FALSE CLAIMS ACT PRIMER

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The False Claims Act (FCA), 31 U.S.C. §§3729-3733 was enacted in 1863 by a Congress concerned that suppliers of goods to the Union Army during the Civil War were defrauding the Army. The FCA provided that any person who knowingly submitted false claims to the government was liable for double the government’s damages plus a penalty of $2,000 for each false claim. Since then, the FCA has been amended several times. In 1986, there were significant changes to the FCA, including increasing damages from double damages to treble damages and raising the penalties from $2,000 to a range of $5,000 to $10,000. The FCA has been amended three times since 1986. Over the life of the statute it has been interpreted on hundreds of occasions by federal courts (which sometimes issue conflicting interpretations of the statute). The purpose of this primer is not to explain how the FCA evolved over the decades or to discuss judicial interpretations of its provisions. Rather, in this primer we simply explain the most significant elements of the FCA to give those new to the statute an introductory understanding of the FCA and how it works. The complete text of the False Claims Act is provided at the end of this primer.

I. LIABILITY

The statute begins, in §3729(a), by explaining the conduct that creates FCA liability. In very general terms, §§3729(a)(1)(A) and (B) set forth FCA liability for any person who knowingly submits a false claim to the government or causes another to submit a false claim to the government or knowingly makes a false record or statement to get a false claim paid by the government. Section 3729(a)(1)(G) is known as the reverse false claims section; it provides liability where one acts improperly – not to get money from the government, but to avoid having to pay money to the government. Section 3729(a)(1)(C) creates liability for those who conspire to violate the FCA. Sections 3729(a)(1)(D), (E), and (F) are rarely invoked.

II. DAMAGES AND PENALITIES

After listing the seven types of conduct that result in FCA liability, the statute provides that one who is liable must pay a civil penalty of between $5,000 and $10,000 for each false claim (those amounts are adjusted from time to time; the current amounts are $5,500 to $11,000) and treble the amount of the government’s damages. When a person who has violated the FCA reports the violation to the government under certain conditions, the FCA provides that the person shall be liable for not less than double damages.

III. THE KNOWLEDGE REQUIREMENT

A person does not violate the False Claims Act by submitting a false claim to the government; to violate the FCA a person must have submitted, or caused the submission of, the false claim (or made a false statement or record) with knowledge of the falsity. In §3729(b)(1), knowledge of false information is defined
as being (1) actual knowledge, (2) deliberate ignorance of the truth or falsity of the information, or (3) reckless disregard of the truth or falsity of the information.

IV. DEFINITION OF A CLAIM

The FCA also defines what a claim is and says that it is a demand for money or property made directly to the Federal Government or to a contractor, grantee, or other recipient if the money is spent on the government's behalf and if the Federal Government provides any of the money demanded or if the Federal Government will reimburse the contractor or grantee.

V. TAX CLAIMS EXCLUSION

In §3729(d), the FCA states that the statute does not apply to tax claims under the Internal Revenue Code.

VI. THE QUI TAM PROVISIONS

The FCA allows private persons to file suit for violations of the FCA on behalf of the government. A suit filed by an individual on behalf of the government is known as a "qui tam" action, and the person bringing the action is referred to as a "relator."

A. Filing a Qui Tam Complaint

The qui tam provisions begin at §3730(b) of the FCA; §3730(b)(1) states that a person may file a qui tam action. Section 3730(b)(2) provides that a qui tam complaint must be filed with the court under seal. The complaint and a written disclosure of all the relevant information known to the relator must be served on the U.S. Attorney for the judicial district where the qui tam was filed and on the Attorney General of the United States.

B. Government Investigation

The qui tam complaint is initially sealed for 60 days. The government is required to investigate the allegations in the complaint; if the government cannot complete its investigation in 60 days, it can seek extensions of the seal period while it continues its investigation. The government must then notify the court that it is proceeding with the action (generally referred to as "intervening" in the action) or declining to take over the action, in which case the relator can proceed with the action.

C. Rights of the Parties in a Qui Tam Action

If the government intervenes in the qui tam action it has the primary responsibility for prosecuting the action. §3730(c)(1). It can dismiss the action, even over the objection of the relator, so long as the court gives the relator an opportunity for a hearing (§3730(c)(2)(A)) and it can settle the action even if the relator objects so long as the relator is given a hearing and the court determines that the settlement is fair. §3730(c)(2)(B). If a relator seeks to settle or dismiss a qui tam action, it
must obtain the consent of the government. §3730(b)(1). When the case is proceeding, the government (§3730(c)(2)(C)) and the defendant (§3730(c)(2)(D)) can ask the court to limit the relator’s participation in the litigation.

D. Award to the Relator

If the government intervenes in the qui tam action, the relator is entitled to receive between 15 and 25 percent of the amount recovered by the government through the qui tam action. If the government declines to intervene in the action, the relator’s share is increased to 25 to 30 percent. Under certain circumstances, the relator’s share may be reduced to no more than 10 percent. If the relator planned and initiated the fraud, the court may reduce the award without limitation. The relator’s share is paid to the relator by the government out of the payment received by the government from the defendant. If a qui tam action is successful, the relator also is entitled to legal fees and other expenses of the action by the defendant. All of these provisions are in §3730(d) of the FCA. The FCA also provides that if the government chooses to obtain a recovery from the defendant in certain types of proceedings other than the relator’s FCA suit, this is known as an alternate remedy and the relator is entitled to the same share of the recovery as if the recovery was obtained through the relator’s FCA suit. §3730(c)(5).

E. Statutory Bars to Qui Tam Actions

The FCA provides several circumstances in which a relator cannot file or pursue a qui tam action:

1. The relator was convicted of criminal conduct arising from his or her role in the FCA violation. §3730(d)(3).
2. Another qui tam concerning the same conduct already has been filed (this is known as the "first to file bar"). §3730(b)(5).
3. The government already is a party to civil or administrative money proceeding concerning the same conduct. §3730(e)(3).
4. The qui tam action is based upon information that has been disclosed to the public through any of several means: criminal, civil, or administrative hearings in which the government is a party, government hearings, audits, reports, or investigations, or through the news media (this is known as the "public disclosure bar.") §3730(e)(4)(A). There is an exception to the public disclosure bar where the relator was the original source of the information.

We repeat that this primer does not discuss every section of the False Claims Act and is not intended to provide legal advice or take formal positions. It is intended only to provide a general introduction to the False Claims Act to those new to the area.

Following is the complete text of the False Claims Act:
§3729. False claims

(a) LIABILITY FOR CERTAIN ACTS. ---

(1) IN GENERAL.— Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount
of damages which the Government sustains because of the act of that person.

(2) REDUCED DAMAGES.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) DEFINITIONS.—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and
(B) require no proof of specific intent to defraud;

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government —

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual’s use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.
(c) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

§3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20
days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action 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.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of
good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government’s prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person’s participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person’s cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government’s expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.
(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government’s investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to
which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys’ fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys’ fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of
the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys’ fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person’s service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--

(i) in a Federal criminal, civil, or administrative hearing, in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.
(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) RELIEF FROM RETALIATORY ACTIONS.—

(1) IN GENERAL.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter.

(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

§3731. False claims procedure

(a) A subpoena [sic] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—
(1) more than 6 years after the date on which the violation of section 3729 is committed, 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, whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.
§3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) SERVICE ON STATE OR LOCAL AUTHORITIES.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

§3733. Civil investigative demands

(a) IN GENERAL.—

(1) ISSUANCE AND SERVICE.—Whenever the Attorney General, or a designee (for purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil
proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b), issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served. Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation.

(2) CONTENTS AND DEADLINES.—

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to
permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and
(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

(b) PROTECTED MATERIAL OR INFORMATION.—

(1) IN GENERAL.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas ducès tecum issued by a court of the United States to aid in a grand jury investigation; or
(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

(1) BY WHOM SERVED.—Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) SERVICE IN FOREIGN COUNTRIES.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

(1) LEGAL ENTITIES.—Service of any civil investigatory demand issued under subsection (a) or of any petition filed under subsection (j) may be made
upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) NATURAL PERSONS.—Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person’s residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) SWORN CERTIFICATES.—The production of documentary material in response to a civil investigative demand served under this section
shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) PRODUCTION OF MATERIALS.—Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.
If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

(1) PROCEDURES.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer’s presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) PERSONS PRESENT.—The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) WHERE TESTIMONY TAKEN.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as
may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) TRANSCRIPT OF TESTIMONY.—When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) CERTIFICATION AND DELIVERY TO CUSTODIAN.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS.—Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness’ testimony.

(7) CONDUCT OF ORAL TESTIMONY.—

(A) Any person compelled to appear for oral testimony under a civil investigative demand
issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18 [18 USCS §§6001 et seq.].

(8) WITNESS FEES AND ALLOWANCES.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—

(1) DESIGNATION.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.
(2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.—

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities.
(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) CONDITIONS FOR RETURN OF MATERIAL.—If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or
(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) APPOINTMENT OF SUCCESSOR CUSTODIANS.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person’s predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.
JUDICIAL PROCEEDINGS.—

(1) PETITION FOR ENFORCEMENT.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) PETITION TO MODIFY OR SET ASIDE DEMAND.—

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply
with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.—

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay,
as it deems proper, compliance with the
demand and the running of the time allowed
for compliance with the demand.

(4) PETITION TO REQUIRE PERFORMANCE BY
CUSTODIAN OF DUTIES.— At any time during
which any custodian is in custody or control of any
documentary material or answers to interrogatories
produced, or transcripts of oral testimony given, by
any person in compliance with any civil investi-
gative demand issued under subsection (a), such
person, and in the case of an express demand for
any product of discovery, the person from whom
such discovery was obtained, may file, in the
district court of the United States for the judicial
district within which the office of such custodian is
situated, and serve upon such custodian, a petition
for an order of such court to require the perform-
ance by the custodian of any duty imposed upon
the custodian by this section.

(5) JURISDICTION.—Whenever any petition is filed in
any district court of the United States under this
subsection, such court shall have jurisdiction to
hear and determine the matter so presented, and to
enter such order or orders as may be required to
carry out the provisions of this section. Any final
order so entered shall be subject to appeal under
section 1291 of title 28. Any disobedience of any
final order entered under this section by any court
shall be punished as a contempt of the court.

(6) APPLICABILITY OF FEDERAL RULES OF CIVIL
PROCEDURE.—The Federal Rules of Civil Pro-
cedure shall apply to any petition under this
subsection, to the extent that such rules are not
inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION.—Any documentary material,
answers to written interrogatories, or oral testimony pro-
vided under any civil investigative demand issued under
subsection (a) shall be exempt from disclosure under
section 552 of title 5.

(l) DEFINITIONS.—For purposes of this section—

(1) the term "false claims law" means—

(A) this section and sections 3729 through
3732; and
(B) any Act of Congress enacted after the date of the enactment of this section [enacted Oct. 27, 1986] which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1);

(7) the term "product of discovery" includes—

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or
administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A); and

(8) the term "official use" means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.
Overview

• Introduction
• Federal False Claims Act
  – Liability Provisions
  – Damages and Penalties
  – Qui Tam Provisions
  – Defenses
• Trends & Developments to Watch

FCA: A Starting Point

• The False Claims Act ("FCA") was enacted during the Civil War to curb procurement fraud by suppliers to the Union Army.
• Key amendments in 1986, 2009 (FERA), and 2010 (PPACA & Financial Reform Act) expanded the FCA’s scope and made it easier for the government and qui tam relators (whistleblowers) to file suit.
• Today, the FCA is the government’s primary civil tool to combat fraud against the government.

FCA: A Starting Point

• Key features include:
  – Mandatory treble (3x) damages and per claim penalty of up to $22,363
  – Strong whistleblower incentives (share up to 30 percent of the recovery)
  – A permissive knowledge requirement
  – Exposure of contractors and other third parties to liability
  – Gives rise to liability for certain false implied statements
FCA: A Starting Point

Main industries exposed to FCA enforcement include:

– Healthcare ($2.4 billion or just under 65% of all recoveries in 2017)
– Housing and Mortgage
– Defense & National Security

Other industries increasingly exposed to FCA liability include:

– Educational lending
– Stimulus projects and alternative energy
– Technology

FCA: A Starting Point
Health Care Fraud Enforcement – 2017

<table>
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<tr>
<th>Company</th>
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**Liability Under the FCA**

- The FCA (31 U.S.C. §§3729-3733) creates liability for **seven** specific types of prohibited conduct. The **two** most often used in FCA litigation are:
  - The **false claims provision**, which creates liability for "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval" (31 U.S.C. §3729(a)(1)(A)); and
  - The **false statement provision**, which creates liability for "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement material to a false or fraudulent claim" (31 U.S.C. §3729(a)(1)(B))

- The FCA also prohibits retaliatory actions against employees, contractors, or agents who report or act to stop an FCA violation (31 U.S.C. §3730(h)(1))

**Liability Under the FCA**

- **Failure to Return Overpayments & 60 day Rule** – Under the PPACA, overpayments from Medicare or Medicaid must be reported and returned within 60 days after identification, after which time it becomes an "obligation" subject to enforcement under the FCA’s “reverse false claims provision” (31 U.S.C. §3729(a)(1)(G)) which prohibits knowingly retaining money owed to the government

  - "**Identification**" (i.e., what starts the 60 day clock) = "when the person has, or should have through the exercise of reasonable diligence, determined that the person has received an overpayment and quantified the amount"

- **Six year look back period**

**Liability for Failure to Return Overpayment**

- **U.S. ex rel. Malie v. First Coast Cardiovascular Institute, P.A.**, No. 3:16-cv-10548 (M.D. Fla.) Jacksonville cardiovascular practice agreed to pay $448,821 to settle allegations that practice did not return known overpayments

  - Alleged overpayments arose from: inadvertently double billing; failure to coordinate bills among multiple insurers; improperly requiring patients to pay upfront; adjustments to charges made after receipt of payment

  - Settlement amount more than 2.5x alleged overpayment amount ($175,000)
Liability Under the FCA

• A properly pleaded FCA claim must contain four elements:
  1. A claim for payment was submitted to the government
  2. The claim (or record or statement material to the claim) was false
  3. Defendant knew or should have known the claim was false
  4. The claim or statement was material to the government's decision to pay

Liability Under the FCA

• "Claim" is defined broadly as "any request or demand ... for money or property" made to the government (31 U.S.C. §3729(b)(2)(A))

• Includes requests or demands made to a contractor, grantee, or other recipient if the money or property is:
  – To be spent or used on the government's behalf, or to advance a government program or interest; or
  – Paid for or reimbursed by the government

Liability Under the FCA

• "False" and "fraudulent" not defined by the statute.

• A factually false claim contains an incorrect description of the goods provided or requests reimbursement for goods not provided.

• A legally false claim occurs when a submitted claim certifies compliance (either expressly or impliedly) with a material statutory, regulatory, or contractual provision:
Liability Under the FCA

Express False Certification – company that submits a claim expressly certifies compliance with ancillary legal requirements, either accompanying the invoice or at some other point.

Implied False Certification – theory that company implicitly certifies compliance with relevant ancillary requirements each time it submits an invoice to the government for any work performed or product delivered, even if no express certification of compliance has been made.

Liability Under the FCA

"Knowingly" defined broadly to include:
- Actual knowledge
- Deliberate ignorance of the truth or falsity of the information
- Reckless disregard of the truth or falsity of the information

Specific intent to defraud is not required

"Material" is defined as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property" (31 U.S.C. §3729(b)(4))

The materiality requirement is "rigorous" and "demanding," and must be strictly enforced to prevent the FCA from becoming an "all-purpose antifraud statute or a vehicle for punishing garden-variety breaches of contract or regulatory violations." Universal Health Services, Inc. v. U.S. ex rel. Escobar, 136 S.Ct. 1989 (2016).
**Damages and Penalties**

- FCA violations are punishable by treble (3x) damages (may be reduced to mandatory double damages if defendant self-discloses fraudulent activity), plus

- Per claim civil penalty between $11,181 and $22,363 for penalties assessed after Jan. 29, 2018 (applies to violations occurring after Nov. 2, 2015)

- **Example:** Healthcare provider submits 250 false claims for which Medicare pays $75,000. Under the FCA, provider potentially liable for more than $5.8 million
  - Damages = $225,000 ($75,000 x 3)
  - Penalties = $5,590,750 (250 claims x $22,363)

**Qui Tam Provisions**

- Both the U.S. Attorney General and private persons may bring a civil action under the FCA.

- An action commenced by a private litigant (qui tam relator or whistleblower) is in the name of the government.

- **Qui tam** relators must: (1) file the complaint under seal; and (2) give the government a copy of the complaint and substantially all material evidence and information they possess (31 U.S.C. §3730(b)(2)).

**Qui Tam Provisions**

- Government has 60 days to investigate and elect to intervene in the case (courts routinely extend this period for good cause shown).

- Main investigative tool is the Civil Investigative Demand (“CID”). The FCA authorizes the DOJ to use CIDs to make document requests, issue interrogatories, and conduct depositions before the defendant is served with formal notice of the suit or the qui tam relator’s complaint is unsealed (31 U.S.C. §3730(b)(2)).
**Qui Tam Provisions**

- Whether the government intervenes in a *qui tam* case is a major factor in the probable outcome and recovery

- The *qui tam* relator stands to collect a percent of any judgment or settlement regardless of government’s intervention decision
  - 25-30 percent if the government does not intervene
  - Up to 25 percent if the government intervenes

- To what extent did relator’s counsel contribution to prosecution?

- To what extent was the action based on disclosures and information from relator?

- Did the relator plan or initiate the underlying violation?

- Will the relator be convicted of criminal conduct arising from its role in the alleged violation of the FCA?

- *Qui tam* relators are entitled to reasonable expenses and attorneys’ fees (31 U.S.C. §3730(d)(3))

**Qui Tam Provisions**

- The FCA protects whistleblowers from adverse employment actions related to their whistleblowing activities

- To establish that an employer retaliated against an employee in violation of §3730(h), an employee must demonstrate that:
  - (1) the employee engaged in protected activity;
  - (2) the employer knew that the employee was engaged in **protected activity** (the notice element); and
  - (3) that, as a result, the employee was discriminated against.
Qui Tam Provisions

• Protected activity includes:
  – Employee “conduct in furtherance of an action under this section;” and
  – "Other efforts to stop 1 or more violations of this subchapter"

• Prevailing employee entitled to: (1) reinstatement; (2) back pay x2 plus interest; and (3) compensation for any special damages sustained as the result of the discrimination, including litigation costs and reasonable attorneys’ fees

Moving to Dismiss an FCA Complaint

• The most common grounds to dismiss FCA cases are:
  – Failure to plead fraud with particularity (Fed. R. Civ. P. 9(b))
  – Failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6))
    • Lack of a false statement
    • Lack of materiality
    • Lack of knowledge

Moving to Dismiss an FCA Complaint


– The first-to-file bar (31 U.S.C. §3730(b)(5))

– The statute of limitations (31 U.S.C. §3731(b))
**FCA Public Disclosure Bar**

- A *qui tam* action must be dismissed if *substantially the same* allegations or transactions in the complaint were publicly disclosed in any of the following:
  - A federal criminal, civil or administrative hearing in which the government or its agent is a party.
  - A congressional, Government Accountability Office or other *federal report*, hearing, audit or investigation.
  - The news media.

**FCA Public Disclosure Bar**

- Exception where the *qui tam* relator is an "*original source*" of the information, meaning they:
  - Conveyed the information to the government prior to the public disclosure; or
  - Had *independent* knowledge that *materially adds* to the publicly disclosed allegation and provided that information to the government before filing the FCA action.

**FCA First-to-File Bar**

- Limits the rights of private litigants to bring an action premised on facts that are already at issue in another pending FCA matter.
- Application presents numerous difficulties
  - Is the first-to-file bar jurisdictional?
**FCA First-to-File Bar**

– Can a later-filed suit that violates the first-to-file bar be "cured" with dismissal of first suit?

– Can a first-to-file violation in a later-filed suit be cured through amendment?

– If yes, is the FCA's limitations period measured from the date of the relator's curative pleading or original complaint?

**FCA Statute of Limitations**

• Either:

  – Six (6) years after the date on which the violation is committed; or

  – Three (3) years after the date when the U.S. official responsible to act in the circumstances knew of, or reasonably should have known, the facts material to the right of action, but not more than ten (10) years after the date on which the violation is committed.

**Grounds for Dismissal: FRCP 9(b)**

• Relators must plead the "who, what, when, where, and how" of the alleged fraud

• The manner in which courts have applied this standard and the types of allegations considered sufficient to satisfy Rule 9(b) vary significantly among federal courts
Grounds for Dismissal: FRCP 9(b)

– Some circuits: Plaintiffs must identify at least one actual claim submitted to the government as the result of the alleged fraud.

– Other circuits (including the First, Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and D.C.): Rule 9(b)’s requirement of particularity is not necessarily synonymous with a representative sample and certain circumstances may warrant a more permissive approach.

Grounds for Dismissal: FRCP 9(b)

• The Sixth Circuit has applied a relaxed standard to Rule 9(b) on one occasion, see U.S. ex rel. Prather v. Brookdale Senior Living Communities, Inc., 838 F.3d 750 (6th Cir. 2016) (holding that a relator had satisfied Rule 9(b) because her allegations were "based on her personal billing-related knowledge" and supported a "strong inference that specific false claims were submitted for payment").

Grounds for Dismissal: FRCP 9(b)

• However, the Sixth Circuit continues to espouse a "strict standard": See U.S. ex rel. Ibanez v. Bristol-Meyers Squibb Co., 874 F.3d 905 (6th Cir. 2017) (dismissing complaint on 9(b) grounds where relators failed to provide a "specific representative claim" which satisfies each step in the chain of causation ultimately ending in the submission of a false claim to the government, and finding that relators were not entitled to the relaxed standard first applied in Prather because they had not alleged specific, detailed personal knowledge of defendants’ billing practices).
Grounds for Dismissal: FRCP 9(b)

– See U.S. ex rel. Hirt v. Walgreen Co., 846 F.3d 879 (6th Cir. 2017) (affirming the dismissal of AKS claims premised on the distribution of Walgreens gift cards where the relator failed to identify, by name or date, any specific customer who filed a prescription at Walgreens after receiving a gift card). When the relator sought to invoke the relaxed standard applied in Prather, the Sixth Circuit explained that its prior use of the word relaxed “runs the risk of misleading lawyers and their clients.” The Sixth Circuit explained that it had no authority to relax Rule 9(b)’s standard, which requires a complaint to include either an actual claim or allegations of detailed personal knowledge of the claims submission process.

Trends & Developments

FCA Trends
• Filing of qui tam cases remains high post-PPACA
  – 600+ cases/year and $29.5 billion in recoveries since 2009
  – 2017’s recoveries originating from qui tam lawsuits (over $3.4B of $3.7B total) is the second-highest total ever
• A more sophisticated and aggressive relator’s bar
• More declined cases being pursued
**FCA Trends**

- Government increasing use of data analysis
- Increased focus on individual liability/responsibility (Yates Memo)
- Increased focus by DOJ criminal division
- Rise in state AG/Medicaid Fraud Control Unit actions
  - Including opioid-related suits against drug manufacturers, distributors, providers, and pharmacists

**National Healthcare Fraud Takedown – June 2017**

- Involved 41 federal districts, including 115 doctors, nurses, and other licensed professionals
- Involved approximately $1.3 billion in false billings stemming from alleged kickbacks and unnecessary services
- HHS has initiated suspension actions against nearly 300 providers, including doctors, nurses, and pharmacists

**Opioid Litigation**

*Kentucky AG Sues Endo For Alleged Role In Opioid Crisis*

*Law360, New York (November 6, 2017, 6:27 PM EST) — Endo Health Solutions Inc. has violated Kentucky law by misrepresenting the safety of the company’s opioids to drive sales, contributing to almost 200 local deaths with its Opana ER drug, the state attorney general alleged in a suit filed Monday.*
Opioid Litigation

**Kentucky AG Sues Endo For Alleged Role In Opioid Crisis**

Suit accuses drug distributor McKesson of fueling Kentucky’s opioid epidemic

A suit filed today in Franklin County Circuit Court accuses drug distributor McKesson of fueling Kentucky’s opioid epidemic.

The suit accuses the company of failing to use its predictive analytics to identify suspicious behavior by doctors, pharmacies and other distributors. McKesson is accused of knowing about the suspicious behavior but failing to report it to the state’s Cabinet for Health and Family Services (CHFS) or Board of Pharmacy, or failed to take reasonable corrective actions.

McKesson is accused of profiting from the opioid epidemic by failing to prevent the diversion of opioids to illegal uses.

The suit seeks unspecified damages.

**Commonwealth of Kentucky ex rel. Beshear v. Cardinal Health, et al.**

- Count VII: Medicaid Fraud KRS Chapter 205: “Defendant Cardinal[] … through its annual deceptive license renewals through the Commonwealth’s Cabinet for Health and Family Services (‘CHFS’) and Board of Pharmacy as well as its failure to identify, track, and reject suspicious orders of addictive prescription opioids: (a) schemed to obtain payment from a medical assistance program through false application or document presented to the CHFS; (b) caused to be presented false or fraudulent claims to the CHFS; and (c) knowingly used or caused to be used a false statement, or statement which concealed or covered up a material fact, to get a false or fraudulent claim paid or approved by a program within the jurisdiction of the CHFS [in violation of the Kentucky Control of Fraud and Abuse Law, KRS 205.8463(1), (2), & (4)].”
Medical Necessity

- **U.S. v. Paulus**, 2017 WL 908409 (E.D. Ky. Mar. 7, 2017) – Cardiologist indicted for health care fraud and making false statements related to medically unnecessary cardiac procedures, including catheterizations and stent placements, and falsely recorded the existence and extent of lesions observed during the procedure and then submitted the allegedly false and fraudulent claims to health care benefit programs.

- Jury convicted cardiologist on eleven counts after twenty-three days of trial and cardiologist moved for judgment of acquittal

**Medical Necessity**

- District court found that the evidence did not support the jury’s verdict and granted motion, vacating verdict
  - Medical judgment at issue was the degree of stenosis (*i.e.*, the narrowing of arteries) requiring performance of cardiac procedures
  - Court held that the judgment associated with whether to insert cardiac stents was a subjective opinion and not subject to proof or disproof
  - Government’s medical experts admitted estimating degree of stenosis an “imprecise exercise”
Medical Necessity

- Relied on leading civil FCA cases examining question of falsity, including:

State of Statistical Sampling

  - Relator alleges that Agape improperly certified ineligible patients for Medicare hospice benefit
  - After district court rejected relator’s request to employ statistical sampling to establish liability and damages for 60,000+ claims, district court suggested “informational bellwether trial”
  - Government argument: cost and time associated with claim-by-claim review of all claims at issue would be impossible and allow defendants to escape accountability

State of Statistical Sampling

- Government had declined to intervene but vetoed settlement reached between Relator and Agape
  - On interlocutory appeal, the Fourth Circuit …
    - Did not provide clarity on the question of whether statistical sampling and extrapolation can be used to establish liability in an FCA case (… Wall?)
    - Held the government possesses an unreviewable right to object to a relator’s settlement, even if it previously had declined to intervene
Under what circumstances can a claim be "false" based on a violation of a statutory, regulatory, or contractual obligation?

Recall theories of liability relevant here:
- Express False Certification: Defendant explicitly certifies compliance with a particular statute or regulation
- Implied False Certification: Even if the certification did not expressly mention a particular law, there are some statutes and regulations that are of such import that certification of compliance could be implied

Many courts distinguished between "conditions of participation" and "conditions of payment"; considered only the former material to the government’s payment decision

Circuit Split
- Seventh: rejected implied false certification liability
- Second and Sixth: limited scope to legal requirements expressly designated as conditions of payment
- First, Fourth, Tenth, Eleventh, D.C.: endorsed broader view of implied certification liability


History: Teenage Medicaid beneficiary died after receiving treatment from unlicensed and unsupervised professionals at a mental health clinic. Parents filed complaints with several state agencies and a qui tam action that alleged that lack of compliance with state regulations governing staff qualifications and supervision rendered claims "false."
Escobar – Implied False Certification & Materiality

- District Court
  - Granted Defendant’s motion to dismiss
  - Parents’ complaint failed to allege that compliance with regulations at issue was a condition of payment of Massachusetts Medicaid

- 1st Circuit Court of Appeals
  - Reversed
  - Supervision standards at issue were "express and absolute" conditions of payment and provided "dispositive evidence of materiality"

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Escobar - Implied False Certification & Materiality

- Held: UHS’s submission of claims designating payment codes for specific counseling services without disclosing underlying violations of the staff and licensing requirements at issue constituted actionable FCA violations.

- Escobar: (1) affirmed the viability of the implied false certification theory of liability, "at least" when two conditions are met; and (2) articulated the standard for analyzing the FCA’s materiality requirement.

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Escobar - Implied False Certification & Materiality

- Two conditions:
  - (1) The claim submitted to the government not only requests payment, "but also makes specific representations about the goods or services provided"; &
  - (2) The defendant’s "failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."

- Necessary or merely a sufficient path for establishing an implied false certification claim?
Escobar - Implied False Certification & Materiality

- Materiality:
  - Scope of FCA liability can be policed through “strict enforcement” of materiality and scienter
  - Materiality is a “demanding” and “rigorous” standard

- “We now clarify how that materiality requirement should be enforced”:
  - It is not sufficient for a finding of materiality that the government “would have had the option to decline to pay if it knew of the defendant's noncompliance.”
  - The government’s decision to “expressly identify a provision as a condition of payment is relevant, but not automatically dispositive” of the materiality inquiry.

Escobar - Implied False Certification & Materiality

- It is evidence of materiality "that the defendant knows that the government consistently refuses to pay claims in the mine run of cases based on noncompliance" with a requirement.
- It is “[v]ery strong evidence” of immateriality "if the government pays a particular claim in full despite its actual knowledge that certain requirements were violated.”
- It is “[s]trong evidence" of immateriality "if the government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position.”

Escobar Applied – Implied Certification


- U.S. ex rel. Schimelpfenig v. Dr. Reddy’s Laboratories Ltd., 2017 WL 1133956, at *6 (E.D. Pa. Mar. 27, 2017) (noting the Third Circuit "appears to interpret Escobar as requiring specific representations that, in conjunction with the claimant’s purposeful omissions, renders the ensuing claims legally false")
Escobar Applied – Implied Certification

• U.S. ex rel. Campie v. Gilead Sciences, Inc., 862 F.3d 890, 895, 901-03 (9th Cir. July 7, 2017) (stating that "two conditions must be satisfied" for an implied false certification claim to proceed but endorsing broad reading of specific representation standard, holding that by submitting claims for payment for certain known brand-name drugs, the defendant represented that the drugs were FDA-approved, manufactured at approved facilities, and were not adulterated or misbranded)

Escobar Applied – Implied Certification

• U.S. ex rel. Badr v. Triple Canopy, Inc., 857 F.3d 174, 175-76, 178 (4th Cir. 2017) (finding that even though Triple Canopy’s invoices contained no specific misrepresentations on their face, they included the kind of "half-truths" that the Supreme Court intended to target in Escobar because they implied the government was receiving the services of guards with the appropriate marksman qualifications)

Escobar Applied – Materiality

• U.S. ex rel. Harman v. Trinity Industries, Inc., 872 F.3d 645 (5th Cir. 2017) (vacating $663 million judgment and noting "the jury’s findings of liability [could not] stand for want of materiality" because relator failed to meet the "substantially" increased burden set by Escobar to prove materiality where the government continued making payments after learning of the alleged fraud)

• U.S. ex rel. Ruckh v. Salus Rehabilitation, LLC, 2018 WL 375720 (M.D. Fla. Jan. 11, 2018) (vacating the jury’s $348 million judgment against the defendants after reviewing the evidence on the question of materiality in light of Escobar)
Escobar Applied – Materiality

• United States v. Sanford-Brown, Ltd., 840 F.3d 445, 447 (7th Cir. 2016) (dismissing an FCA claim for failure to establish materiality where contracting agency continued to do business with defendant after discovering the alleged regulatory noncompliance and relator could not show evidence that the government’s payment decision would have been different had it actually known of the alleged noncompliance beforehand)

Escobar Applied – Materiality

• U.S. ex rel. Kolchinsky v. Moody’s Corp., 2017 WL 825478, at *5 (S.D.N.Y. Mar. 2, 2017) (dismissing FCA allegations for lack of materiality where defendant showed that the government had investigated purported inaccuracies in Moody’s credit ratings, yet continued to pay Moody’s for its credit-ratings products)

• U.S. ex rel. Prather v. Brookdale Senior Living Communities, Inc., 265 F.Supp.3d 782 (M.D. Tenn. 2017) (dismissing FCA allegations based on alleged delay in obtaining physician signatures, finding that the timing of the signature was not material to government’s decision to pay in light of Escobar considerations)

Aftermath of Escobar

• On remand, First Circuit again held that compliance with the regulations at issue was material. Centrality of licensing and supervision requirements go to “very essence of the bargain.” Fact that Government might have paid with knowledge is not dispositive.

• Post-Escobar, how does a provider evaluate whether a particular regulatory or contractual requirement is material to payment?
Aftermath of Escobar

- Strategic considerations regarding the government’s decision to pay will drive discovery
- Watch for continued developments regarding falsity and materiality in the wake of Escobar

Developments to Watch in 2018

- Yates Memorandum regarding the DOJ’s policy with respect to prosecutions of individuals for their role in corporate malfeasance is “under review”
- Possible increased activity by DOJ to dismiss qui tam cases under 31 U.S.C. §3720(c)(2)(A)
- "[N]on-exhaustive list of factors that the Department can use as a basis for dismissal”:
  1. Curbing Meritless Qui Tams
  2. Preventing Parasitic or Opportunistic Qui Tam Actions

Developments to Watch in 2018

- Preventing Interference with Agency Policies and Programs
- Controlling Litigation Brought on Behalf of the United States
- Safeguarding Classified Information and National Security Interests
- Preserving Government Resources
- Addressing Egregious Procedural Errors
Developments to Watch in 2018

• The effect of Associate Attorney General Rachel Brand’s 1/25/2018 memorandum entitled “Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases”

Minimizing FCA Exposure

• Companies that do business with the government can minimize their exposure to FCA liability by:
  – Implementing strong compliance programs
  – Self-disclosing promptly any conduct that may be subject to the FCA or other fraud and abuse laws
  – Structuring business relationships appropriately on the front end

• To stay current on the latest developments regarding the FCA, visit:
  – http://fraudinhealthcare.com/
  – https://www.insidethefca.com/