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ADG Insights

Roadmap for False Claims Act enforcement in 2020

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Michael F. Mason, Jonathan Diesenhaus, Jessica Ellsworth, Gregory Noonan, Michele Sartori, Peter Spivack, Michael Vernick, Stacy M. Hadeka, Marta Thompson, and Rebecca Umhofer

Government recoveries under False Claims Act (FCA) enforcement grew slightly in fiscal year (FY) 2019 to just over $3 billion.

Companies operating in the Aerospace, Defense, and Government Services (ADG) industry continue to face an ever-present threat that the government, or more likely a whistleblower, will allege an FCA violation. Below, we examine recent enforcement trends in the ADG industry, key FCA-related case law developments, and changes in enforcement policies and practices that could affect your business.

FCA enforcement continues in the ADG industry

The Department of Justice (DOJ) recovered $3.05 billion through settlements and judgments in civil cases involving fraud and false claims against the government during FY 2019, which ended September 30, 2019. This figure is up from $2.8 billion in 2018 and down from $3.4 billion in 2017. As we have mentioned before, it is important not to read too much into annual fluctuations; a handful of large recoveries may skew the numbers from year to year, and the timing of settlements is always a variable. Although the majority of FCA recoveries continue to come from the health care industry, approximately $400 million was recovered from companies operating in other industries, most commonly in the ADG industry. As in the past, the vast majority of cases that resulted in recoveries in 2019 were initiated by whistleblowers or qui tam relators. DOJ also continued to pursue FCA actions against individuals, including owners and officers of ADG companies.

As discussed in one of our recent ADG Insights articles, key FCA risk areas for ADG companies include cybersecurity, defective pricing, supply chain risk management, overbilling, and defective quality of products or services. Not surprisingly, many of the recoveries from ADG companies in FY 2019 fell into these categories. In addition, ADG companies came under FCA scrutiny for bid-rigging and for falsely representing that they qualified for government set-aside programs for small businesses. Federal FCA investigations resolved in 2019 that involved ADG companies include:

Company[1]	Allegations	Settlement amount in U.S. dollars
Five South Korea-based companies (four energy companies and one logistics company)	Bid rigging: Conspiring with other South Korean entities to rig bids on Department of Defense (DOD) contract to supply fuel to U.S. military bases	$206,146,000
Aluminum extrusion manufacturer	Defective quality of products or services: Falsifying results of tensile tests, which are designed to ensure consistency and reliability of aluminum, and providing related false certifications	$34,600,000
Defense contractor	Overbilling: Overstating the number of hours employees worked on two battlefield communications contracts with the Air Force	$27,450,000
Airline	Defective quality of products or services: Falsely reporting delivery times for U.S. mail delivered to specific foreign destinations as required by U.S. Postal Service contract	$22,100,000
Software development company	Defective pricing: Providing false information concerning its commercial discounting practices for products and services to resellers, who then used the information in negotiations with the General Services Administration (GSA)	$21,570,000
Defense contractor Chief Executive Officer (CEO)	Government set-aside programs: Falsely representing that his company qualified as a small business and was eligible for federal set-aside contracts	$20,000,000
Electrical components manufacturer	Defective quality of products or services: Supplying electrical connectors that had not been properly tested to military customers	$11,000,000
Airline	Defective quality of products or services: Falsely reporting delivery times for U.S. mail delivered to specific foreign destinations as required by U.S. Postal Service contract	$5,800,000
Information Technology (IT) contractor	Overbilling: Billing U.S. Postal Service for IT services at hourly rates not justified by the education and/or experience of the personnel performing the work	$5,200,000
Original Equipment Manufacturer (OEM) of video surveillance equipment provider	Cybersecurity: Providing video surveillance equipment that did not comply with contractual cybersecurity requirements and contained software vulnerabilities[2]	$2,600,000
Afghan supply subcontractor	Overbilling: Falsifying documents to secure payment for work that was never performed (or performed other than as described in documentation) and paying kickbacks to obtain subcontracts to transport military supplies[3]	$1,500,000
Environmental cleanup management and technology provider	Overbilling: Making false statements to Department of Energy regarding the amount of profit included in billing rates in subcontract with affiliated company	Suit filed by DOJ Feb. 2019
Defense contractor	Overbilling: Submitting fraudulent invoices to support inflated prices for commercial parts under its contract to supply armored vehicle	DOJ intervened Dec. 2019
Total recoveries		**$356,966,000**

1. This list captures the most significant settlements in the ADG industry but is not exhaustive. The listed settlement amounts do not include any related criminal fines.
2. An additional $6 million settlement was reached with state customers that alleged violations of state FCA laws.
3. Approximately $23.5 million was also recouped through civil forfeiture procedures.

It is noteworthy that the largest procurement-related FCA settlements in FY 2019 involved alleged bid-rigging in South Korea. DOJ's Antitrust Division, Civil Division's Fraud Section, and the United States Attorney's Office in the Southern District of Ohio were involved in this investigation, which also spawned criminal antitrust fines. DOJ has since launched a Procurement Collusion Strike Force to focus on "deterring, detecting, investigating and prosecuting antitrust crimes, such as bid-rigging conspiracies and related fraudulent schemes, which undermine competition in government procurement, grant and program funding."[4]

The long-anticipated concern that ADG companies will be subject to FCA actions for an alleged failure to comply with expanding cybersecurity regulations has also now become a reality. In July of 2019, an OEM of video surveillance equipment agreed to pay $8.6 million ($2.6 million to the federal government and $6 million to state government purchasers) to resolve FCA allegations that the company failed to meet cybersecurity requirements. The relator and government alleged that flaws in the video surveillance equipment could allow hackers to take over the surveillance system and gain access to the entire networks of government agencies that had purchased the system. These security flaws allegedly rendered claims for payments for the video surveillance equipment false under the federal and state false claims acts because: (1) the video surveillance equipment's security flaws were so significant that they rendered the equipment worthless; and (2) the video surveillance equipment's flaws violated numerous federal information processing standards.[5]

In another FCA case, a leading aerospace and defense company faced allegations by a whistleblower (the company's former senior director of cybersecurity, compliance, and controls) that the company made false statements to the government relating to the level of its compliance with DOD and NASA cybersecurity requirements. After the government declined to intervene in the action, the company moved to dismiss, arguing that because it had disclosed its noncompliance to the government, the whistleblower (a/k/a relator) could not adequately allege that the noncompliance was material under the FCA. The court acknowledged that if the government "pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material."[6] The court, however, found that the relator adequately alleged that the company had not disclosed the full extent of its noncompliance. Moreover, the court held that even if the government never expected full technical compliance, the relator had properly pled that the extent of a company's compliance still mattered to the government's decision to grant it a contract and therefore the materiality pleading requirement was satisfied.[7]

Supreme Court's interpretation of FCA statute of limitations expands potential liability

In May 2019, the Supreme Court unanimously held in *Cochise Consultancy, Inc. v. United States ex rel. Hunt*,[8] that a relator can file a qui tam action up to 10 years after a violation of the FCA occurs if the relator did so within three years of when the government official charged with responsibility to act in the circumstances learned of the alleged fraud. The FCA contains two limitation periods preventing an action from being brought (1) "more than 6 years after the date on which the [FCA violation] is committed,"[9] or (2) "more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,"[10] whichever occurs last.

4. Press Release, U.S. Dep't of Justice, Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding (Nov. 5, 2019) available here.
5. Joseph Marks, *Cisco to Pay $8.6 Million Fine for Selling Government Hackable Surveillance Technology*, Wash. Post (July 31, 2019).
6. *United States ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.*, 381 F.Supp. 1240, 1246 (E.D. Ca. 2019) (quoting *Universal Health Servs. Inc. v. United States ex rel. Escobar*, 135 S.Ct. 1989 (2016)).
7. *Id.* at 1249.
8. 139 S. Ct. 1507 (2019).
9. 31 U.S.C. § 3731(b)(1).
10. 31 U.S.C. § 3731(b)(2).

In *Cochise*, the relator conceded that his suit was untimely under the six-year limitations period in § 3731(b)(1), but argued his suit was timely under § 3731(b)(2) because he filed (1) within three years of an interview with federal agents, in which he disclosed the alleged fraud, and (2) within 10 years of the violation's occurrence. The Supreme Court held that the statute's "plain text" makes clear that relators in declined cases may take advantage of § 3731(b)(2)'s limitations period if they meet the requirements set forth in that subsection.[11]

Although *Cochise* involved alleged misconduct during a limited period seven years before the suit was filed, the decision's consequences are potentially far greater for government contractors in the ADG industry with long-term contracts. For those entities, the decision means that relators may be able to seek treble damages plus per-claim penalties for up to 10 years' worth of false claims, even in declined cases.

Cochise strengthens the incentive for defendants to seek discovery of what the government knew and when, because a relator seeking to use § 3731(b)(2)'s 10-year limitations period must file the complaint within three years of when "facts material to the right of action are known or reasonably should have been known" by "the official of the United States charged with responsibility to act in the circumstances." Defendants may expand their efforts to develop defenses showing the relator failed to meet this requirement.

Shift in DOJ policy may impact future FCA enforcement

DOJ exercises its dismissal authority with mixed success

We reported last year that DOJ signaled it would increasingly exercise its authority to dismiss non-intervened FCA actions under Section 3730(c)(2)(A) of the FCA.[12] There was indeed an uptick in government motions to dismiss in 2018 and the courts spent 2019 deciding whether to grant them.

11. *Cochise*, 139 S. Ct. at 1512-1513.

12. 31 U.S.C. § 3730(c)(2)(A) (providing for dismissal "notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.").

While many of these motions played out as expected, there were a few surprises and the potential for a deepening circuit split on the degree of deference to afford DOJ when it seeks dismissal of a relator's action has emerged. The government's continued interest in moving to dismiss non-intervened FCA cases appears to be driven primarily by concerns about the burdens placed on federal agencies and the DOJ by litigation around the materiality requirement articulated in *Universal Health Services, Inc. v. U.S. ex rel. Escobar*.[13]

On December 17, 2018, DOJ moved to dismiss 10 actions brought by relators who were backed by the National Healthcare Analysis Group (NHCA), an entity created by investors and former Wall Street investment bankers to take advantage of what they deemed to be "a massive business opportunity" created by the availability of Medicare claims data.[14] DOJ's motions gave the following reasons for dismissing the NHCA relators' claims: (1) dismissal is "rationally related to the valid governmental purposes of preserving scarce government resources and protecting important policy prerogatives of the federal government's healthcare programs;" (2) the allegations lack sufficient factual and legal support; and (3) allowing the suit to go forward will necessarily result in substantial litigation burdens to the United States, such as the expense of producing documents from multiple federal health care programs and data for thousands of beneficiaries, preparing agency witnesses for depositions, and filing statements of interest on legal issues in these cases.[15]

In response, three NHCA relators gave up the fight, moving themselves for voluntary dismissal.[16] One qui tam was dismissed on other grounds the day after the DOJ filed its motion,[17] and six other NCHA relators opposed dismissal, but after subsequent briefing and hearings, five of these cases were dismissed.[18] In a surprise, a court in the Southern District of Illinois denied the government's motion to dismiss in *U.S. ex rel. CIMZNHCA, LLC v. UCB, Inc.*[19]

The *CIMZNHCA* court first adopted the standard for deciding a motion to dismiss based on Section 3730(c)(2)(A) of the FCA applied by the Ninth and Tenth Circuits.[20] This standard from *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corporation* requires the government to demonstrate a valid purpose for dismissal and a "rational relation" between dismissal and accomplishment of that purpose.[21] In contrast, the D.C. Circuit "give[s] the government an unfettered right to dismiss an action," rendering the government's decision to dismiss essentially "unreviewable" under its opinion in *Swift v. United States*,[22] and the Fifth and Eighth Circuits have suggested they would apply a similar standard.[23] The Seventh Circuit, where the *CIMZNHCA* court sits, has not reached this issue. The court, in adopting the *Sequoia Orange* standard, observed that Congress could not have intended that courts "sit[] idly by" given the relator's statutory right to a hearing on the government's motion.[24]

13. 136 S. Ct. 1989 (2016).

14. J.C. Herz, *Medicare Scammers Steal $60 Billion a Year. This Man is Hunting Them.*, Wired, May 7, 2016 (quoting NHCA Group investor John Mininno).

15. *See, e.g.*, The United States' Mot. to Dismiss Relator's Second Am. Compl. at 14-16, *U.S. ex rel. Health Choice Grp., LLC v. Bayer Corp.*, No. 5:17-cv-126-RWS-CMC (E.D. Tex. Dec. 17, 2018), ECF No. 116.

16. Notice of Voluntary Dismissal at 1, *U.S. ex rel. SAPF, LLC v. Amgen, Inc.*, No. 16-cv-05203-GLP (E.D. Pa. Feb. 8, 2019), ECF No. 19; Notice of Voluntary Dismissal at 1, *U.S. ex rel. Miller v. AbbVie, Inc.*, No. 3:16-cv-2111 (N.D. Tex. March 13, 2019), ECF No. 58; Notice of Voluntary Dismissal at 1, *U.S. ex rel. Carle v. Otsuka Holdings Co.*, No. 17-cv-00966 (N.D. Ill. Jan. 24, 2019), ECF No. 35.

17. Electronic Order, *U.S. ex rel. SMSF, LLC v. Biogen, Inc.*, No. 1:16-cv-11379-IT (D. Mass. Dec. 18, 2018), ECF No. 54 (granting defendants' motions to dismiss as unopposed and denying government's motion as moot).

18. *U.S. ex rel. SMSPF, LLC v. EMD Serono, Inc.*, 370 F. Supp. 3d 483, 485 (E.D. Pa. 2019); *U.S. ex rel. NHCA-TEV, LLC v. Teva Pharm. Prods.*, No. 17-2040, 2019 WL 6327207, at *1 (E.D. Pa. Nov. 26, 2019); *U.S. ex rel. SCEF LLC v. Astra Zeneca PLC*, No. 2:17-cv-1328-RSL, 2019 WL 5725182, at *4 (W.D. Wash. Nov. 5, 2019); *U.S. ex rel. Health Choice Alliance, LLC v. Eli Lilly & Co.*, No. 5:17-cv-123-RWS-CMC, 2019 WL 4727422, at *1 (E.D. Tex. Sep. 27, 2019) (dismissing cases against both Eli Lilly and Bayer).

19. *U.S. ex rel. CIMZNHCA, LLC v. UCB, INC.*, No. 3:17-cv-00765-SMY-MAB, 2019 WL 1598109, at *4 (S.D. Ill. Apr. 15, 2019).

20. *Id.* at *3.

21. 151 F.3d 1139, 1145 (9th Cir. 1998). This standard has also been adopted by the 10th Circuit. See *Ridenour v. Kaiser–Hill Co., L.L.C.*, 397 F.3d 925, 940 (10th Cir. 2005).

22. 318 F.3d 250, 252-253 (D.C. Cir. 2003).

23. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (en banc) (noting that "the government retains the unilateral power to dismiss an action 'notwithstanding the objections of the person'"); *U.S. ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998) (government has power to dismiss over relator's objection "subject only to notice and a hearing for the qui tam relator").

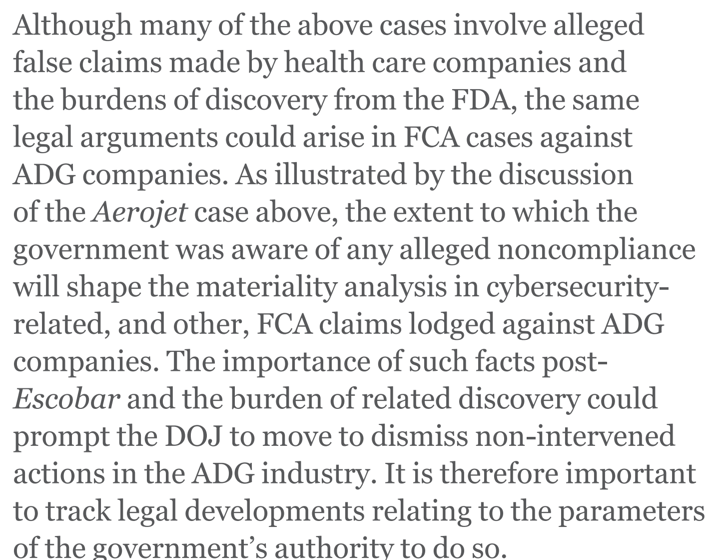
24. *CIMZNHCA*, 2019 WL 1598109, at *3.

Surprisingly, the *CIMZNHCA* court denied DOJ's motion, concluding that the government's stated purposes for dismissal were arbitrary and capricious and not rationally related to a valid government purpose.[25] The court acknowledged the government generally has a valid interest in avoiding litigation costs, especially in cases it deems lacking factual and legal support, but the government's decision to dismiss "must have been based on a minimally adequate investigation, including a meaningful cost-benefit analysis" for the purpose to be valid and rationally related to dismissal.[26] The court found that DOJ failed to fully investigate the allegations against the defendant by only conducting a general, collective investigation of the cases brought by NHCA and "failed to conduct a cost-benefit analysis to support its concerns, including an assessment of the potential proceeds from the lawsuit."[27] The court also questioned whether dismissal was truly in the interest of government health care programs and suggested the reasons DOJ gave for dismissal were a pretext for the government's animosity towards this corporate relator.[28]

DOJ sought interlocutory appeal of this decision in the Seventh Circuit Court of Appeals, which accepted the case, and the appeal remains pending.[29] The Ninth Circuit may weigh in on the same question – currently pending before it is another interlocutory appeal of a district court's denial of a DOJ Section 3730(c)(2)(A) motion to dismiss.[30] That district court also concluded the government's decision to dismiss was based on an inadequate investigation, suggesting that is an area ripe for clarification. The Fifth Circuit, which previously suggested the government retained "unilateral power" to dismiss, is also considering appeals brought by NHCA relators in two cases after a district court granted DOJ's motions to dismiss.[31] These are all cases to watch in the coming year, as appellate courts have a chance for the first time in a while to weigh in on the government's dismissal authority under Section 3730(c)(2)(A).

DOJ's motions to dismiss NHCA qui tams – which comprised over half of its Section 3730(c)(2)(A) motions in 2018 – focused on the burdens of continued litigation on the government, especially on federal agencies. This issue continued to be a driving force behind government dismissals in 2019. For example, DOJ moved to dismiss the qui tam in *Gilead Sciences, Inc. v. U.S. ex rel. Campie*, making good on its promise in the Solicitor General's amicus curiae brief in the Supreme Court to dismiss the complaint because "if this suit proceeded past the pleading stage, both parties might file burdensome discovery and *Touhy* requests for [U.S. Food and Drug Administration (FDA)] documents and FDA employee discovery (and potentially trial testimony), in order to establish 'exactly what the government knew and when,' which would distract from the agency's public-health responsibilities."[32] Similarly, DOJ moved to dismiss the complaint in *U.S. ex rel. Polansky v. Executive Health Resources, Inc.* in August 2019 after the district court overruled its objections to the defendant's latest discovery requests.[33] The defendant had already subpoenaed six government entities and received over 42,000 pages of documents.[34]

25. *Id.* at *4.
26. *Id.* at *3.
27. *Id.*
28. *Id.* at *4.
29. Am. Notice of Appeal at 1, *U.S. ex rel. CIMZNHCA, LLC v. UCB, Inc.*, No. 3:17-cv-00765-SMY (S.D. Ill. July 5, 2019), ECF No. 110; Order at 1, *U.S. ex rel. CIMZNHCA, LLC v. UCB, Inc.*, No. 19-2273 (7th Circ. Aug. 14, 2019), ECF No. 13 (ordering that appeal shall proceed to briefing).
30. *See* Docketing Letter at 1, *U.S. ex rel. Thrower v. Academy Mortgage Corp.*, No. 18-16408 (9th Cir. July 27, 2018), ECF No. 3.
31. *Riley*, 252 F.3d at 753; see First Am. Notice of Appeal, *U.S. ex rel. Health Choice Grp., LLC v. Bayer Corp.*, No. 5:17-cv-126-RWS-CMC (E.D. Tex. Oct. 25, 2019), ECF. No. 158; Sec. Am. Notice of Appeal at 1, *U.S. ex rel. Health Choice Alliance, LLC v. Eli Lilly & Co.*, No. 5:17-cv-123-RWS-CMC (E.D. Tex. Oct. 25, 2019), ECF No. 249.
32. Brief for the United States as Amicus Curiae at 15, *Gilead Scis., Inc. v. U.S. ex rel. Campie*, No. 17-936 (U.S. Nov. 30, 2018).
33. *See* The United States' Mot. Dismiss Relator's Third Am. Compl. at 1, *U.S. ex rel. Polansky v. Exec. Health Res., Inc.*, No. 2:12-cv-04239-MMB (E.D. Pa. Aug. 20, 2019), ECF. No. 526; *see also* Final Mem. at 37, *Polansky*, No. 2:12-cv-04239-MMB (E.D. Pa. Nov. 5, 2019), ECF No. 561 (granting motions to dismiss filed by defendants and the government).
34. The United States' Mot. Dismiss Relator's Third Am. Compl. at 8, *Polansky*, No. 2:12-cv-04239-MMB (E.D. Pa. Aug. 20, 2019), ECF. No. 526.



Although many of the above cases involve alleged false claims made by health care companies and the burdens of discovery from the FDA, the same legal arguments could arise in FCA cases against ADG companies. As illustrated by the discussion of the *Aerojet* case above, the extent to which the government was aware of any alleged noncompliance will shape the materiality analysis in cybersecurity-related, and other, FCA claims lodged against ADG companies. The importance of such facts post-*Escobar* and the burden of related discovery could prompt the DOJ to move to dismiss non-intervened actions in the ADG industry. It is therefore important to track legal developments relating to the parameters of the government's authority to do so.

DOJ guidance on cooperation credit in FCA cases

On May 7, 2019, DOJ's Civil Division released new guidance, codified in Justice Manual Section 4-4.112, which provides that DOJ will now award cooperation credit for defendants who self-disclose, cooperate, and remediate in FCA matters. Similar to policies adopted by DOJ's Criminal Division over the past four years, the policy is meant to encourage companies to cooperate in investigations. It remains to be seen, however, whether the promised cooperation credit will prove certain enough to successfully incentivize cooperation in FCA cases.

The FCA typically requires defendants to pay three times the damages the government sustained as a result of false claims.[35] However, absent a trial, treble damages are rare. The FCA statute itself allows for double damages when a violator timely self-discloses and fully cooperates.[36] It is also not unusual that, even when there has been no self-disclosure and varying degrees of cooperation, an agreed-upon settlement will amount to double damages.

Prior to the May 2019 guidance, DOJ provided little guidance on how to earn cooperation credit in FCA cases. In the September 9, 2015 Yates Memorandum

35. 31 USC § 3729(a)(1).

36. 31 USC § 3729 (a)(2).

on individual culpability, Sally Yates, the then-deputy attorney general stated that, in the FCA context, "[t]o be eligible for any cooperation credit, corporations must provide all relevant facts about the individuals involved in corporate misconduct." Her successor, Rod Rosenstein, subsequently recognized the need for more discretion in FCA actions, stating on November 29, 2018, "[w]hen criminal liability is not at issue, our attorneys need flexibility to accept settlements that remedy the harm and deter future violations, so they can move on to other important cases."[37] While recognizing the need for flexibility, Rosenstein's statement did little to clarify the actual benefits of cooperation in the FCA context.

The Civil Division's cooperation credit guidance for FCA cases echoes the previously announced Criminal Division policies and, ostensibly, the flexibility Rosenstein noted in his public comments. The guidance provides that DOJ will award credit for defendants for "voluntarily disclosing misconduct unknown to the government, cooperating in an ongoing investigation, or undertaking remedial measures in response to a violation." As to self-disclosure and cooperation, the guidance both identifies factors that should be considered by government counsel and preserves prosecutorial discretion. The factors prosecutors are instructed to consider are: "(1) the timeliness and voluntariness of the assistance; (2) the truthfulness, completeness, and reliability of any information or testimony provided; (3) the nature and extent of the assistance; and (4) the significance and usefulness of the cooperation to the government."[38]

Any cooperation credit awarded would be reflected in a reduction to the damages multiplier applied to any settlement. However, the guidance makes it clear that the government must still receive the full actual damages, as well as lost interest, costs of the investigation, and the relator's share.[39] These additional costs are significant and, when added to the base damages figures, may already reflect a significant multiplier.[40]

Given the five factors defining voluntary disclosure and cooperation, awarding any credit under the FCA guidance is also highly discretionary. For example, it is unclear what constitutes a "timely" disclosure. Because it takes time to conduct an internal investigation and determine whether a self-disclosure is appropriate, companies will lag in engaging DOJ. Will a disclosure made after a qui tam complaint has been filed qualify as "timely"? As the first to file bar incentivizes relators to bring qui tam actions as quickly as possible, relators often bring qui tam actions at the same time they raise concerns internally.[41] Because of this "race against the clock," one could argue that cooperation and remediation, rather than disclosure, should be given a heavier weight in the FCA context when compared to cooperation credit provided in criminal contexts.

It is possible, of course, that over time and as the guidance is implemented, a clearer picture will emerge as to substantive benefits of cooperation. For now, though, the ambiguity and discretion inherent in the FCA policy makes it a quite uncertain, and thus limit its attractiveness.

The road ahead

FCA enforcement over the course of 2019 suggested on the one hand – through DOJ's increased willingness to move to dismiss declined qui tam cases and stated commitment to award cooperation credit – that there may be a scaling back of FCA exposure on the horizon. But on the other hand, DOJ has also signaled a willingness to expand the reach of the FCA in novel ways.

DOJ increasingly seeks to enforce the FCA in areas not typically subject to FCA scrutiny. For example, in FY 2019, DOJ entered into FCA settlements with

37. Rod Rosenstein, United States Dep't of Justice Deputy Attorney General, Remarks at *American Conference Institute's 35th International Conference on Foreign Corrupt Practices Act* (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

38. Justice Manual, 4-4.112 – *Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters*, https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.112.

39. United States Dept. of Justice, *Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual* (May 7, 2019), https://www.justice.gov/opa/pr/department-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual.

40. For example, if just the relator's share is added on top of single damages, that would add anywhere from 15-25 percent to the single damages figure, reflecting a 1.15 to 1.25 multiplier (before any other costs are added).

41. 31 U.S.C. § 3730(b)(5).

five South Korean companies to resolve allegations of bid rigging.[42] As noted above, DOJ has now launched a Procurement Collusion Strike Force that will focus on detecting and deterring bid-rigging conspiracies and related fraudulent schemes, which undermine competition in government procurement, grant, and program funding.[43] Also, in December 2019, the U.S. Attorney for the Eastern District of Virginia and the Civil Division resolved an alleged sanctions violation for $45 million under an FCA fraud in the inducement theory. There, the government alleged that a false certification of compliance with sanctions laws fraudulently induced a prime contractor and the U.S. Army to award contracts to a defense contractor for logistical support to U.S. troops in Afghanistan.[44] Although these FCA settlements were part of larger resolutions that included criminal and civil remedies that have been traditionally relied on in these types of enforcement actions, the addition of the FCA allegations to these actions is noteworthy. We will be watching in 2020 to see whether DOJ extends the reach of FCA enforcement into other novel territories.

Also noteworthy is that long held concerns that cybersecurity requirements will give rise to FCA claims against government contractors have become a reality. Government contractors should strive to cabin their cyber-related FCA risk by regularly reviewing their compliance with fast-developing cybersecurity rules and regulations, even in the advent of the Cybersecurity Maturity Model Certification or CMMC. It is also important to continue monitoring cyber-related court decisions that address whether non-compliance with cybe rsecurity rules and regulations is material for FCA purposes and what the appropriate measure of damages is if and when an FCA claim can be sustained.

Staying on top of these and other potential developments in FCA enforcement will be critical for ADG businesses moving forward. Hogan Lovells stands ready to help you; our lawyers have substantive experience in FCA investigations and litigation with a deep understanding of the ADG industry.

42. Press Release, U.S. Dep't of Justice, Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts (Nov. 14, 2018), available here; Press Release, U.S. Dep't of Justice, More Charges Announced in Ongoing Investigation into Bid Rigging and Fraud Targeting Defense Department Fuel Supply Contracts for U.S. Military Bases in South Korea (Mar. 20, 2019), available here.

43. Press Release, U.S. Dep't of Justice, Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding (Nov. 5, 2019) available here.

44. Defense Contractor Agrees to Pay $45 Million to Resolve Criminal Obstruction Charges and Civil False Claims Act Allegations, DOJ Press Release (Dec. 4, 2019) https://www.justice.gov/opa/pr/defense-contractor-agrees-pay-45-million-resolve-criminal-obstruction-charges-and-civil-false.

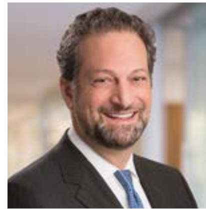
Micheal F. Mason
Partner | Washington, D.C.
T +1 202 637 5499
mike.mason@hoganlovells.com

Jonathan L. Diesenhaus
Partner | Washington, D.C.
T +1 202 637 5416
jonathan.diesenhaus@hoganlovells.com

Jessica L. Ellsworth
Partner | Washington, D.C.
T +1 202 637 5886
jessica.ellsworth@hoganlovells.com

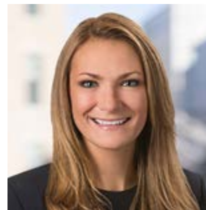
Gregory F. Noonan
Partner | Boston
T +1 617 371 1029
gregory.noonan@hoganlovells.com

Michele W. Sartori
Partner | Washington, D.C.
T +1 202 637 6443
michele.sartori@hoganlovells.com



Peter S. Spivack
Partner | Washington, D.C.
T +1 202 637 5631
peter.spivack@hoganlovells.com

Michael J. Vernick
Partner | Washington, D.C.
T +1 202 637 5878
michael.vernick@hoganlovells.com



Stacy Hadeka
Senior Associate | Washington, D.C.
T +1 202 637 3678
stacy.hadeka@hoganlovells.com

Marta A. Thompson
Senior Associate | Washington, D.C.
T +1 202 637 6562
marta.thompson@hoganlovells.com

Rebecca H. Umhofer
Knowledge Lawyer | Washington, D.C.
T +1 202 637 6939
rebecca.umhofer@hoganlovells.com

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*Our associated offices
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