine

Allowability of Legal Costs for FCA Investigations & Litigation

- Costs incurred in connection with FCA proceedings (including investigations) are unallowable if the result is (FAR 31.205-47):
  - Criminal conviction or finding of contractor liability; or
  - Final decision to suspend, debar, void or terminate a contract for default; or
  - Disposition of the matter by consent or compromise "if the proceeding could have led to any of the outcomes listed" above
- Settlement agreement with DOJ: costs are allowable only if specifically provided
- Settlement of non-intervened *qui tam*: costs are allowable if CO determines there was "very little likelihood" that the relator would have succeeded on the merits
- Contractor can only recover up to a maximum of 80% of reasonable costs

***Energy Matter Conversion Corp.*, ASBCA No. 61583, 19-1 BCA ¶ 37,225**

- Legal costs relating to the DOJ's FCA investigation, which resulted in contractor refunding costs billed to the Navy, were expressly unallowable because the compromise did not provide that any of the legal costs were allowable

***Tolliver Group, Inc. v. United States*, 140 Fed. Cl. 520 (2018)**

- Contractor's claim for 80% of its attorney fees incurred in successfully defending against a *qui tam* suit survived the Government's motion to dismiss

Deciding Where to Pursue Contract Disputes Act Claims

- Court of Federal Claims
  - Has jurisdiction over fraud claims
  - The government may assert FCA violations as counterclaims to a contractor CDA claim at the Court of Federal Claims

- Boards of Contract Appeals
  - ***Generally lack jurisdiction over fraud claims***, but not all appeals involving or relating to fraud must be dismissed
  - However, the Boards may have jurisdiction over the government's affirmative defense of prior material breach based on fraud provided the ASBCA does not have to make ***factual determinations of fraud*** (*Laguna Constr. Co. Inc. v. Carter*, 828 F.3d 1364 (Fed. Cir. 2016))

Federal District Court Authority to Request Advisory Opinions

- The Contract Disputes Act authorizes federal district courts to request ***an advisory opinion*** from the Boards of Contract Appeals "on matters of contract interpretation" when an action involving "any issue that could be the proper subject of" a contracting officer's final decision is pending before the court (41 U.S.C. § 7107(f))
- Rarely used procedure, so it is not yet clear how district courts would use a Board of Contract Appeal's advisory opinion
- Government contractors who are defendants in an FCA action may consider moving the district court to seek an advisory opinion, if the FCA allegations involve questions of contractual interpretation—particularly if the questions are unique to government contracting (e.g., Cost Accounting Standards issues)

Key Risk Areas for Government Contractors

- Small business status
- GSA schedule pricing
- Anti-trust / bid rigging
- Price and cost issues
- Labor billing and executive compensation caps
- Testing and quality control
- Performance and delivery requirements
- Compliance with DFARS cybersecurity requirements
- Supply chain and imports

Recent settlements provide examples of how some of these risks serve as the basis for FCA allegations

Small Business Status – Recent Settlements

- **Former CEO of ADS Inc.**
  - Individual agreed to pay $20 million to settle allegations that he falsely certified as a small business to win set-aside contracts
  - Combined settlements relating to ADS Inc. have exceeded $36 million; largest FCA recovery ever relating to small business fraud
- **Regiment Construction Corp.**
  - Agreed to pay $2.4 million to settle allegations that it falsely certified as a service-disabled veteran-owned small business to win government contracts

Contract Bidding and Award – Recent Settlements

- **Hyundai Oilbank Co. and S-Oil Corp.**
  - Had contracts with the U.S. military to supply fuel to bases in South Korea
  - Agreed to pay approximately $127 million to resolve allegations that they conspired to suppress and eliminate competition during the contract award process ("bid rigging")
  - The payments settled criminal and civil antitrust claims and civil FCA claims
  - DOJ noted that the Antitrust Division and the Civil Fraud Section "worked together effectively to reach coordinated global settlements that were equitable and proportionate to the defendants' conduct" in accordance with the Anti-Piling On policy
- **IBM and Cúram Software**
  - Had a contract and subcontract with the state of Maryland to develop software for Maryland's health insurance exchange website, which was funded by federal grants
  - Agreed to pay $14.8 million to settle allegations that, during the contract procurement process, they made material misrepresentations to Maryland regarding the development status and functionality of software applications

Labor Billing – Recent Settlements

- **Mission1st Group Inc.**
  - Agreed to pay over $4 million to settle allegations that it charged the government for salary uplifts (e.g., danger and hazardous duty pay) that it did not actually pay its employees
- **PAE Applied Technologies**
  - Agreed to pay $4.2 million to settle allegations that it charged the government for wages higher than what the company actually paid to its employees

GSA Schedule Pricing – Recent Settlement

- **Informatica LLC**
  - Agreed to pay over $21 million to resolve allegations that the company:
    - caused the government to be overcharged by providing misleading information about its commercial sales practices
    - knowingly provided false information concerning commercial discounting practices for its products and services to resellers, which the resellers used in negotiations with the GSA for schedule contracts
    - caused sales of products that violated the Trade Agreements Act

Testing & Quality Control – Recent Settlements

- **Hydro Extrusion Portland, Inc. and Hydro Extrusion USA, LLC**
  - Agreed to pay $46 million to resolve criminal allegations that the companies falsified test results on aluminum products that they sold to NASA and the military, for use in rockets and missiles
  - Also agreed to submit annual reports regarding its implementation of a compliance program
  - DOJ noted the factors contributing to its decision to settle the case:
    - Cooperation with the government's investigation
    - Termination of employees involved
    - Implementation of automated testing equipment
    - Conducting company-wide audits
    - Increasing resources to compliance, quality controls, and quality audits
    - "However, the companies did not receive more significant mitigation credit, either in the penalty or the form of resolution, because the companies did not voluntarily self-disclose the full extent of their misconduct to the Department"
- **ITT Cannon**
  - Agreed to pay $11 million to settle allegations that it sold untested electrical connectors to the military, both directly and through distributors
  - Also alleged that when the company conducted remedial testing, the products failed and the company failed to immediately disclose this to the government
  - Relator was the former regional quality manager for the company

Defective Products – Recent Settlements

- **Cisco Systems Inc.**
  - Agreed to pay $8.6 million to settle allegations that it sold video surveillance software that contained cybersecurity defects
  - Relator was a former software security engineer for the company
- **Sesolinc Group**
  - Agreed to pay $2.4 million to resolve allegations that it built battery systems with faulty electrical wiring that it then sold to the military
  - Also alleged that the company misled the government into spending more by ordering parts separately rather than buying the entire battery systems
  - Relator was a former salesperson for the company
- **Indal Technologies Inc.**
  - Agreed to pay $3.5 million to resolve allegations that it knowingly sold defective helicopter landing systems to the Navy
  - Alleged that the company used a less expensive type of steel than what the contracts required

Performance Delays – Recent Settlements

- **American Airlines**
  - Had contracts with the Postal Service for mail delivery, which provided penalties for mail delivered late or to the wrong location
  - Agreed to pay $22 million to resolve allegations that the company falsely reported delivery times
- Similar allegations were settled by British Airways and Iberia Airlines last year, for $5.8 million

Unallowable Costs – Recent Settlements

- **Alpha Research & Technology Inc.**
  - Subcontractor submitted proposals to major defense contractors, which were then included in fixed-price proposals to the government
  - Agreed to pay $1 million to settle allegations that the company included unallowable costs in the proposals, including for luxury personal expenses (e.g. cars and vacations)

Import Duties – Recent Settlements

- **Bassett Mirror Company**
  - Agreed to pay $10.5 million to settle allegations that it violated the FCA by misclassifying items on customs forms to avoid paying anti-dumping duties on furniture imported from China
- **American Dawn, Inc. and individual executives**
  - Agreed to pay $2.3 million to settle allegations that it misclassified goods being imported into the U.S. to avoid paying higher tariff rates

Best Practices for FCA Compliance

Minimizing Exposure

- Set a compliance-focused "tone from the top"
- Adopt and implement reasonable compliance policies and controls
  - Required by FAR 52.203-13, and strongly advised in FAR 3.1002
  - A strong internal compliance program may not prevent a rogue employee from committing fraud, but it may help to defeat scienter
- Train employees on compliance policies and reporting options
- Monitor and audit
- Investigate and remediate
  - Develop standards and procedures to prevent, detect, and respond to improper conduct

Risk Assessment

- Monitor government interactions
- Understand express certifications in government contracts and programs
- Account for use of government contract funds and grants
- Evaluate business partners, especially government subcontractors
- Document the government's knowledge, awareness, and ratification of contractual and programmatic deviations
- Take care in responding to billing inquiries as incorrect explanations may be used as evidence of fraud
- Documentation and transparency are key

Investigation Responsiveness

- Critical to uncover allegations of FCA-related complaints as early as possible
- Foster an environment in which employees and other interested parties report concerns internally
- *Qui tam* warning signs
  - HR issues;
  - Exit interview statements;
  - Unexpected audits;
  - Requests for billing explanations;
  - Increased web activity; and
  - Former employees contacted
- Proactively engage with and present your case to DOJ and USAO
- The most critical juncture is the government's intervention decision

Gibson Dunn 2019 False Claims Act Webcast Series

- This has been one in a series of webcasts on the FCA and various industry sectors in which our clients and friends have an interest
  - FCA and Financial Services Sector (September 17)
  - **FCA and Government Contracting (October 1)**
  - FCA and Drug & Device Industry (October 15)
- The series is available at http://www.gibsondunn.com/publications/pages/webcasts.aspx
- If you have any unanswered questions, please feel free to contact any one of us at:
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