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Roadmap for False Claims Act enforcement in 2021

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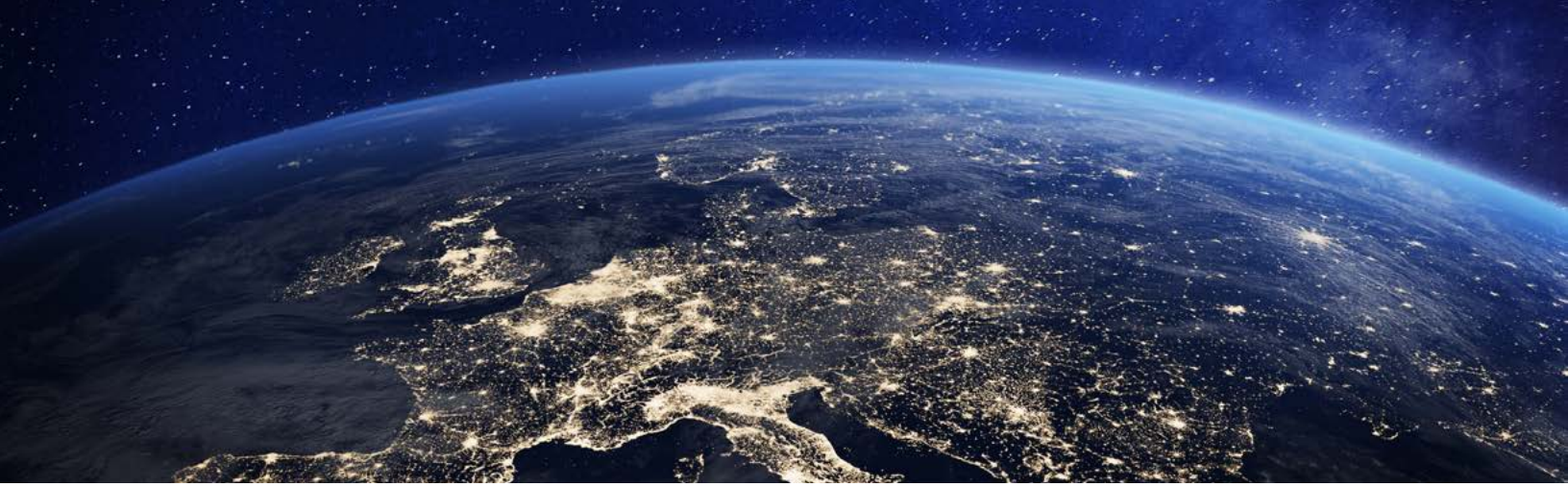

Through Aerospace & Defense Insights, we share with you the top legal and political issues affecting the aerospace and defense (A&D) industry. Our A&D industry team monitors the latest developments to help our clients stay in front of issues before they become problems, and seize opportunities in a timely manner.

The federal government's recoveries from investigations and cases involving the False Claims Act (FCA) fell in fiscal year (FY) 2020 to US$2.2 billion from US$3.05 billion in FY2019. However, with an influx of approximately US$4 trillion in government assistance disbursed in 2020 to combat the effects of the COVID-19 pandemic, and with more expected in FY2021, as well as an increased level of assertiveness in enforcement actions expected from the Biden administration, the decrease in FCA recoveries is expected to have been temporary. These factors, combined with an increasingly difficult regulatory compliance framework involving cybersecurity, supply chain assurance, and other unique requirements for companies that conduct business with the government, pose heightened FCA risk for aerospace, defense, and government services (ADG) companies. Below, we examine recent enforcement trends in the ADG industry sector and key FCA-related case law developments that could affect your business.

FCA enforcement continues in the ADG industry

The U.S. Department of Justice (DOJ) recovered US$2.2 billion through settlements and judgments in civil cases involving alleged fraud and false claims against the government during FY2020, which ended 30 September 2020. This figure is down from US$3.05 billion in FY2019, US$2.8 billion in FY2018, and US$3.4 billion in FY2017. It is important not to read too much into annual fluctuations as a handful of large recoveries may skew the numbers from year to year, and the timing of settlements is always a variable. And, with a change in political leadership at DOJ, the lower recoveries in 2020 are not expected to signal an enforcement trend that will continue into 2021. Although the majority of FCA recoveries continue to come from the health care industry, more than US$188 million was recovered from companies operating in the ADG industry. As in the past, the vast majority of cases that resulted in recoveries in 2020 were initiated by whistleblowers or qui tam relators. DOJ also continued to pursue FCA actions against individuals, including executives and individual shareholders.

Key FCA risk areas for ADG companies continue to include defective pricing, overbilling, and defective quality of products or services. In addition, as discussed separately below, Section 3610 of the CARES Act creates new FCA risk for ADG companies. During 2020, there were also a number of FCA claims resolved that involved alleged "fraud in inducement" theories, often related to qualifying for government set-aside programs. We noted last year that the long-anticipated concern that ADG companies will be subject to FCA actions for an alleged failure to comply with expanding cybersecurity regulations became a reality.

Federal FCA investigations resolved in FY2020 that involved ADG companies include the following:[1]

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.

Business	Allegations	Settlement amount
Environmental cleanup contractor	**Overbilling**: Failing to prevent billing the U.S. Department of Energy for inflated labor hours and for work not actually performed.	US$57,750,000
Software engineering firm	**Fraudulent inducement**: Bribery scheme to steer contracts through a corrupt partnership with Air Force contracting official.	US$37,757,714
Defense contractor	**Fraudulent inducement**: Fraudulently inducing the Defense Logistics Agency and the U.S. Army to award wartime contracts for food and trucks by knowingly and falsely certifying compliance with U.S. sanctions against Iran and falsely certifying construction progress.	US$27,000,000
Foundry and metal casting contractor	**Defective services or products**: Providing substandard steel components for installation on U.S. Navy submarines.	US$10,896,924
IT contractor	**Mischarging**: Billing employee time spent working on unfunded projects to projects that were funded.	US$5,982,865
Architect-engineering services firm	**Defective pricing**: Submitting inaccurate cost and labor hour estimates and related certifications in connection to contract for services to Navy bases.	US$5,600,000
Engineering services provider	**Fraudulent inducement**: Paying bribes to secure U.S. Army contract.	US$5,200,000
Shipping services provider	**Defective services or products**: Submitting electronic documentation that falsely reported time cargo was delivered.	US$4,700,000
Construction services provider	**Government set-aside programs**: Exploiting contracting opportunities reserved for veteran-owned small businesses and small businesses operating in historically underutilized business zones by orchestrating a scheme to secure government set-aside contracts for which the contractor was not eligible.	US$4,470,000
Asphalt contractor	**Defective quality of products or services**: Misrepresenting to the government the materials used to pave federally-funded roads.	US$4,250,000
Construction services provider	**Defective services and products**: Misrepresenting work was completed according to contract specification.	US$3,000,000
Painting contractor	**Government set-aside programs**: Misrepresenting compliance with Disadvantaged Business Enterprise rules, which require participation of businesses owned by women and minorities.	US$3,000,000
Construction services provider	**Government set-aside programs**: Improperly obtaining federal set-aside contracts reserved for disadvantaged small businesses.	US$2,800,000
Construction services provider	**Fraudulent inducement**: Obtaining a military contract by falsely representing that U.S. subsidiary of foreign company would perform a substantial portion of the work as prime contractor and making related false certifications.	US$2,800,000
Fuel logistics company	**Fraudulent inducement**: Conspired with other South Korean entities to rig bids on Department of Defense (DoD) contract to supply fuel to U.S. military bases	US$2,000,000
Non-profit corporation	**Government set-aside programs**: Misrepresenting extent to which company would rely on blind employees, improperly subcontracting a set-aside contract to entity that did not generally use blind labor, and accepting impermissible payments and gifts from manufacturers on certain contracts.	US$1,938,684
Defense contractor	**Overbilling**: Steering lease for an Iraqi police training facility toward a property owned by the employer of a co-conspirator in exchange for kickback payments.	US$1,500,000
Food by-product collection service provider	**Overbilling**: Underpaid rebates related to collection of used cooking oil from Air Force and Army bases.	US$1,375,000
Dog training services	**Overbilling**: Fraudulently submitting claims for inflated labor hours.	US$1,350,000

Construction services provider	**Overbilling**: Improperly submitting claims for inflated standby or delay costs associated with construction contracts at Naval Station Guantanamo Bay.	US$1,100,000
Oil and fuel analysis instrument company	**Government set-aside programs**: Falsely certifying eligibility for Air Force Small Business Innovation Research program.	US$1,050,957
Defense contractor	**Defective services or products**: Knowingly shipping grenade launchers with barrels that did not meet the contract specifications and falsely certifying that each shipment conformed to contract specifications.	US$1,025,429
Construction services provider	**Government set-aside programs**: Misrepresenting use of small disadvantaged business in order to obtain a federally-funded construction contract.	US$1,000,000
Construction services provider	**Government set-aside programs**: Entering a set of agreements that were not disclosed to the government that enabled company to profit from contracts the company was not qualified to bid on itself.	US$1,000,000
		US$188,547,573

CARES Act programs create new FCA risk

Companies that have made misrepresentations to secure loans through the Paycheck Protection Program (PPP) and the Main Street Lending Program, both of which were authorized under the CARES Act, could be subject to FCA scrutiny. For government contractors, Section 3610 of the CARES Act allowed federal agencies, at their discretion, to modify the terms of existing contracts or other agreements to reimburse the contractor for paid leave, including sick leave, which a contractor provides to keep its employees in a ready state.[2] Many government agencies issued their own guidance regarding what certifications are required and what costs can be billed.

As a representative example, DoD issued a cost principle, DFARS 231.205-79, under which contractors could only seek reimbursements if they made the following representations, among others:

- The contractor can support all claimed costs with appropriate documentation.
- The contractor identifies other relief funds claimed or received related to COVID-19 (e.g., PPP loans).
- The contractor affirms it has not and will not pursue reimbursement elsewhere for the same costs accounted for under their Section 3610 request.

FCA risk under Section 3610 may arise, for example, due to the prohibition on double payments to cover the same costs. For example, DoD requires that the government receive a credit or reduction in billing for any PPP loans or loan payments that are forgiven if PPP credits are allocable as costs allowed under a contract. While we can expect to see CARES Act-related FCA activity, the statute and its implementing guidance may offer certain defenses.

Courts continue to apply the materiality lessons of *Escobar*

An important predicate for liability under the FCA is that an alleged misrepresentation must be material to the government's payment decision. The U.S. Supreme Court made clear in *Universal Health Services, Inc. v. United States ex rel. Escobar*, that the FCA's materiality requirement is "demanding" and "rigorous,"[3] yet did not articulate clear standards for what constitutes materiality. Thus, lower courts are continuing to develop and apply standards for materiality post-*Escobar*.

Consistent with *Escobar*, courts have dismissed cases asserting conclusory claims of materiality. Reciting boilerplate or general language conditioning payment on compliance is insufficient; instead, courts have required relators to include specific *factual*

2. *See* Public Law 116–136, div. A, title III, §3610. If Congress doesn't pass an extension, this provision is set to expire 31 March 2021.
3. *Universal Health Servs., Inc. v. United States ex rel. Escobar* (*Escobar*), 136 S. Ct. 1989, 2003, 2004 n.6 (2016).

allegations demonstrating how the alleged falsity did affect, or was likely to affect, the government's payment decision.[4] This was the case in *United States ex rel. Adams v. Dell Computer Corporation*.[5] There, a district court examined materiality allegations related to an alleged undisclosed security vulnerability in computer systems sold to government agencies. The relator alleged the vulnerability was material because government agencies are required to assure the security of their and their contractors' information technology. Therefore, he argued, the agencies would not have purchased the hardware had they known of the security vulnerabilities. The court disagreed because the relator did not allege the manufacturer of the hardware was required to comply with the federal technology policies or that the contracts required such compliance. Moreover, the court noted that "even if those requirements were passed along to [the supplier], the technology policies referenced by [relator] do not require defect-free products, merely that the agencies limit the vulnerabilities and attempt to remedy them if located."[6] The court therefore concluded the existence of a single security vulnerability would not necessarily be material to the agencies' acceptance of and payment for the computer systems, and thus the relator had not adequately alleged materiality.[7]

In *United States v. Strock*, the Second Circuit examined the materiality of allegations that the defendant company fraudulently claimed to be eligible for set-aside contracts for service-disabled, veteran-owned small businesses (SDVOSBs). The government asserted the company would not have been awarded any of the contracts at issue absent false claims that it was an SDVOSB. The district court granted the motion to dismiss holding that the defendants' allegedly false statements were important to the company being awarded the contracts, but not important to the government's decision to make payments under those contracts. The Second Circuit disagreed and held "at least in fraudulent inducement cases, the government's 'payment decision' under *Escobar* encompasses both its decision to award a contract and its ultimate decision to pay under that contract."[8] The court relied on the express nature of the eligibility condition and the substantiality of the defendants' alleged noncompliance to conclude the government has plausibly alleged materiality.[9]

It is clear that evidence of government inaction in the face of knowledge about an alleged fraud is probative evidence on the question of materiality.[10] The *Dell* court noted that continued government purchases of the computer systems even after the relator disclosed the existence of the alleged security vulnerability to the United States Attorney's Office for the Eastern District of Texas and other DOJ personnel "further supports the Court's finding" that the relator failed to adequately allege materiality.[11] As we noted last year, however, at least one court has indicated that government inaction after disclosure of non-compliance may not be sufficient to support a motion to dismiss on materiality grounds where the relator pleads that the company's disclosure did not disclose the full extent of its noncompliance.[12] Courts have also viewed government action taken when the alleged fraud is disclosed as evidence of materiality.[13]

4. *See e.g. United States ex rel. Porter v. Magnolia Health Plan, Inc.*, 810 F. Appx 237, 238, 242 (5th Cir. 2020) (affirming dismissal of a complaint alleging a Medicaid contractor violated the FCA by using licensed professional nurses for jobs that required registered nurses (RNs) after concluding that the relator failed to provide evidence that such staffing practices would have impacted Medicaid payment decision despite the fact that state law required the use of RNs and "broad boilerplate language" generally required the contractor to "follow all laws").
5. No. 15-CV-608 (TFH), 2020 WL 5970677, at *1 (D.D.C. Oct. 8, 2020).
6. *Id.* at *6.
7. The *Dell* court also found that the relator's claim to have discovered the security vulnerability "against all odds" and through "unique methods and tools" undercut his allegation that the defendant's employees must have had knowledge of the vulnerability or acted in reckless disregard for the truth and therefore, the court concluded that the relator failed to state a plausible claim of knowledge. *Id.* at *7.
8. *United States v. Strock*, No. 19-4331, 2020 WL 7062274, at *6 (2d Cir. Dec. 3, 2020).
9. *Id.* at *9.
10. In the course of affirming dismissal for failure to adequately allege materiality, the Fifth Circuit in *Porter* noted the government took no action after the relator informed the relevant agency and local U.S. Attorney's office of the underlying allegations several years before filing suit. *See Porter*, 810 F. App'x at 238, 242. Similarly, the Tenth Circuit in *United States ex rel. Janssen v. Lawrence Memorial Hospital* emphasized that the government had investigated the relator's central allegations, did nothing in response, and continued to pay the defendant's Medicare claims. *See Janssen*, 949 F.3d at 542.
11. *See United States ex rel. Adams v. Dell Computer Corp.*, 2020 WL 5970677, at n. 5.
12. *United States ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.*, 381 F.Supp. 1240, 1249 (E.D. Ca. 2019)
13. *See e.g. United States ex rel. Wallace v. Exactech, Inc.*, No. 2:18-CV-01010-LSC, 2020 WL 4500493, at *15 (N.D. Ala. Aug. 5, 2020) (pointing to the relator's allegation that the *Australian* government declined to pay for a product after learning of the device's high failure rate to conclude the relators had sufficiently alleged the noncompliance with health care laws was material to the *U.S.* government's payment decision); *But see United States ex rel. Taylor v. Boyko*, No. 2:17-CV-04213, 2020 WL 520933, at *5–6 (S.D.W. Va. Jan. 31, 2020) (holding that the relator's citation to a single instance of CMS prospectively revoking *another* company's Medicare enrollment based on misrepresentations of corporate licensure status did not support a finding of materiality).

Finally, it's noteworthy that the teachings of *Escobar* are beginning to be applied in the criminal context as prosecutors, defendants, and courts scrutinize the real-world impact of criminal defendants' alleged fraud on the government. For example, in *United States v. Clark*, after being convicted of multiple counts related to schemes to defraud government agencies to obtain government construction contracts under a Small Business Administration program, one defendant – who was no longer directly eligible under the program – moved for judgment of acquittal notwithstanding the verdict, which the district court granted as to four counts related to the submission of false claims.[14] Citing the "rigorous" *Escobar* materiality standard, the district court concluded the evidence was insufficient to establish a false material fact.[15] In particular, the court concluded that a failure to disclose to the government certain details regarding the extent of the defendant's involvement in projects involving other entities was immaterial, and that even if those facts had been disclosed to the government, it "may still have paid" on the invoices.[16]

Growing circuit split regarding standard for government motions to dismiss qui tam actions

We reported last year that the government was increasingly exercising its authority to dismiss non-intervened FCA actions under Section 3730(c)(2)(A) of the FCA.[17] There is now a growing body of case law concerning the standard to be applied when the DOJ seeks such dismissal. Until recently, the courts had lined up in one of two camps. Some courts have followed the Ninth Circuit's decision in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*,[18] which requires a "valid government purpose" and a demonstrated "rational relation between dismissal and accomplishment of the purpose."[19] Under the *Sequoia Orange* test, if the government meets this burden, the burden shifts to the relator to show that "dismissal is fraudulent, arbitrary and capricious, or illegal." Other courts have applied the standard articulated by the D.C. Circuit in *Swift v. United States*, which recognizes that the government has "an unfettered right" to dismiss.[20] On 17 August 2020, the U.S. Court of Appeals for the Seventh Circuit added yet a third standard in *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*[21]

The Seventh Circuit opinion in *CIMZNHCA* was issued in one of 11 FCA suits filed by the same relators in different jurisdictions, alleging essentially identical violations of the FCA arising from alleged violations of the Anti-Kickback Statute.[22] The DOJ declined to intervene in the qui tam action and moved to dismiss the suit in the U.S. District Court for the Southern District of Illinois. The district court adopted the Ninth Circuit rule, applying a standard akin to the "arbitrary and capricious" standard found in administrative law, and denied dismissal.[23] The government appealed the district court's decision, which stands as only one of the two occasions when a court has denied a dismissal request by DOJ since the Granston Memo[24] was issued in 2018.[25]

The Seventh Circuit rejected the *Sequoia Orange* test as too rigorous, and the *Swift* test as too lax.[26] It instead purported to draw the applicable standard from Federal Rule of Civil Procedure 41(a). Rule 41(a)(1)(A)(i) provides that "the plaintiff may dismiss an action" by serving a notice of dismissal any time "before the opposing party serves either an answer or a motion for summary judgment." Unless the notice states otherwise, dismissal is without prejudice.[27] This right is "absolute" according to the Seventh Circuit.

14. *United States v. Clark*, No. 1:19-CR-148, 2020 WL 830057, at *1, 10–12 (N.D. Ohio Feb. 20, 2020) (three counts of submitting false claims in violation of 18 U.S.C. § 287 and one count of conspiracy to submit false claims in violation of 18 U.S.C. § 286).
15. *Id.* at *10–11.
16. *Id.*
17. 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.").
18. 151 F.3d 1139 (9th Cir. 1998).
19. *Id.* at 1145.
20. 318 F.3d 250, 252 (D.C. Cir. 2003).
21. 970 F.3d 835 (7th Cir. 2020).
22. 42 U.S.C. § 1320a-7b(b).
23. *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 2019 WL 1598109 (S.D. Ill. Apr. 15, 2019).
24. The Granston memo was later incorporated into the Justice Manual. See Memorandum from Michael D. Granston, Dir. Com. Lit., Fraud Section, U.S. Dep't of Justice, To Att'ys in the Com. Lit., Fraud Section and U.S. Att'ys, Handling False Claims Act Cases, Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A) (Jan. 10, 2018), https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf; Justice Manual, § 4-4.111 – DOJ Dismissal of a Civil Qui Tam Action, https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.111.
25. *See United States v. Academy Mortgage Corp.*, 2018 WL 3208157, at *2-*3 (N.D. Cal. June 29, 2018), appeal dismissed, 968 F.3d 996 (9th Cir. 2020).
26. The Seventh Circuit noted, however, that its position lay much nearer to the *Swift* approach than Sequoia Orange. CIMZNHCA, 970 F.3d at 839.
27. Fed. R. Civ. P. 41(a)(1)(B).

"In other words, once a valid Rule 41(a)(1) notice has been served, 'the case [is] gone; no action remain[s] for the district judge to take.'"[28]

However, Rule 41(a) on its own terms allows only "the plaintiff" to dismiss, not an intervenor-plaintiff like the government.[29] The Seventh Circuit reasoned, however, that the provisions of Rule 41(a) are "[s]ubject to … *any applicable federal statute*," which in this case sweeps in the provisions of the FCA.[30] Turning to Section 3730(c)(2)(A) of the FCA, the court observed that "[t]he Government may dismiss the action" without the relator's consent if the relator receives notice and opportunity to be heard.[31] This unrestricted procedural right afforded to the government is the only authorized statutory deviation from Rule 41. Construing Rule 41 and Section 3730(c)(2)(A) together, the Seventh Circuit held that once the required notice and hearing have taken place before an answer or motion for summary judgment is served, the case could be dismissed.

The Seventh Circuit recognized its conclusion may seem counterintuitive (i.e., after notice and a hearing a case is summarily dismissed), but it noted that in some cases (unlike the one at issue here) the conditions of Rule 41(a)(1) may not apply. For example, if the litigation has progressed beyond the filing of an answer or summary judgment motion, Rule 41(a)(2) would apply and would add an additional condition on top of the notice and hearing requirement for government dismissal—i.e., a "court order, on terms that the court considers proper."[32] In this instance, a required hearing under Section 3730(c)(2)(A) could serve as an opportunity for the relator to air what terms of dismissal, if any, it believes are proper.[33]

28. CIMZNHCA, 970 F.3d at 849.
29. Fed. R. Civ. P. 41(a)(1)(A).
30. Id. (emphasis added).
31. 31 U.S.C. § 3730(c)(2)(A).
32. Fed. R. Civ. P. 41(a)(2).
33. CIMZNHCA, 970 F.3d at 850-851 ("Thus, if the government's chance to serve notice of dismissal has passed, see Fed. R. Civ. P. 41(a)(1)(A)(i), and the relator by hypothesis refuses to agree to dismissal, see Fed. R. Civ. P. 41(a)(1)(A)(ii), then a hearing under § 3730(c)(2)(A) could serve to air what terms of dismissal are 'proper.'").

Based on these conclusions, the Seventh Circuit remanded the case to the district court to dismiss the relator's claims as all prerequisites for dismissal were met. The new approach proffered by the Seventh Circuit would appear to provide further latitude to courts to dismiss qui tam actions that should be welcomed by both DOJ and defendants. The *CIMZNHCA* decision affords the government a largely unfettered right to intervene and dismiss over the relator's objection during the early stages of litigation. This will likely serve to reinforce the DOJ's increased cadence for seeking dismissal of qui tam actions under the Granston Memo.

The emergence of a third standard applied to DOJ dismissals under the FCA, may make it more attractive for the Supreme Court to ultimately address the deepening split after declining to review this topic in April 2020.[34]

The road ahead

DOJ has announced its first civil settlement of FCA claims that involve alleged fraud against the PPP program. We will be watching to see if Section 3610 of the CARES Act indeed gives rise to FCA claims in the coming months. We also anticipate courts will continue to enforce the materiality requirement to limit attempts to use the FCA as an "all-purpose antifraud statute" or "vehicle for punishing garden-variety breaches of contract or regulatory violations."[35] Just as relators will seek to frame allegations and develop evidence of materiality consistent with these requirements, so too should FCA defendants actively seek evidence of government knowledge of the underlying allegations of fraud, as well as other evidence of immateriality, as central components of a potential defense. Moreover, time will tell whether federal courts' standards of analyzing materiality post-*Escobar* will converge or, instead, produce differing approaches to the fact-intensive yet often critical question of materiality.

As DOJ continues to seek dismissal of qui tam suits, parties should continue to monitor developments in this area, and consider the approach that will likely be applied by a court in the relevant federal circuit assessing a motion by the government to dismiss. The increased exercise of DOJ's dismissal authority may well lead to additional disputes over the correct standard of review for Section 3730(c)(2)(A) dismissal. Currently, there are three different approaches to DOJ dismissals under the FCA, and there is an opportunity for yet additional splits, or Supreme Court review. The topic of DOJ dismissals has also caught the attention of Senator Chuck Grassley, who has announced plans to introduce legislation to address perceived flaws in DOJ's dismissal authority.[36]

It is also noteworthy that after concerns that cybersecurity requirements will give rise to FCA claims against government contractors became a reality in 2019, we are beginning to see court decisions that will shape the scope of that risk.

Staying on top of these and other potential developments in FCA enforcement will help inform your company's compliance, internal investigation, and potential defense posture relating to FCA risk moving forward. Hogan Lovells stands ready to help you with our market-leading lawyers who have deep experience in FCA investigations and litigation and a deep understanding of the aerospace and defense industry.

34. On 6 April 2020, the Supreme Court denied a petition for certiorari that could have provided an opportunity for the Court to clarify the standard for DOJ dismissal. *See United States ex rel. Schneider et al. v. JPMorgan Chase Bank NA, et al.*, No. 19-678 in the Supreme Court of the United States.
35. *Escobar*, 136 S. Ct. at 2003.
36. Prepared Floor Remarks by U.S. Senator Chuck Grassley of Iowa, Celebrating Whistleblower Appreciation Day (30 July 2020), available at https://www.grassley.senate.gov/news/news-releases/grassley-celebrating-whistleblower-appreciation-day.

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