GIBSON DUNN

The False Claims Act – 2017 Mid-Year Update

Government Contracting

August 9, 2017

Today's Panelists

Karen Manos is a partner in the Washington, D.C. office and is Chair of the firm's Government Contracts practice group. She has nearly thirty years' experience on a broad range of government contracts issues, including civil and criminal fraud investigations and litigation, complex claims preparation and litigation, bid protests, qui tam suits under the False Claims Act, defective pricing, cost allowability, the Cost Accounting Standards, and corporate compliance programs.

Joe West is a partner in the Washington, D.C. office. He previously Co-Chaired the firm's Government Contracts practice group, and he concentrates his practice on contract counseling, compliance/enforcement, and dispute resolution. He has represented both contractors (and their subcontractors, vendors and suppliers) and government agencies, and has been involved in cases before various United States Courts of Appeals and District Courts, among others.

John Chesley is a partner in the Washington, D.C. office. He focuses his practice on white collar criminal enforcement and government contracts litigation. He represents corporations, audit committees, and executives in internal investigations and before government agencies in matters involving the Foreign Corrupt Practices Act, procurement fraud, environmental crimes, securities violations, antitrust violations, and whistleblower claims.

Erin Rankin is an associate in the Washington, D.C. office, where she is a member of the firm's Litigation Department. She has broad experience representing clients on government contracts matters relating to contract claims, bid protests, suspension and debarment proceedings, voluntary disclosures and government investigations.

Agenda

- FCA Overview
- FCA Enforcement Overview
- Recent Developments: (Implied) False Certifications
- Recent Developments: Government Contractor FCA Settlements
- Recent Developments: FCA and Government Contract Disputes
- FCA Compliance Best Practices

- **We encourage your questions throughout this presentation**

FCA 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

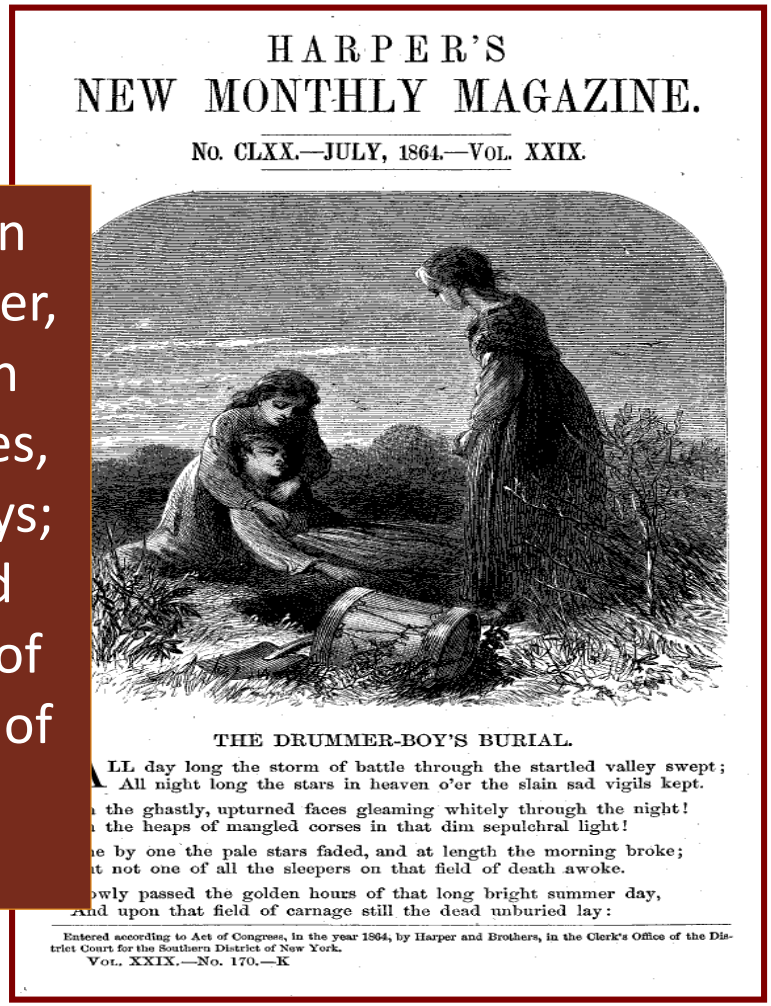
"It seems quite clear that the objective of Congress was broadly ***to protect the funds and property of the Government from fraudulent claims*** …."

Rainwater v. United States, 356 U.S. 590 (1958)

FCA – 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,
And upon that field of carnage still the dead unburied lay:

Entered 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).

FCA – 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

FCA – 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

FCA – Overview of Key FCA Theories

Factual Falsity

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

Legal Falsity / False Certification

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

Promissory Fraud / Fraud in the Inducement

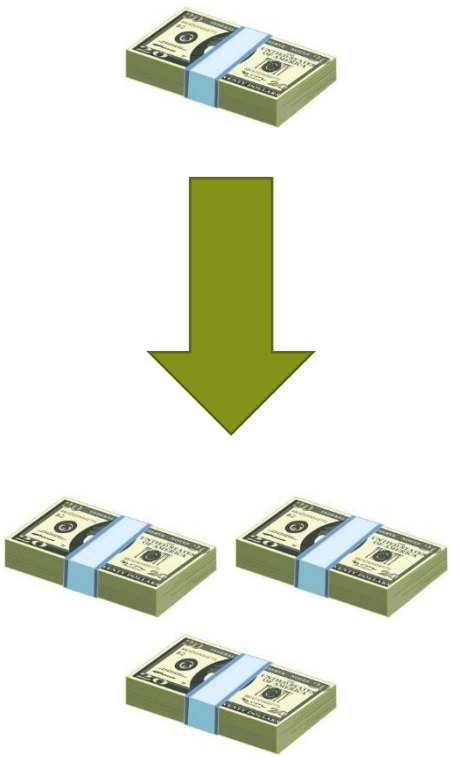
- Obtaining a contract through false statements or fraudulent conduct
- *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (claims by contractors who colluded on bids)

Reverse False Claims

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

FCA – 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
  - Nearly doubled effective August 1, 2016
  - 2017 inflation adjustment increased to range of $10,957 to $21,563 per violation
  - Penalties are **in addition to** treble damages



FCA – Statute of Limitations

- The statute of limitations is:
  - 6 years from the date of violation *or*
  - 3 years from when facts material to the violation are known or reasonably should have been known to the government
- ***But*** not more than 10 years from the violation

Government Players

DOJ

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 the Defense Contract Audit Agency) increasingly view contract disputes as false claims

Cooperation

Inspectors General

Department of Defense IG

General Services Administration IG

Contracting Agency IG

FCA – Public Disclosure and First-to-File Bars

- The **public disclosure bar** provides that 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
- The **first-to-file bar** 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***"

Recent Legal Development: Public Disclosure Bar

Amphastar Pharmaceuticals Inc. v. Aventis Pharma SA, 856 F.3d 696 (9th Cir. 2017)

- Affirmed district court dismissal of generic pharmaceutical company's FCA allegations that defendant overcharged the government after fraudulently obtaining a patent on one of its drugs
- Court found that the allegations were publicly disclosed during discovery in its own earlier patent litigation with defendant
  - Although government reimbursement of the drug was not publicly disclosed in that suit, that reimbursement was "***an obvious inference based on the publicly disclosed allegations***"
- Relator also was not an "original source" under the pre-amendment version of the bar because it developed the allegations through the discovery process
  - Relator admitted this fact in its required disclosures to DOJ

Recent Legal Developments: First-to-File Bar

***U.S. ex rel. Shea v. Cellco Partnership, Inc.*, No. 15-7135 (D.C. Cir. July 25, 2017)**

***U.S. ex rel. Carter v. Halliburton Co.*, No. 16-1262 (4th Cir. July 31, 2017)**

- Both courts addressed the question of whether a violation of the FCA's first-to-file provision requires dismissal of the action or, rather, can be cured by an amendment to the complaint
- Both held that the first-to-file provision ***requires dismissal of the second-filed action***, rejecting the argument that amending the second-filed complaint cures the violation of the first-to-file provision

DOJ's Absolute Right of Veto Over Voluntary Settlements

U.S. ex rel. Michaels v. Agape Senior Community, Inc.
848 F.3d 330 (4th Cir. 2017)

- Relators filed *qui tam* alleging that Agape fraudulently billed Medicare for services to patients that were not provided, or provided despite the patients' ineligibility for those services
- DOJ declined to intervene and relators mediated to a proposed settlement
- DOJ objected to the proposed settlement, even as it stood by its original decision not to intervene, because it believed the settlement was insufficient and disputed the district court's refusal to permit statistical sampling as a basis for higher damages

- Relators sought to enforce the settlement over DOJ's objection
- District court rejected the settlement, holding that DOJ had absolute veto power over settlements

- Fourth Circuit affirmed, holding that "the Attorney General possesses an absolute veto power over voluntary settlements in FCA *qui tam* actions"
  - Decision based on language of FCA, which directs that any action "may be dismissed only if the court and the Attorney General give written consent to the dismissal"
  - The statute "is not temporally qualified or explicitly limited in any other manner" and "does not overtly require the Government to satisfy any standard or make any showing reviewable by the court"
- Decision is in line with views of Fifth and Sixth Circuits, but contrary to ruling of Ninth Circuit

FCA – *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 argues that it has unlimited authority to dismiss FCA cases, but seldom exercises it
- **Whistleblower Protections (31 U.S.C. § 3730(h))**
  - Protects employees and others (e.g., contract workers)
  - Relief may include double back pay and interest on back pay; reinstatement (at seniority level); and/or costs and attorneys' fees

"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)

Additional Federal Contractor Whistleblower Protections

- **41 U.S.C. § 4712(a) provides additional protections to employees of government contractors and subcontractors**
  - Employees may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing what the employee **reasonably believes is evidence of 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 (including the competition for or negotiation of a contract) or grant
  - Agency Inspectors General to investigate complaints and provide report to complainant, contractor / grantee, and Agency head

- **FAR 52.203-17, Contractor Employee Whistleblower Rights and Requirement To Inform Employees of Whistleblower Rights**
  - Requires the contractor to inform its employees in writing of employee whistleblower rights and protections under 41 U.S.C. § 4712
  - Flows down to subcontractors

Mandatory Disclosure of “Credible Evidence” of FCA Violations

- **FAR 52.203-13 & 3.1003 mandate disclosure of credible evidence of misconduct:**
  - 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 –
    - (1) A violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations in Title 18 of the United States Code;
    - (2) A **violation of the civil False Claims Act** (31 U.S.C. §§ 3729-3733); or
    - (3) 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

- Applies to contracts for which the value is expected to exceed $5.5 million and the performance period is 120 days or more

- But *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 immediately

FCA – The “Yates Memo”

September 9, 2015 memorandum by then-Deputy Attorney General, “Individual Accountability for Corporate Wrongdoing,” sets forth six priorities for DOJ civil and criminal investigations, including those of suspected FCA violations:

1. Corporations must provide all relevant facts relating to the individuals responsible for the misconduct in order to qualify for cooperation credit;
2. Prosecutors to focus on individuals from inception of corporate investigation;
3. Close coordination between DOJ criminal and civil attorneys;
4. DOJ will not release culpable individuals from civil or criminal liability when resolving a matter (absent extraordinary circumstances or DOJ policy);
5. DOJ resolution with corporation should not occur without clear plan to resolve related individual cases; and
6. DOJ civil attorneys should focus on individuals and evaluate whether to bring suit against them based on considerations beyond ability to pay

FCA Enforcement Overview

FCA Enforcement by the Numbers: FY 2016

$4.7 billion

Civil Settlements and Judgments Under the FCA

800

New FCA Cases Filed

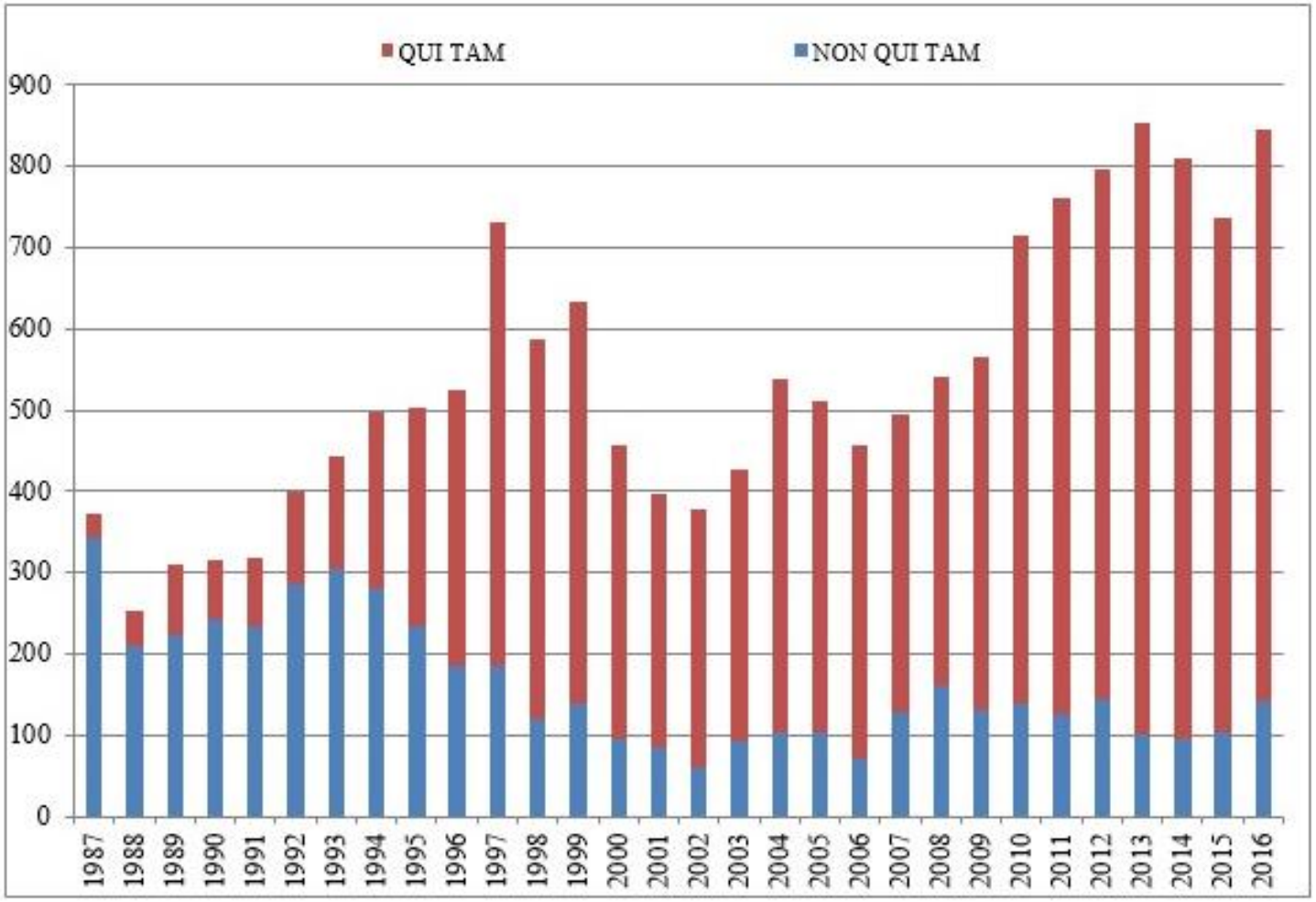
83 percent

Percentage of New FCA Cases Initiated by a Whistleblower

98 percent

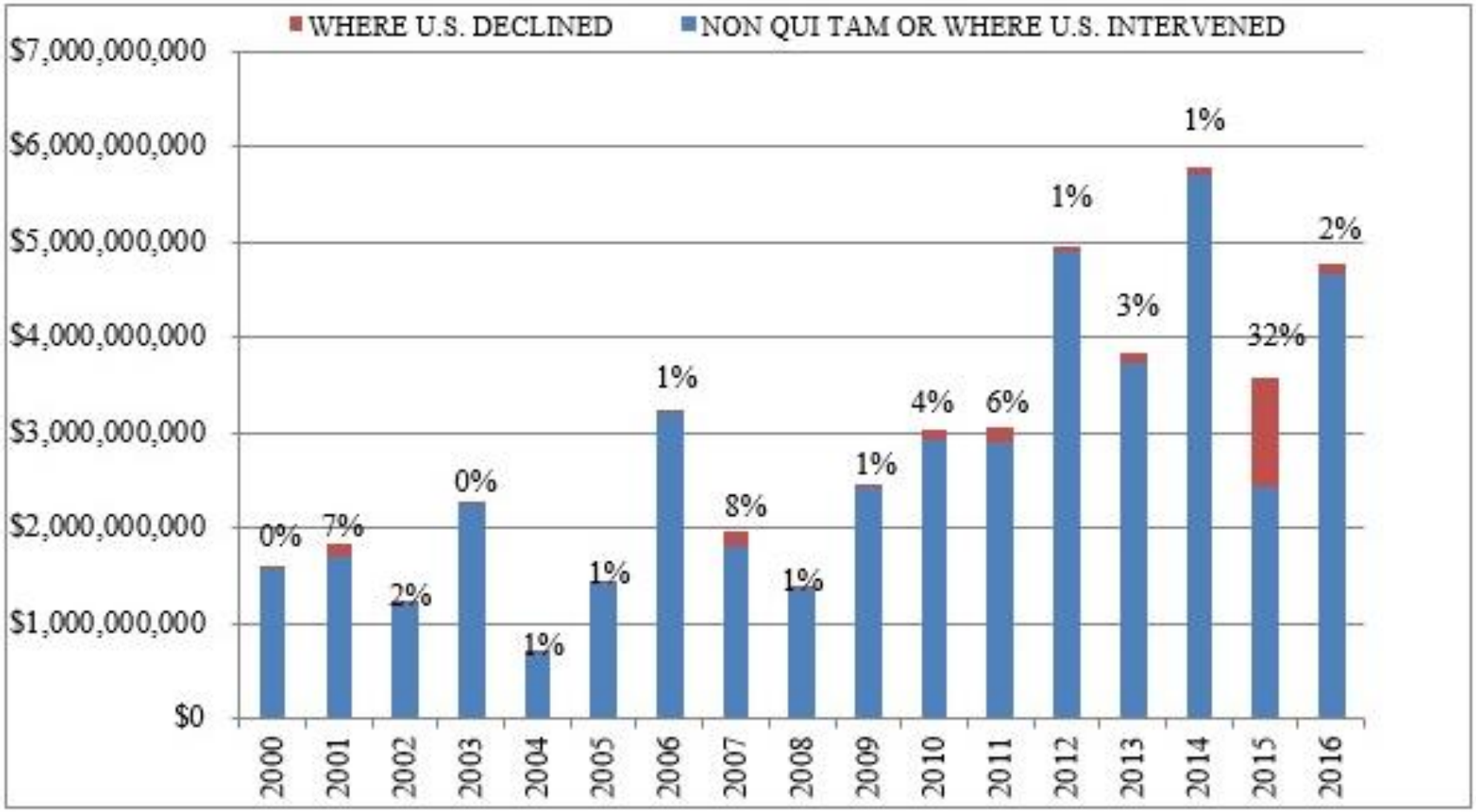
Percentage of Overall Federal Recovery from Cases in which the Government Intervened

Number of New FCA Suits (FY 1987 – 2016)



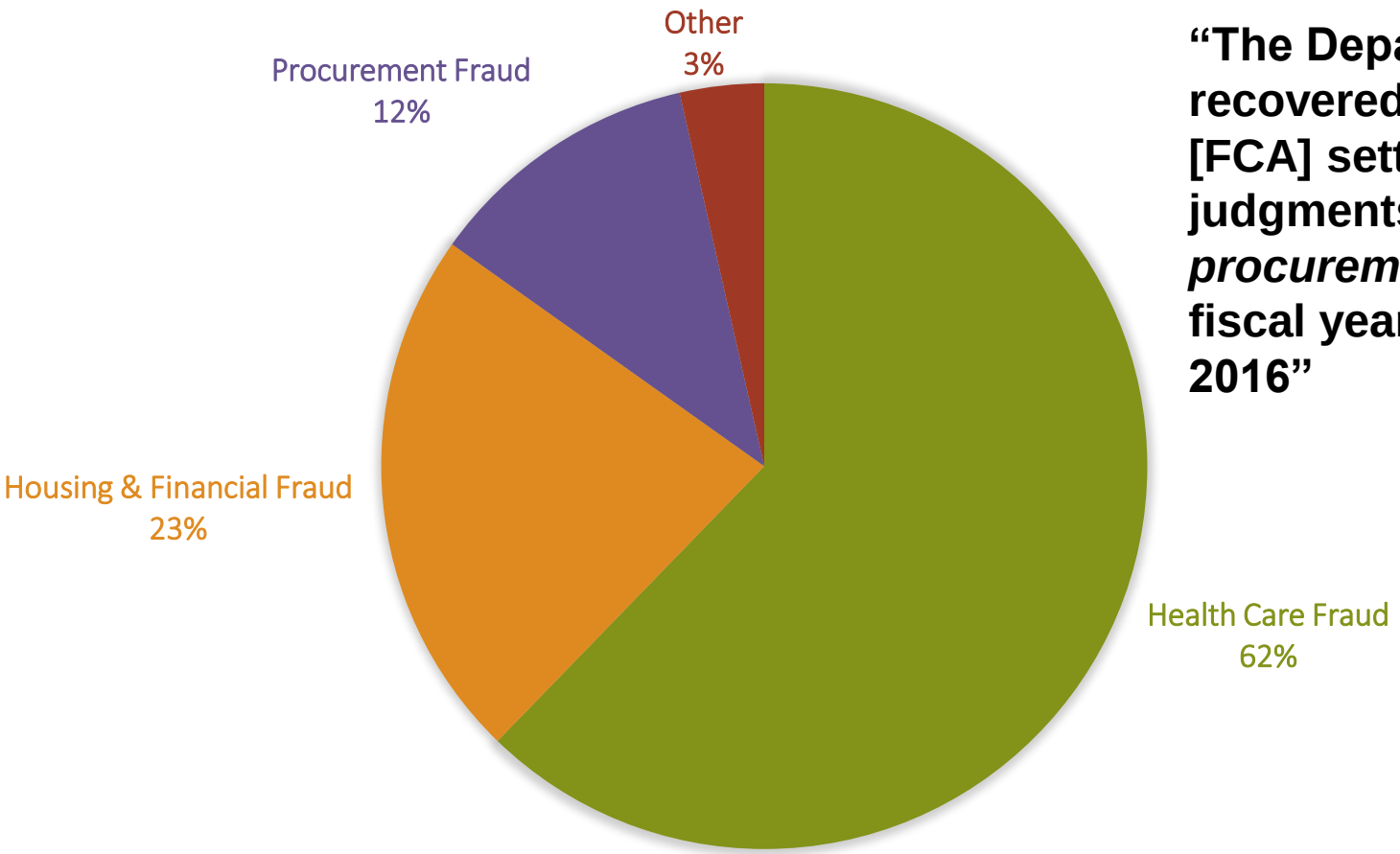
Source: DOJ "Fraud Statistics – Overview" (Dec. 13, 2016)

Declined Cases in FCA Actions (FY 2000 – 2016)



Source: DOJ "Fraud Statistics – Overview" (Dec. 13, 2016)

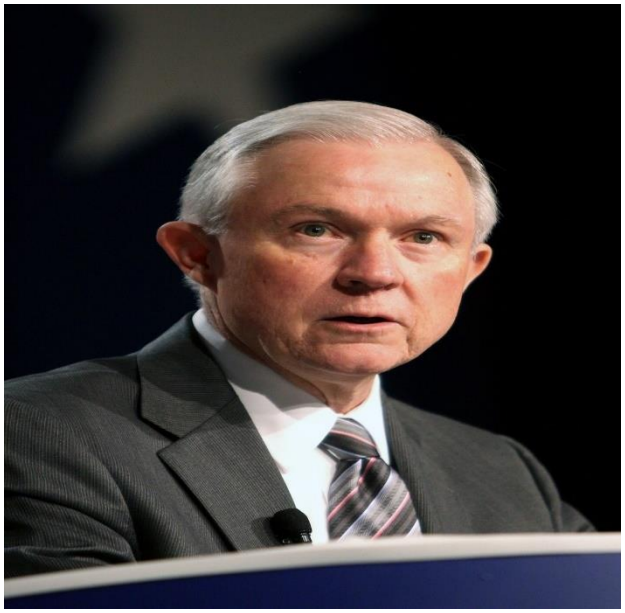
FCA Recovery by Industry (FY 2009 – 2016)



"The Department recovered $3.6B in [FCA] settlements and judgments *relating to procurement fraud* in fiscal years 2009 to 2016"

Source: Department of Justice, "2009-2016 Fact Sheet on Civil Recoveries"

Recent Statements from the New Administration



"We cannot afford to lose a single dollar to corruption, and you can be sure that if I am confirmed, I will make it a high priority of the department to root out and prosecute fraud in federal programs and to recover monies lost due to fraud or ***false claims***"

- Attorney General Jeff Sessions III

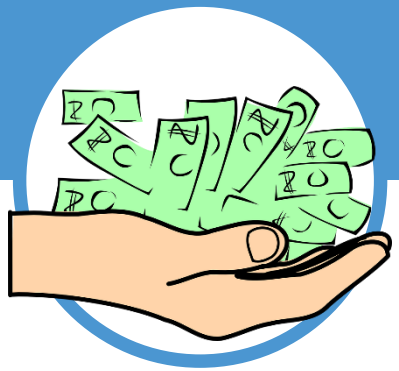
(Senate Judiciary Committee Hearing on Nomination of Sen. Jeff Sessions to be Attorney General (Jan. 10, 2017))

"We certainly will continue to enforce [the FCA]" and the DOJ will ensure that "whistleblowers receive any protection they are entitled to by law or regulation"

– Deputy Attorney General Rod Rosenstein

(Senate Judiciary Committee Hearing on Nominations of Rod Rosenstein (Mar. 7, 2017))

2017 Mid-Year Check-In on FCA Enforcement



$1.3 billion

FCA recoveries from settlements in the first half of 2017

$370 million

Judgments from FCA cases in the first half of 2017

8th

DOJ remains on pace for 8th consecutive year exceeding $3 billion in total FCA recoveries

Recent Developments: (Implied) False Certifications

Escobar and Implied Certification: *Universal Health Srvs., Inc. v. U.S. ex rel. Escobar*

136 S. Ct. 1989 (2016)

- Relator brought FCA suit against leading nationwide provider of mental health services, alleging that hospital submitted payment claims to Medicaid program for services rendered by personnel who did not meet state-regulated staffing qualifications
- Implied certification theory advanced was that when defendant submitted the claims, it impliedly certified compliance with all applicable regulations
- The Court endorsed the implied certification theory of FCA liability, "at least where two conditions are satisfied":
  1. "the claim does not merely request payment, but also makes ***specific representations about the goods or services provided***," and
  2. "the defendant's ***failure to disclose noncompliance with material statutory, regulatory, or contractual requirements*** makes those representations misleading half-truths"
- The Court declined to decide "whether ***all*** claims for payment ***implicitly*** represent that the billing party is legally entitled to payment"

Escobar Materiality

- Implied certification liability and fair notice can be policed through "rigorous" enforcement of FCA's "materiality" and "scienter" requirements
  - Materiality "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation"
  - Violation is "material" if:
    - "A reasonable man would attach importance to [the misrepresented information] in determining his choice of action in the transaction"; or,
    - "the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter 'in determining his choice of action,' even though a reasonable person would not"

Escobar Materiality

- Materiality does not "rest on a single fact or occurrence as always determinative," but must be weighed in the context of each case:
  - Government's right to refuse payment based on noncompliance is insufficient, by itself, to demonstrate materiality
  - Rejected argument that Government may require "contractors to aver their compliance with the entire U.S. Code and [CFR]," then deem all violations material; noncompliance cannot be minor or insubstantial
  - 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"
  - Government's payment of "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

Post-*Escobar*: Necessity of "Specific Representations"

- *Escobar* upheld implied certification as a viable theory where:
  - "claim . . . makes specific representations about the goods or services provided," **and**
  - "failure to disclose noncompliance with material [regulation / contract provision] makes those representations misleading half-truths"
- Two circuits have required *both* conditions, dismissing cases that do not plead "specific representations"
  - *U.S. ex rel. Kelly v. Serco*, 846 F.3d 325 (9th Cir. 2017)
  - *U.S. v. Sanford-Brown*, 840 F.3d 445 (7th Cir. 2016)
- Two other courts have refused to require both conditions, holding specific representations not required for actionable "half-truths":
  - *U.S. ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174 (4th Cir. 2017)
  - *U.S. ex rel. Landis v. Tailwind Sports Corp., et al.,* 2017 WL 573470 (D.D.C. Feb. 13, 2017)

Post-*Escobar*: Materiality of Government Intervention

- Two courts have examined the impact of the Government's intervention decision as a factor in the materiality analysis
  - *U.S. ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174 (4th Cir. 2017)
    - Evidence that upon discovering the alleged misrepresentation the "Government did not renew its contract for base security . . . and immediately intervened in the litigation" tends to demonstrate that the misrepresentation was material
  - *U.S. ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481 (3d Cir. 2017)
    - Government's failure to take any action against pharmaceutical company after relator disclosed the alleged misrepresentations, including by deciding not to intervene, tended to demonstrate that the misrepresentation was not material

Post-*Escobar*: Government Acquiescence

Since *Escobar*, a number of courts have cited "government knowledge" of alleged misrepresentations, and failure to take action in response thereto, as demonstrating immateriality:

- *U.S. ex rel. Kelly v. Serco*, 846 F.3d 325 (9th Cir. 2017) (no materiality where government accepted and paid defendant's reports that on their face did not comply with time-charging guidelines)
- *U.S. ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027 (D.C. Cir. 2017) (affirming summary judgment where DCAA investigation of alleged inflated headcounts did not result in any disallowance and company continued to receive award fees for exceptional performance)
- *Abbott v. BP Exploration & Prod., Inc.*, 851 F.3d 384 (5th Cir. 2017) (affirming summary judgment of alleged false certification of "compliance with various regulatory requirements" where Congress and the Department of Interior had both investigated allegations and taken no action)

Post-*Escobar*: Key Gov't Contractor Materiality Decisions

U.S. ex rel. Badr v. Triple Canopy, Inc., 857 F.3d 174 (4th Cir. 2017)

- Allegation that security services contractor in Iraq falsified the scorecards of guards who failed to meet range qualifications
- Reversed grant of motion to dismiss, finding that invoices impliedly represented compliance with "core contract requirement" that guards met Army marksmanship standards (even though invoices did not so state)
- Noted Government's immediate action to terminate contract and intervene

U.S. ex rel. McBride v. Halliburton Co., 848 F.3d 1027 (D.C. Cir. 2017)

- Allegation that LOGCAP contractor falsified "headcount data" concerning number of soldiers who patronized base recreational facilities
- Affirmed grant of summary judgment for contractor where Army witnesses testified that "headcount data (false or not) had no bearing" on payment
- Noted failure to challenge costs following DCAA review in response to allegation, as well as continuing "award fee for exceptional performance"

Recent Developments: Gov’t Contractor FCA Settlements

FCA False Certification Settlements (Jan. – June 2017)

Energy & Process Corp. (Apr. 24, 2017) (Quality Assurance Testing)

- DOE allegedly paid a premium for the supply of steel rebar that met stringent regulatory standards in connection with a nuclear waste treatment facility
- Subcontractor E&P allegedly supplied defective rebar and failed to conduct required quality assurance tests, but nonetheless certified that it complied with these requirements
- Employee of prime contractor filed *qui tam*, in which the Government intervened
- E&P agreed to pay $4.6 million to settle, in addition to replacement costs for defective rebar

CA Inc. (Mar. 10, 2017) (Pricing / Discount Representations in GSA Schedule Contract)

- Information Technology company entered into a GSA schedule contract for the supply of software licenses and maintenance services
- CA allegedly failed to comply with contract requirements that it accurately disclose commercial pricing and discount practices and reduce the price to the Government if commercial pricing improved
- *Qui tam* filed by former employee of Israeli subsidiary, in which the Government intervened
- CA agreed to pay $45 million to settle, $10.2 million of which went to the relator

Gov't Contractor FCA Overbilling Settlements (Jan. – June 2017)

Agility Public Warehousing Co. KSC (May 26, 2017) (Failure to Apply Discounts)

- Agility indicted in 2009 for alleged manipulation of pricing on DOD contracts to provide locally available fresh fruits and vegetables by, among other things, failing to pass through discounts
- Investigation initiated upon complaint of Agility vendor, which filed *qui tam* complaint
- Global resolution involved misdemeanor guilty plea and retraction of contracting suspension
- Agility paid $95 million, gave up $249 million in claims against DLA, and retained a monitor

Sierra Nevada Corp. (Feb. 15, 2017) (Cost Misclassification)

- DOD / NASA contractor alleged to have misclassified certain direct costs as indirect IR&D, as well as charging IR&D to the wrong accounting period, thereby inflating indirect rates
- SNC paid $14.9 million to settle

Washington River Protection Solutions LLC (Jan. 23, 2017) (Timecard Fraud)

- WRPS awarded DOE contract to perform environmental cleanup and maintenance at radioactive waste site; warned of "systemic timecard fraud" by prior contractor
- WRPS allegedly failed to implement additional controls to prevent DOE from being charged overtime for "busy work" or work not actually performed and allegedly failed to install qualified person to head contractually required Internal Audit Department
- WRPS paid $5.3 million to settle

Gov't Contractor FCA Bidding Fraud Settlements (Jan – June 2017)

Misr Sons Development S.A.E. (June 13, 2017)

- Egyptian construction company, which was ineligible to participate in USAID infrastructure projects, allegedly concealed its participation through an undisclosed joint venture
- Misr Sons settled for $1.1 million; total amount recovered by the Government, including prior settlements by joint venture partners, exceeded $10 million

Integrated Medical Solutions, Inc. + Jerry Heftler (June 5, 2017)

- IMS and its former CEO agreed to settle FCA and Anti-Kickback Act claims that IMS retained a BOP employee as a paid consultant who provided defendants with confidential, non-public information in connection with BOP bids to manage healthcare network for federal inmates
- IMS and Heftler settled for $2.5 million; BOP employee previously pleaded guilty (2014) to criminal false statement charge associated with failure to disclose payments

Recent Developments: FCA and Gov't Contract Disputes

Fraud and Prior Material Breach of Contract under the CDA

Laguna Constr. Co. Inc. v. Carter,
828 F.3d 1364 (Fed. Cir. 2016)

- Government refused to reimburse Laguna for approximately $3 million in costs related to subcontracts, which Laguna appealed to the ASBCA in 2012
- That same year, Laguna's COO was criminally indicted for fraud based on alleged kickbacks he received in exchange for awarding the subcontracts at issue

- After the COO pleaded guilty, the Government asserted the affirmative defense of "prior material breach" based on the kickbacks
  - ASBCA granted summary judgment to the Government on the basis that it was not required to pay because Laguna had committed a prior material breach that excused the Government's later non-performance

- Federal Circuit affirmed
  - Although ASBCA does not have jurisdiction over fraud defense, it does have jurisdiction over prior material breach defense based on fraud provided it does not have to make any factual determinations of fraud
  - Admissions by company officers to fraud committed within the scope of their duties for the company sufficient to impute to the company under doctrine of *respondeat superior*
  - Government did not have to know about the prior material breach at the time it committed its subsequent breach of non-payment in order to assert defense

False Certification Can Void a Government Contract

Bryan Concrete & Excavation, Inc. v. Dep't of Veterans Affairs
CBCA No. 5287, 16-1 BCA ¶ 36,475

- BCE awarded Service Disabled Veteran Owned Small Businesses (SDVOSB) set-aside contract to upgrade HVAC equipment at a VA facility
- Prior to award, BCE (which was a valid SDVOSB) entered into a teaming agreement with a non-SDVOSB, through which the third-party "took over management and control of BCE," but did not disclose this agreement the VA
- The teaming agreement, if known, would have disqualified BCE for the set-aside contract

- Unrelated issues resulted in termination for default, which BCE appealed to the CBCA
  - VA learned of the teaming agreement through discovery, and moved for summary judgment on the grounds that the contract was void *ab initio*

- CBCA awarded summary judgment to VA on the grounds that the contract was void *ab initio*
  - "To prove that a government contract is tainted from its inception by fraud and is thus 'void *ab initio*,' the government must prove that the contractor (a) obtained the contract by (b) knowingly (c) making a false statement" (quoting *Long Island Savings Bank v. US* (Fed. Cir. 2007)
- Standard met here and the contract was deemed to be void

Stay of BCA Proceedings Pending Related Civil FCA Litigation

***BAE Sys. Tactical Vehicle Sys. LP*,**
ASBCA No. 59491, 16-1 BCA ¶ 36,450

- In 2014, BAE appealed to the ASBCA a COFD finding that it submitted defective cost and pricing data to the Army in connection with a Family of Medium Tactical Vehicles contract award
- In 2015, DOJ filed an FCA complaint in the U.S. District Court for the Eastern District of Michigan based on substantially the same factual claims at issue in the ASBCA litigation
- In 2016, DCMA moved the Board to stay the ASBCA proceedings pending resolution of the FCA suit

- The Board declined to stay the ASBCA litigation, finding:
  - Sufficient differences in claims between the ASBCA appeal and the FCA case;
  - Stay would prejudice BAE due to risk of loss of witnesses and evidence;
  - Government failed to establish a clear case of hardship in litigating both cases simultaneously;
  - Judicial efficiency warranted proceeding with the ASBCA appeal because it would likely simplify and streamline the issues in the FCA action; and
  - Stay of indefinite duration is unreasonable without a pressing need (which did not exist)

Stay of BCA Proceedings Pending Related Criminal Litigation

***Public Warehousing Co. K.S.C.*,**
ASBCA No. 59020, 17-1 BCA ¶ 36,630

- Agility Public Warehousing (Agility) held "Prime Vendor" contracts with DLA to supply food to the troops in Iraq
- One of Agility's vendors filed a *qui tam* alleging, among other things, that Agility knowingly failed to pass through discounts and rebates received from food suppliers as required under contracts
- DOJ intervened and also pursued criminal charges, indicting Agility in 2009
- Meanwhile, Agility submitted numerous CDA claims to the contracting officer, worth a total of $249 million, which were denied and appealed to the ASBCA
- At least one claim involving issues ancillary to the alleged fraud went forward to a full evidentiary hearing, but the majority of claims implicated the same facts underlying DOJ's fraud claims
- DLA moved to stay or dismiss the ASBCA litigation pending resolution of the criminal case

- Applying the same balancing test set forth in *BAE*, the Board here agreed to stay the case for one year to allow the criminal case to proceed without the distraction of parallel civil litigation
- Significant factor appeared to be the substantial difference between criminal / civil discovery
- Agility and DOJ reached a global settlement in May 2017, resolving all claims (criminal and civil) with Agility pleading guilty to a misdemeanor, paying $95 million in FCA claims, and dismissing its CDA claims against DLA

CO Authority to Resolve Claims Where Fraud is Suspected

Savannah River Nuclear Solutions, LLC v. Dep't of Energy
CBCA No. 5287, 17-1 BCA ¶ 36,749

- Contractor submitted claim for costs included in fully burdened labor rates of "corporate reachback" employees in accordance with disclosed cost accounting practices
- After the contracting officer questioned whether the costs were allowable, but otherwise refused to take action, the contractor filed a certified claim requesting a COFD

- Following the certified claim, DOJ filed an FCA complaint in U.S. District Court for the District of South Carolina alleging that the contractor falsely claimed the costs at issue
  - The CO then refused to issue a decision on the claim on the basis that he lacked authority to do so under FAR 33.210(b)
  - Contractor filed appeal of a deemed denial at the CBCA

- In the FCA case, the contractor successfully moved for referral to the CBCA for an advisory opinion on the underlying cost allowability issue in accordance with 41 U.S.C. § 7107(f)
  - FCA case is stayed pending receipt of CBCA's advisory opinion

- Meanwhile, the CBCA dismissed the deemed denial appeal on the ground that the CO lacked authority to issue a COFD because of the suspicion of fraud and, therefore, there can be no deemed denial

FCA Compliance Best Practices

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 know of FCA complaints as soon 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 FCA Summer 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 Education Sector (July 26)
  - FCA and Drug & Device Industry (August 2)
  - **FCA and Government Contracting (August 9)**
  - FCA and Financial Services Sector (August 23)
  - FCA and Health Care Providers (August 30)
- 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:
  - Karen Manos (202.955.8536, kmanos@gibsondunn.com)
  - Joe West (202.955.8658, jwest@gibsondunn.com)
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