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Introduction

Smith Pachter McWhorter PLC is pleased to present the 2019 edition of its False Claims Act Practice Guide. On one level, this Guide is meant to serve as a practical reference tool for our clients and friends, to provide guidance on how the statutory scheme works, where potential False Claims Act ("FCA") violations might be encountered, and what elements the government must prove for liability to attach. These topics are covered in Parts One and Two.

Part One ("The Statutory Framework") lays out the statute itself, explains the elements that must be proven to find a violation, reviews how a typical enforcement action might proceed, and discusses how damages are calculated. Part Two ("Stumbling Blocks") describes classic theories of liability that the Department of Justice and qui tam relators have pursued and describes how and where these issues often arise for government contractors. With the material contained in Parts One and Two, we hope to help clients anticipate and avoid the many issues that can arise under the FCA in contracting with the government by understanding and mitigating the risks, identifying or remediating potential violations, and dealing with enforcement authorities if they become involved.

In Part Three ("Recent Trends"), the Guide provides an update on DOJ guidance issued in 2018, enforcement activity, and notable case law developments to ensure our clients understand how the government is focusing its enforcement efforts and what legal theories federal courts have constrained or expanded. There have been several interesting developments over the past year, touching on various aspects of the FCA, including:

- In January 2018, Michael Granston, Director of the Department of Justice’s ("DOJ") Commercial Litigation Branch, Fraud Section, issued a memorandum identifying factors to evaluate for the potential dismissal of meritless FCA cases in accordance with 31 U.S.C. § 3730(c)(2)(A). The factors identified in the memorandum thus provide important guidance to contractors on how best to advocate for dismissal. Although time will tell how significantly the memorandum will influence DOJ policy, it is notable that in December 2018 DOJ moved to dismiss ten kickback-related FCA complaints against pharmaceutical vendors, which suggests that the memorandum may indeed herald an increased DOJ willingness to seek dismissal in more marginal cases.

- Also in January 2018, Associate Attorney General Rachel Brand published a memorandum that effectively prohibited DOJ litigators from using noncompliance with agency guidance documents as a basis for proving violations of the FCA.

- The window for successfully pressing FCA claims based on Trade Agreements Act ("TAA") noncompliance in the context of GSA Schedule contracting seemed to narrow, with the D.C. District Court and Seventh Circuit issuing useful opinions related to the materiality of noncompliance with the TAA and the requirement to plead fraud with particularity.

- The Eleventh Circuit held that the FCA's statute of limitations tolling provision applies to a qui tam relator regardless of whether the government intervenes in the case. The decision sharpened a circuit split on this point. On November 16, 2018, the Supreme Court granted certiorari to address two issues: (a) whether the tolling provision in the FCA's statute of limitations, which is based on “government knowledge,” applies if the government declines to intervene; and (b) whether a qui tam relator is an “official of the United States” for purposes of the FCA's tolling provision.
District and circuit courts continue to wrestle with the Supreme Court’s 2016 ruling in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), in particular, the opinion’s discussion of when a false statement or regulatory noncompliance is material to the government’s payment decision. How the federal courts continue to interpret *Escobar*, and whether any circuit splits arise due to differing interpretations, will be issues for continued observation in the months and years ahead.

We hope you find this Guide useful in considering potential FCA issues for your company. And to the extent you find yourself facing a problem that requires guidance in addition to what we provide here, please feel free to reach out to the authors or any of the practitioners listed at the end of this Guide.
Part One: The Statutory Framework

“The FCA was enacted as a reaction to rampant fraud and price gouging by merchants supplying the Union army during the Civil War.” United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co., 839 F.3d 242, 247 (3d Cir. 2016). The Act is “the Government’s primary litigative tool for combatting fraud.” Olson v. Fairview Health Servs. of Minnesota, 831 F.3d 1063, 1069 (8th Cir. 2016). The Supreme Court, however, noted in Escobar that the FCA is “‘not an all-purpose antifraud statute,’ ... or a vehicle for punishing garden-variety breaches of contract or regulatory violations.” Escobar, 136 S. Ct. at 2003 (citation omitted). Rather, the FCA creates civil and criminal penalties for those who submit certain false or fraudulent documents to the federal government, whether claims for payment or documentation concerning delivery of goods or services. Following is a discussion of the statute, the elements that must be proven for liability to attach, how an enforcement action might proceed, and how damages are calculated.

A. The Law

1. The Statute

FCA liability, civil or potentially criminal, attaches when any person:1

(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.


1 The FCA does not apply to claims, records, or statements made under the Internal Revenue Code of 1986. 31 U.S.C. § 3729(d); see also Canen v. Wells Fargo Bank, N.A., 118 F. Supp. 3d 164 (D.D.C. 2015) (“The FCA specifically excludes such claims from its purview in providing that it does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.”) (citing Anansev v. Freitas, 37 F. Supp. 3d 297 (D.D.C. 2014)). Section 3729(c) also clarifies that any information furnished pursuant to subsection (a)(2), which relates to cooperation with government investigation of a potential violation, shall be exempt from disclosure under the Freedom of Information Act (5 U.S.C. § 552).
Key definitions provided by the statute follow:

a. A person acts *knowingly* whenever that person, with respect to information, has actual knowledge of that information, acts in deliberate ignorance of the truth or falsity of the information, or acts with reckless disregard of the truth or falsity of the information. Note that *intent to defraud* is not necessary to prove a violation occurred. 31 U.S.C. § 3729(b)(1). This knowledge or *scienter* requirement has also been more fully developed in the case law, as described below.

b. A *claim* is any request or demand, whether under a contract or otherwise, for money or property (regardless of whether or not the United States has title to the money or property) that is presented to an officer, employee, or agent of the United States; or 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 either provides, or has provided, any portion of the money or property requested or demanded; or will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded. Claims do 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. 31 U.S.C. § 3729(b)(2)(A)-(B).

c. *Obligation* is defined as 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. 31 U.S.C. § 3729(b)(3).

d. *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 has also been more fully developed in the case law, as described below.

2. **The Elements**

A violation of the FCA occurs when there has been: (1) a *false statement or fraudulent course of conduct*; (2) made or carried out *with knowledge of the falsity*; (3) that was *material*; and (4) that *involved a claim* (i.e., a request or demand for money or property from the United States). *See United States v. Bollinger Shipyards, Inc.*, 775 F.3d 255, 259 (5th Cir. 2014). We examine each of these elements in turn.

a. **Falsity**


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1 Congress amended the FCA in 2009 to expressly define “claim.” *U.S. ex rel. Heath v. Wisconsin Bell, Inc.*, 111 F. Supp. 3d 923, 926 (E.D. Wis. 2015). Although the statute defines claim, in part, as any request or demand for money or property from the United States, some courts have interpreted the term to mean “cases” in order to retroactively apply 2009 amendments to cases where defendants may otherwise escape FCA liability. *See United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 642 (7th Cir. 2016). In *Kmart Corp.*, the Seventh Circuit held “claims” did not mean “request[s] or demand[s] for ... money or property.” *Id.* Instead, the court noted it “held before that the word ‘claims’ in § 4(f)(1) refers to cases, not to individual requests for payment.” *Id.* at 639. Through this interpretation of “claims,” the court held the amendments “were effective as if subsection (a)(1)(B) had been enacted on June 7, 2008,” such that the amendments then applied to all FCA claims pending on that date, rather than individual requests for payment. *Id.* The court went on to note the “majority of [its] sister circuits take the same position.” *Id.* (citing cases).
Factual falsity occurs when a contractor makes a claim or request for reimbursement with “an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided.” United States ex rel. Forcier v. Computer Scis. Corp., 2017 WL 3616665, at *7 (S.D.N.Y. Aug. 10, 2017); see also United States ex. rel. Dresser v. Qualium Corp., 2016 WL 3880763, at *5 (N.D. Cal. July 18, 2016) (“The literally false theory says that an FCA action may lie where ‘the claim for payment is itself literally false or fraudulent.’”).

Legal falsity, however, is “[m]ore difficult to assess,” and occurs in cases where a “contractor falsely represents that it is in compliance with a particular federal statute or regulation.” Id. Legal falsities include cases where a contractor has either expressly or impliedly certified compliance with some statutory, regulatory or contractual requirement. United States ex rel. Schimelpfenig v. Dr. Reddy’s Labs. Ltd., 2017 WL 1133956 (E.D. Pa. Mar. 27, 2017); Novartis Pharm. Corp., 41 F. Supp. 3d 329 (S.D.N.Y. 2014) (“a ‘legally false’ claim is ‘false’ because it has been tainted by some underlying statutory, regulatory, or contractual violation made in connection with that claim, which renders the claim ineligible for reimbursement.”).3

b. Knowledge / Scienter

Whether a contractor alleged to have violated the FCA acted with knowledge of the falsity, as required for liability to attach, is an evidentiary question, and courts look at the totality of the circumstances to resolve it. See United States ex rel. Purcell v. MWI Corp., 807 F.3d 281, 290 (D.C. Cir. 2015). Courts have analyzed how relators or the government can prove this scienter requirement.

Under the FCA, a person acts “knowingly,” or meets the scienter requirement, if he or she: “(1) has actual knowledge of the [falsity]; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.” U.S. ex rel. Bartlett v. Ashcroft, 39 F. Supp. 3d 656, 665 (W.D. Pa. 2014) (emphasis added); see also United States ex rel. Harper v. Muskingum Watershed Conservancy Dist., 842 F.3d 430, 437 (6th Cir. 2016) (“unless the circumstances of a case show that a defendant knows of, or ‘acts in deliberate ignorance’ or ‘reckless disregard’ of, the fact that he is involved in conduct that violates [the FCA], the defendant cannot be held liable.”).

“Although proof of a specific intent to defraud is not required, the statute’s language makes plain that liability does not attach to innocent mistakes or simple negligence.” United States ex rel. Phalp v. Lincare Holdings, Inc., 857 F.3d 1148, 1155 (11th Cir. 2017). This standard is “designed to address the problem of the ‘ostrich-like’ refusal to learn of information which an individual, in the exercise of prudent judgment, had reason to know.” Horn & Assocs., Inc. v. United States, 123 Fed. Cl. 728, 763 (2015).

The key takeaway is that the FCA “covers not just those who set out to defraud the government, but also those who ignore obvious deficiencies in a claim.” Id. at 764. In Lamb Engineering & Construction, the court held a “failure to make minimal examination of records constitutes deliberate ignorance or reckless disregard, and a contractor that deliberately ignored false information submitted as part of a claim is liable under the False Claims Act.” 58 Fed. Cl. 106, 110 (2003) (quoting UMC Elec. Co. v. United States, 43 Fed. Cl. 776, 794 (1999)).

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3 The express and implied certification theories of liability are described in more detail in Part Two, Section A.3, infra. The Supreme Court confirmed the viability of the implied certification theory of liability in Escobar, described in more detail at Part Three, Section B, infra.
c. Materiality

FCA subsections (a)(1)(B) and (a)(1)(G) require the false record or statement to be material before liability is imposed. 31 U.S.C. §3729(a)(1)(B), -(G). The statute defines material 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). Courts have noted that materiality is a “mixed question of law and fact.” United States v. Williams, 865 F.3d 1302, 1310 (10th Cir. 2017) (citing United States v. Schulte, 741 F.3d 1141, 1154 (10th Cir. 2014).

In 2016 the Supreme Court explained materiality under the FCA is a “fact-specific inquiry,” and the standard is demanding. Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 2002-03 (2016) (“materiality cannot rest on a single fact or occurrence as always determinative”). The Court also confirmed that the FCA is not a “vehicle for punishing garden-variety breaches of contract or regulatory violations,” and elaborated that “materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.” Id.

The materiality standard becomes more difficult to apply in the false certification context, when the government must demonstrate that the standard or fact to which a contractor falsely certified was actually material to the payment decision. In Escobar, the Court explained the Government’s “decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive.” Id. at 2003. The Court further clarified this point, explaining proof of materiality may include evidence the Government “consistently refuses to pay claims ... based on noncompliance with the particular statutory, regulatory, or contractual requirement,” and that a defendant submitted these claims despite that knowledge. Id. Or, “[c]onversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.” Id.

Thus, materiality cannot rest on a single fact or occurrence as always determinative, and the outcome of each case is based on its own set of facts. Id. at 2001 (quoting Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 39 (2011) (internal quotations omitted). Cases interpreting Escobar’s materiality standard are discussed further in Part Three, infra.

d. Presentation of a claim

To violate the FCA, the false or fraudulent statement must be associated with a “claim” as described by the statute, which is presented to the government. United States ex rel. Prather v. Brookdale Senior Living Communities, Inc., 838 F.3d 750, 768 (6th Cir. 2016). The FCA “attaches liability, not to the underlying fraudulent activity or to the government’s wrongful payment, but to the ‘claim for payment.’” United States v. Lang, 251 F. Supp. 3d 971, 975 (E.D.N.C. 2017) (citing Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999)). See also United States ex rel. Sheldon v. Kettering Health Network, 816 F.3d 399, 411-12 (6th Cir. 2016); United States ex rel. Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1311 (11th Cir. 2002) (holding the FCA “does not create liability merely for a health care provider’s disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe.”).

Under the FCA, a typical false claim “involves an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided.” United States ex rel. Scott v. Pac. Architects & Engineers (PAE), Inc., 270 F. Supp. 3d 146, 153 (D.D.C. 2017). However, courts construe the FCA broadly and will interpret the term “false claims” generally to apply to demands for government funds, such as false applications for government loans, or fraudulent claims for federal assistance. States v. Neifert–White, 390 U.S. 228, 230 (1968); Sell v. United States, 336 F.2d 467, 474 (10th Cir. 1964).

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4 Depending on the number of claims submitted, liability could still be significant even if the government does not pay the claims. Contractors are liable for the statutory penalty applicable to each submitted claim, although there would be no damages (which are subject to trebling). See Part One, Section C, infra.
In broadly construing the FCA, courts have held the “causes to be made” or “presented” prong of the FCA extends liability beyond a prime contractor, reaching any person knowingly assisting in causing the Government to pay claims grounded in fraud. United States ex rel. Tran v. Computer Sciences Corp., 53 F. Supp. 3d 104, 126-27 (D.D.C. 2014). The “causes to be presented” prong will attach liability to a defendant whose conduct was “at least a substantial factor in causing, if not the but-for cause of, submission of false claims.” Id. at 126 (citing United States v. Toyobo Co., 811 F. Supp. 2d 37, 48 (D.D.C. 2011)). Thus, a prime contractor that submits false subcontractor claims to the federal government will be liable if the prime contractor knew of the falsity or acted with reckless disregard or deliberate ignorance of the falsity.

Where courts have considered the liability of a non-submitting party, so long as the person agreed to take critical actions in furtherance of the fraud, courts may find the party liable. In United States v. President & Fellows of Harvard College, 323 F. Supp. 2d 151 (D. Mass. 2004), the court held “where a defendant has an ongoing business relationship with a repeated false claimant, and the defendant knows of the false claims, yet does not cease doing business with the claimant or disclose the false claims to the United States, the defendant’s ostrich-like behavior itself becomes a course of conduct that allowed fraudulent claims to be presented to the government.” Id. at 187 (internal quotation marks and citations omitted).

e. Statute of Limitations

The FCA has a two-tier statute of limitations. The first tier, 31 U.S.C. § 3731(b)(1), sets forth a general statute of limitations, allowing six years from the date of the alleged violation for the government or a qui tam relator to bring suit. See, e.g., United States ex rel. Griffith v. Conn, 117 F. Supp. 3d 961, 984 (E.D. Ky. 2015); United States ex rel. Shemesh v. CA, Inc., 89 F. Supp. 3d 36, 53 (D.D.C. 2015). In certain jurisdictions, “[t]he statute of limitations begins to run on an FCA claim on the date upon which the offender submits a false claim for payment, regardless of the date of payment.” United States ex rel. Jackson v. Univ. N. Tex., 673 Fed. Appx. 384, 387 (5th Cir. 2016) (per curiam). Other courts, however, have held that if payment is made on a fraudulent claim, the statute of limitations begins to run on the date of payment. United States v. Wells Fargo Bank, N.A., 972 F. Supp. 2d 593, 609 n.8 (S.D.N.Y. 2013) (citing Kreindler & Kreindler, 985 F.2d 1148, 1157 (2d Cir. 1993)).

However, if the defendant’s fraudulent activity is concealed at the time of the actual violation, resulting in a delay in the government’s knowledge of the wrongdoing, the FCA allows for a tolling of the typical six-year limitation period. This tolling period allows a plaintiff to bring suit within three years of the date on which a government official knew or had reason to know of the violation, but not to exceed ten years from the date of the false claim. 31 U.S.C. § 3731(b)(2); see, e.g., Shemesh, 89 F. Supp. 3d at 53-54. Circuit courts are split on whether this tolling period applies to qui tam relators, but all circuits agree that the tolling period applies in cases brought by the government. See U.S. ex rel. Sanders v. North American Bus Industries, Inc., 546 F.3d 288, 295 (4th Cir. 2008) (holding the FCA’s tolling provision only applies in cases where the United States is a party); But see United States ex rel. Hunt v. Cochise Consultancy Inc., 887 F.3d 1081 (11th Cir. 2018) (finding that the tolling period “applies to an FCA claim brought by a relator even when the United States declines to intervene”).

As noted above, the tolling period only allows for a maximum of ten years within which to bring suit, meaning that regardless of when the government knew or should have known of the violation, actions under the FCA are limited to no more than ten years from the date of the violation.
f. **Qui Tam Provision**

The FCA's *qui tam* provision allows “private persons, known as ‘relators,’ to bring actions to recover damages on behalf of the United States.” *United States ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772 (S.D.N.Y. 2017) (citing 31 U.S.C. § 3730(b)). The relator is granted rights under the FCA but must cooperate with the government under certain circumstances. Any individual with knowledge of fraudulent activity against the government may file a claim as the plaintiff, and the relator need not have personally been harmed by the defendant in order to bring a *qui tam* suit.

The United States Department of Justice (“DOJ”) is given the chance to be substantially involved in a *qui tam* relator’s suit from its outset. *Qui tam* plaintiffs, who must be represented by an attorney, are required to file their claims under seal and to leave them under seal for at least 60 days. At the end of the 60-day period, DOJ may file a motion showing good cause for the case to remain under seal, see 31 U.S.C. § 3730(b)(3), and such extension requests—often for six months at a time—are not uncommon.

Upon receiving notice of the complaint and a disclosure statement from the relator, DOJ is required to investigate the relator’s allegations of fraud. See 31 U.S.C. § 3730(a). Once its investigation is complete, DOJ has several options:

1. **intervene** in one or more counts of the pending *qui tam* action. As a general matter, this signals more significant potential liability for the defendant, as intervention means the federal government, with all of its resources brought to bear, intends to participate as a plaintiff in prosecuting those counts of the complaint in which it has intervened. However, DOJ intervenes on any count in fewer than 25% of filed *qui tam* actions.

2. **decline** to intervene, in which case, the relator and his or her attorney may continue to prosecute the action on behalf of the United States. The United States is considered a party to the proceedings only insofar as it continues to receive pleadings and retains its right to any recovery but is not considered a party for the purposes of discovery nor will it expend resources on the prosecution.

3. **move to dismiss** the relator’s complaint, either because it believes no violation has occurred, or the case conflicts with significant statutory or policy interests of the United States.

The statute also details 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. 31 U.S.C. § 3730(d)(3).

2. Another *qui tam* concerning the same conduct already has been filed (the “first to file bar”). 31 U.S.C. § 3730(b)(5).

3. The government already is a party to a civil suit or administrative money proceeding concerning the same conduct. 31 U.S.C. § 3730(e)(3).

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6 Once the complaint is filed, copies are provided to DOJ, including the local United States Attorney, and to the assigned judge of the relevant District Court. DOJ is also entitled to a “disclosure statement” from the relator, which must contain “substantially all” of the evidence in his or her possession, related to the complaint’s allegations. See 31 U.S.C. § 3730(b)(2). These materials help DOJ in its investigation and evaluation of the case, and ultimately its decision on intervention, described further below.

7 In addition to impacting the resources brought to bear during the *qui tam* litigation, the decision to intervene has a significant effect on the percentage of proceeds a relator is entitled to if the FCA violation is proven. Specifically, if the government intervenes the relator is entitled to 15%-25% of the total amount awarded (penalty plus damages), but if the government declines to intervene the relator is entitled to 25%-30% of the total amount awarded. See 31 U.S.C. § 3730(d)(1)-(2).

The share of proceeds to which the relator is entitled can be reduced if the relator was involved in the fraud that led to the litigation, and if the relator is convicted of a criminal charge related to this involvement he is dismissed from the claim and can collect nothing. See 31 U.S.C. § 3730(d)(3).
4. The *qui tam* action is based on information that has already been disclosed to the public by some other means, such as criminal, civil, or administrative hearings in which the government is a party, government hearings, audits, reports, or investigations, or through the media (the “public disclosure bar”). 31 U.S.C. § 3730(e)(4)(A). Note, however, that there is an exception to the public disclosure bar where the relator was the original source of the information that was disclosed to the public.

These restrictions seek to prevent “parasitic” *qui tam* actions, where the relator has not helped the government uncover fraud (or have themselves benefitted from the fraud) but seek instead to profit from misconduct already known to the government. *United States ex rel. Shea v. Cellco P’ship*, 863 F.3d 923, 926 (D.C. Cir. 2017) (restrictions on *qui tam* actions created “to curtail abusive suits” and in response to “the danger of parasitic exploitation of the public coffers”).

**B. Typical Course of Enforcement**

FCA cases often arise after a government agency has audited a contractor and identified discrepancies in billing or failures in contract performance that the agency believes amount to FCA violations. The agency can then issue an administrative subpoena, and federal agents and attorneys responsible for investigating the matter will be assigned, or describe its concerns to a local United States Attorney’s office for investigation. Regardless of whether the subpoena is issued by a federal agency, a U.S. Attorney’s office, or a grand jury, the subpoena is usually the first strong indicator that a targeted contractor is facing potential FCA liability.

Subpoenas designed to help the government investigate potential FCA issues often request a range of documents such as emails or other communications, invoicing, contract performance documentation, and contractor cost information. The precise nature of the government’s concern is often difficult to discern from the document requests themselves, however, such that contractors often have outside counsel conduct an internal investigation of the facts while responding to the subpoena. To the extent the contractor learns that the government’s concerns are based on a misunderstanding of contractual requirements or the factual background, counsel can enter into discussions with the government in an attempt to resolve the situation. If the contractor learns that there may have been an FCA violation, counsel can defend the action or negotiate a settlement.

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1 We note also that contractors sometimes become aware of potential FCA violations through internal reviews of invoicing or contract performance (e.g., by a contractor’s Internal Audit group) or anonymous allegations of fraud made through a whistleblower hotline. In such cases, contractors may need to disclose the potential violation to the federal government: FAR 52.203-13—which is required to be included in all prime contracts or subcontracts expected to exceed $5.5 million and with a performance period of 120 days or more—requires contractors themselves to disclose FCA violations to the relevant agency’s Office of the Inspector General if they have “credible evidence” of such violations. Furthermore, because the FCA’s “knowledge” element can be satisfied by reckless disregard or deliberate ignorance of the truth, potential liability is not avoided by refusing to investigate. The FCA does not apply to mere mistakes, however, such that contractors often engage outside counsel to conduct an internal investigation of potential problems, to determine whether there is credible evidence of an FCA violation (i.e., all the required elements have been met) and if so, assist with the disclosure process. Engagement of outside counsel (as opposed to in-house counsel or Internal Audit) allows a contractor to protect the results of the investigation as privileged attorney work product or attorney-client communications and enables the contractor to present a credible, third-party “outsider” to the government in the event a disclosure needs to be made.

2 A subpoena can also be prompted when the government is investigating a *qui tam* relator’s complaint, which will have been filed under seal such that the contractor would have no knowledge of it.

3 As noted above, ensuring that the investigation is conducted by outside counsel is important both to protect investigation materials as privileged and to enable an “outsider” third party to negotiate with the government and/or defend the matter. To the extent the investigation reveals that the government’s FCA concerns are not supported by the facts, law or contract requirements, outside counsel will likely be best positioned to press that case credibly with government investigators.

4 We note that United States Attorneys’ Offices only have authority to settle claims of $1,000,000 or less, or claims of up to $5,000,000 when the difference between the gross amount of the original claim and the proposed settlement does not exceed $1,000,000. See United States Attorneys’ Civil Resource Manual at 46, available at https://www.justice.gov/usam/civil-resource-manual-46-redlegation-authority-compromise-civil-claims. Settlements outside of those parameters must be handled by the appropriate Branch or Office within the DOJ Civil Division.
C. Damages

FCA violations will result in a civil penalty per false claim, of not less than $11,181 and not more than $22,363, plus treble the government’s actual damages. 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.5 (2018). A person who violates § 3729 will also be held liable for the government’s costs for bringing a civil action to recover any penalty or damages. Id.12

1. Treble Damages

In addition to the above penalties applicable on a per-claim basis, a contractor that has violated the FCA will be liable for treble the amount of damages sustained by the government as a result of the conduct. Although trebling actual damages is a straightforward concept, it can be more complicated when an FCA violation is based on a theory of liability implying that every claim submitted in connection with a particular contract is false or fraudulent (e.g., the Fraud in the Inducement and False Certification theories of liability, described in more detail infra at Part Three, Sections A.3 and 4). In such cases, courts must determine what value was received and when to apply the trebling factor; thus, different Circuits compute treble damages differently.

In the Seventh Circuit, courts apply a “net trebling approach,” meaning they determine “the monopoly overcharge—the difference between the product’s actual price and the price that would have prevailed in competition—and trebles that difference.” United States v. Anchor Mortg. Corp., 711 F.3d 743, 749 (7th Cir. 2013) (noting basing damages on net loss is the norm in civil litigation). The Ninth Circuit, however, applies the “gross trebling” approach the Anchor Mortg. Corp. court disfavored, which it defined as trebling “the monopolist’s price, then subtract[ing] that price that would have prevailed in competition.” Id.; see also United States v. Eghbal, 548 F.3d 1281, 1285 (9th Cir. 2008).

The D.C. Circuit has rejected an aggressive government argument on treble damages in United States v. Science Applications International Corp., 626 F.3d 1257 (D.C. Cir. 2010) (“SAIC”). In SAIC, the district court found FCA liability due to an implied false certification regarding disclosure of organizational conflicts of interest; the government argued that damages should be calculated as three times the amount of the full contract price—plus civil penalties—despite the fact that actual damages related to the contract violation were computed as seventy-eight dollars. Ultimately, the district court entered a judgment against SAIC of nearly $6.5 million. SAIC, 626 F.3d at 1264. The circuit court rejected this approach, explaining: “In a case where the defendant agreed to provide goods or services to the government, the proper measure of damages is the difference between the value of the goods or services actually provided by the contractor and the value the goods or services would have had to the government had they been delivered as promised. ... [W]e see no basis for adopting an irrebuttable presumption—essentially what the government seeks—that treats services involving expert advice and analysis affected by potential organizational conflicts as categorically worthless.” SAIC, 626 F.3d at 1278-80.13

Finally, as noted above, due to the FCA’s statutory penalties a person need not have successfully defrauded the government for liability to attach. See, e.g., Lamb Eng’g & Constr. Co. v. United States, 58 Fed. Cl. 106, 111 (2003). The Court of Federal Claims has confirmed that “a contractor who submits a false claim for payment may still be liable under the FCA for statutory penalties, even if it did not actually induce the government to pay out funds or to suffer any loss.” Id. at

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12 The FCA is codified in two different places in the United States Code: 31 U.S.C. §§ 3729-3733 establishes civil liability and 18. U.S.C. § 287 imposes criminal liability. This Guide focuses on the former (i.e., the Civil FCA). Generally speaking, the Criminal FCA requires the same elements but a more significant degree of intent. See United States v. Maher, 582 F.2d 842, 847 (4th Cir. 1978), cert. denied, 439 U.S. 1115 (1979) ("Under § 287, the government must prove beyond a reasonable doubt that the defendant performed forbidden acts with a criminal intent. The prohibition of the statute is absolute in that the defendant's liberty is at stake. Under [the Civil FCA], the government is empowered to enforce the underlying civil duty to submit to the government only valid claims for payment by bringing an action for imposition of civil penalties. The nature of the proceedings, the standards of proof, and the defendant's interests at stake are wholly different under these two statutes.").

13 The Sixth Circuit rejected a similar damages calculation in U.S. ex rel. Wall v. Circle C Construction, LLC, 813 F.3d 616 (6th Cir. 2016), which is described in more detail in Part Two, Section B.5. The government argued for and received damages in the amount of the entire contract value ($763,000), based on an underpayment of statutorily-required wages of just $9,200. In reversing the damages award the Circuit court commented that these damages were not “grounded in reality” and were “fairyland rather than actual.” Id. at 618.
111. Thus, the FCA attaches liability to the “claim for payment,” rather than the underlying fraudulent activity or to the government’s wrongful payment. Id. (noting “the government need not prove actual damages in order to recover statutory penalties”).

2. **Reduced Monetary Liability**

If the court finds that the following factors exist, the court may assess no less than two times, rather than three times, the amount of damages which the government sustains because of the FCA violation:

(A) the person committing the violation 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.

Part Two: Stumbling Blocks

There are situations where the elements required for FCA liability—false statements, made with knowledge, that are material to the government’s payment decision—are more likely to arise. Below we detail common theories of liability pursued by the government, followed by typical fact patterns through which those theories of liability can be proven.

A. Classic Theories of Liability

Below are classic theories of liability pursued by the government.

1. Getting What You Paid For

The “typical” claim “under the FCA alleges that a person or company submitted a bill to the government for work that was not performed or was performed improperly, resulting in an undeserved payment flowing to that person or company.” United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co., 839 F.3d 242, 247 (3d Cir. 2016). FCA liability arises when contractors provide goods to the government but knowingly use inferior or defective parts or materials. See, e.g., United States ex rel. Westrick v. Second Chance Body Armor Inc., 128 F. Supp. 3d 1 (D.D.C. 2015) (involving FCA charges “in connection with allegedly defective body armor material made or sold by the defendants involving federally-funded purchases”). In Second Chance, the government alleged a subcontractor supplied material for bulletproof vests—ultimately purchased by the government—knowing the material was deficient, causing the vests to be defective. See also United States ex rel. Roby v. Boeing Co., 100 F. Supp. 2d 619 (S.D. Ohio 2000) (involving allegations that a contractor violated the FCA by knowingly “manufacturing and selling defective transmission gears to the United States.”). FCA liability also arises when contractors knowingly provide deficient services. See, e.g., United States v. Triple Canopy, Inc., 857 F.3d 174 (4th Cir. 2017). Triple Canopy involved a contract for security services in Iraq that required the contractor to supply guards who had received weapons training and passed tests demonstrating marksmanship competency. Id. at 175-76. Relators alleged the contractor invoiced for guards that the contractor knew had failed to satisfy the contract’s marksmanship requirements. Id. According to the Fourth Circuit, the contractor would be liable under the FCA if the relators proved it knowingly employed and invoiced for guards who “could not, for lack of a better term, shoot straight.” Id. at 179.

2. Truth in Negotiations Act

In 1962, Congress passed the Truth in Negotiations Act (“TINA”), 10 U.S.C. §§ 2306a et seq., to counter what Congress perceived as an imbalance between the negotiating strengths of the government and potential contractors.14 Aerojet Solid Propulsion Co. v. White, 291 F.3d 1328, 1330 (Fed. Cir. 2002). Congress believed contractors were failing to disclose important facts regarding the probable cost of non-competitive contracts when negotiating with the government, and that the government lacked adequate negotiating tools to address the nondisclosures. Unisys Corp. v. United States, 888 F.2d 841, 844 (Fed. Cir. 1989). Contractors, according to Congress, overestimated costs of future contract performance, resulting in frequent, excessively priced fixed price contracts. Lockheed Martin Corp., ASBCA No. 50464, 02-1 BCA ¶ 31,784, at 156,942.

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14 TINA has been renamed the Truthful Cost or Pricing Data Act but is still commonly referred to as TINA. 10 U.S.C. § 2306a, 41 U.S.C. § 3506, FAR 15.403.
TINA attempts to redress the purported imbalance between the government and contractors by requiring contractors to make disclosures of factual data before the parties agree on a price for non-competitive contracts, and of certain subcontracts. United States v. United Techs. Corp., 255 F. Supp. 2d 787, 788 (S.D. Ohio 2003). Stated differently, TINA is a disclosure statute that lacks any prescription regarding pricing requirements for potential contractors, who are free to negotiate whatever prices and terms the government will accept. Motorola, Inc. v. United States, 125 F.3d 1470, 1474 (Fed. Cir. 1997). Nevertheless, the disclosures TINA requires during the negotiation process must be current, accurate and complete.

Because TINA requires these disclosures to the government, FCA liability can attach when the disclosures amount to false statements. Specifically, FCA charges can arise when a contractor invoices the government after knowingly violating TINA during the negotiation process. See, e.g., United States v. BAE Sys. Tactical Vehicle Sys., LP, 2016 WL 894567 (E.D. Mich. Mar. 9, 2016) (government brought FCA charges alleging contractor violated TINA by failing “to meet its obligation to provide cost or pricing data that was accurate, complete, and current”); Sanders v. Allison Engine Co., 703 F.3d 930 (6th Cir. 2012) (involving “allegations that the defendants withheld cost and pricing data during their negotiations with the government’s agent in violation of the Truth in Negotiations Act and the FCA”); United States v. United Techs. Corp., Sikorsky Aircraft Div., 51 F. Supp. 2d 167 (D. Conn. 1999).

3. False Certification (Express or Implied)

As noted above, federal courts have defined two types of false statements that can create FCA liability—“factually” vs. “legally” categories of false claims under the FCA: a factually false claim and a legally false claim.”). A “factually false” FCA case is the straightforward or “paradigmatic” case, involving “an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided.” United States v. Sci. Apps. Intl Corp., 626 F.3d 1257, 1266 (D.C. Cir. 2010); United States v. Loving Care Agency, Inc., 226 F. Supp. 3d 357, 364 (D.N.J. 2016).

“Legally false” claims are premised on a “certification theory” of liability; that is, the claims involve “a false representation of compliance with a federal statute or regulation or a prescribed contractual term.” Mikes v. Straus, 274 F.3d 687, 696 (2d Cir. 2001); U.S. ex rel. Wood v. Allergan, Inc., 246 F. Supp. 3d 772, 783 (S.D.N.Y. 2017). Legally false certification claims “can rest [on] one of two theories—express false certification, and implied false certification.” United States ex rel. Conner v. Salina Reg’l Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008). “In an express false certification, the defendant is alleged to have signed or otherwise certified to compliance with some law or regulation on the face of the claim submitted.” United States ex rel. Hobbs v. MedQuest Assocs., Inc., 711 F.3d 707, 714 (6th Cir. 2013). “The payee’s ‘certification’ need not be a literal certification, but can be any false statement that relates to a claim.” United States ex rel. Lemmon v. Enviroclore of Utah, Inc., 614 F.3d 1163, 1168 (10th Cir. 2010). See also United States ex rel. Sloan v. Waukegan Steel, LLC, 2018 WL 1087642 (N.D. Ill. Feb. 28, 2018) (holding qui tam relator’s allegation that subcontractor submitted false steel weld inspection certifications to prime contractor under a government contract to receive payment was sufficiently detailed and material to survive motion to dismiss). In contrast, a contractor has not expressly certified anything in an implied false certification claim, which is instead “based on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment.” Mikes, 274 F.3d at 699 (emphasis added).
4. **Fraud in the Inducement**

FCA liability can attach for fraudulent inducement claims. See, e.g., *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 902 (9th Cir. 2017). An FCA fraudulent inducement claim occurs where the government awards a contract or provides some other benefit on the basis of false statements or conduct. *United States ex rel. Barko v. Halliburton Co.*, 241 F. Supp. 3d 37, 52 (D.D.C. 2017). “Under the fraudulent inducement theory, liability attaches under [the FCA] for each claim submitted to the Government under a contract which was procured by fraud, even in the absence of evidence that the claims were fraudulent in themselves.” *United States ex rel. Morsell v. Symantec Corp.*, 130 F. Supp. 3d 106, 120-21 (D.D.C. 2015).

B. **Common Trouble Areas**

The above theories of liability can often be pursued in certain factual circumstances or in the context of specific contractual requirements. The most common of these circumstances or contractual requirements are detailed below.

1. **Prime Contractor Liability for Pass-through Claims**

Prime contractors and subcontractors are subject to FCA liability when presenting pass-through claims to the government: “[i]n False Claims Act actions, statements of the subcontractor, when submitted by the general contractor, may serve as a basis for liability against the general contractor.” *United States ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Grp.*, Inc., 370 F. Supp. 2d 18, 41 (D.D.C. 2005). A subcontractor’s false claim can be “attributed to” the prime contractor; “where the prime contractor allegedly knows that a material certification by a subcontractor was false,” courts hold “as a matter of law that the prime contractor has adopted the subcontractor’s certification by submitting it to the government.” *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 793 (4th Cir. 1999); see also *Blake Constr. Co. v. United States*, 28 Fed. Cl. 672, 681 (1993) (pass-through claim requires that the prime “considers there are good grounds for the claim, and that [the prime] intends for it (not [the subcontractor]) to be held liable for any possible fraud attributable to assertion of the claim”).

2. **Performance Deficiencies**

Liability under the FCA can arise through a contractor’s deficient or otherwise inadequate performance of contract work. In *Commercial Contractors, Inc. v. United States*, the U.S. Court of Appeals for the Federal Circuit affirmed that a contractor was liable for violations of the FCA based on submission of false claims for additional compensation related to its contract work. 154 F.3d 1357 (Fed. Cir. 1998). *Commercial Contractors, Inc.* ("CCI") entered into a contract with the Army Corps of Engineers for construction of several segments of the Telegraph Canyon Channel in Chula Vista, California as part of a flood control project. *Id.* at 1361. CCI’s contract work included excavating for the channel segments, constructing the segments by setting forms and pouring concrete into the forms and then backfilling the excavated area around the forms. *Id.* CCI filed suit on its claims for additional compensation and the government counterclaimed for violations of the FCA and the Forfeiture of Fraudulent Claims Act, 28 U.S.C. § 2514.

The contract required CCI to excavate per contract drawings, and based on the evidence presented at trial, the trial court found that CCI submitted false cross-sections and quantity surveys indicating that it excavated up to the contract lines. *Id.* at 1363. CCI did not dispute that excavation was not within the contract lines, but instead argued that it interpreted the contract to allow submission for payment based on the volume of excavation. Therefore, CCI argued that it did not knowingly submit false excavation claims. The court held CCI’s interpretation of the contract was untenable based on the clear and unambiguous contractual requirements. Accordingly, the trial court held “CCI either knew or acted in reckless disregard of whether the cross-sections and quantity surveys it submitted in support of its claims were false.” *Id.* at 1363. The Court of Appeals affirmed the lower court’s finding.

CCI was also found liable for false claims related to the amount of backfill claimed, the composition of its backfill actually used by CCI, and other performance-related issues. The Court of Appeals affirmed the trial court’s ruling that CCI violated the FCA and further that CCI forfeited its affirmative claims through the submission of false claims with the intent to deceive the government.

3. **Calculation and Certification of Claims**

Contractors can violate the FCA when submitting claims that “drastically” inflate their damages. *Daewoo Eng’g and Constr. Co. v. United States*, 557 F.3d 1332 (Fed. Cir. 2009). In that case, the contractor submitted a $64 million claim. *Id.* at 1338. The contractor, however, inflated the amount of the $64 million claim by $50 million. See *id.* at 1338-41; *Daewoo Eng’g and Constr. Co. v. United States*, 73 Fed. Cl. 547, 585 (2006). The contractor assumed the government was responsible for each day of its additional performance period beyond the original performance period, “without even considering whether there was any contractor-caused delay or delay for which the government was not responsible.” *Id.* at 1338. Nor did the contractor use “outside experts to make its certified claim calculation.” *Id.* Instead, the contractor inflated the claim as a “negotiating ploy.” *Id.* at 1339. The court also determined the claim amount was based on a “baseless calculation.” *Id.*

The Federal Circuit affirmed the trial court’s determination that the claim was fraudulent. See *id.* at 1338-41. The trial court had determined the contractors case was “wholly without merit.” *Daewoo Eng’g*, 73 Fed. Cl. at 550. According to the trial court, “the certified claim itself was false or fraudulent and plaintiff knew that it was false or fraudulent.” *Id.* at 585. The contractor “did not honestly believe that the Government owed it the various amounts stated when it certified the claim.” *Id.* at 590. The contractor’s damages experts at trial had treated the certified claim computation as “essentially worthless,” did not use it, and “did not even bother to understand it.” *Daewoo Eng’g*, 557 F.3d at 1338. The employees who prepared the claim “inconsistently referred to and interchanged actual, future, estimated, calculated and planned costs.” *Id.*
In contrast, the court in MW Builders, Inc. v. United States, 134 Fed. Cl. 469 (2017) held that a construction contractor did not violate the FCA. The on-site project manager, who prepared the claim, was “very comfortable” about the costs claimed, which he believed were “accurate.” *Id.* at 522. The claim was signed by MW Builders’ president, “an experienced contractor, who previously performed hundreds of millions of dollars worth of construction work for the Government over ... nineteen years.” *Id.* Although the president’s review of the claim “was not as thorough as it could have been,” the contractor did not submit the claim with reckless disregard of the truth. The estimated costs in the claim were similar to actual costs recorded in contractor’s accounting system. *Id.* at 522-53. Thus, the contractor did not violate the FCA when submitting its certified claim.

4. **Prime Contractor Certifications for Subcontractors**

Under the Contract Disputes Act ("CDA"), 41 U.S.C. § 7101 *et seq.*, claims over $100,000 must include certifications that the claim is made in good faith, the supporting data are accurate and complete, and the amount requested accurately reflects the amount for which the government is liable. 41 U.S.C. § 7103(b). When “passing-through” subcontractor claims to the government, prime contractors must make this certification. AAB Joint Venture v. United States, 68 Fed. Cl. 363, 367 (2005) (dismissing pass-through claim where prime contractor failed to provide CDA certification). A prime contractor’s false certification of its subcontractor’s costs in a pass-through claim gives rise to liability under the FCA. See, e.g., Daewoo Eng’g & Constr. Co. v. United States, 557 F.3d 1332 (Fed. Cir. 2009) (holding prime contractor violated FCA by submitting false claim that included subcontractor costs).

When submitting pass-through claims, prime contractors need not “believe the subcontractor’s claim to be certain. Rather, the prime contractor need only believe that there is good ground for the claim.” Century Constr. Co. v. United States, 22 Cl. Ct. 63, 65 (1990) (citing United States v. Turner Constr. Co., 827 F.2d 1554, 1561 (Fed. Cir. 1987)). In United States v. Turner Construction, the Federal Circuit held that in addition to certifying there is “good ground” for the subcontractor’s claim:

> [H]ow the prime contractor itself would resolve the dispute should not be relevant to the certification issue; the prime contractor should not, through the requirement that it certify subcontractor claims, be used as a substitute for the contracting officer or the board in the determination of the merits of the submitted claims under the CDA.

Turner Constr. Co., 827 F.2d at 1561 (internal citations omitted).

Although “the prime contractor [is] required to review and manage the claims of the subcontractor in order to prevent fraudulent or frivolous claims by the subcontractor,” a prime contractor need only make “a good faith effort to comply” with its legal obligations when submitting pass-through claims. Arnold M. Diamond, Inc. v. Dalton, 25 F.3d 1006, 1010-11 (Fed. Cir. 1994). Accordingly, prime contractors can protect against FCA liability for pass-through claims, and against “exposure to liability for a false certification,” because the prime contractor “is permitted to qualify its certification of the claim under the CDA by relying on the subcontractor’s representations.” George Hyman Constr. Co. v. United States, 30 Fed. Cl. 170, 176 n.11 (1993) (citing Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1580 (Fed. Cir. 1992)); see also Century Constr. Co., 22 Cl. Ct. at 65 (prime contractor “must provide ‘minimum assurances’ of its own belief in a subcontractor claim.”).
5. **Davis-Bacon and Service Contract Act Compliance**

The Davis-Bacon and Related Acts (“Davis-Bacon”), 40 U.S.C. §§ 3141 et seq., require submission of certified information related to the payment of workers on federally funded projects. 40 U.S.C. § 3145. The falsification or misrepresentation of such information may result in liability under the FCA. See *United States v. Fulton Cty., Georgia*, 2016 WL 4158392 (N.D. Ga. Aug. 5, 2016). A purpose of Davis-Bacon is to “give local laborers and contractors fair opportunity to participate in building programs when federal money is involved and to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.” *William J. Lang Land Clearing, Inc. v. Adm'r, Wage & Hour Div.*, 520 F. Supp. 2d 870, 877 (E.D. Mich. 2007).

Under Davis-Bacon, all contractors and subcontractors performing work on federally funded or federally assisted contracts for the construction, alteration, or repair (including painting and decorating) of public buildings or public works in excess of $2,000 must pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits, as determined by the Secretary of Labor. To ensure compliance, contractors and subcontractors subject to Davis-Bacon must furnish weekly wage payroll certifications pertaining to each employee, and prime contractors are responsible for submitting copies of payrolls by all subcontractors and ensuring compliance by subcontractors. See 40 U.S.C. § 3145(a) and 29 C.F.R. § 5.5(a)(3)(ii)(A), (a)(6).

A contractor may be subject to FCA violations where it submits falsified or otherwise inaccurate payroll certifications, as discussed in *United States ex rel. Wall v. Circle Constr., LLC*, 700 F. Supp. 2d 926, 932 (M.D. Tenn. 2010), aff’d in part, rev’d in part sub nom. *United States ex rel. Wall v. Circle C Constr., L.L.C.*, 697 F.3d 345 (6th Cir. 2012). In that case, Circle C contracted with the Army to construct buildings at a military base. Circle C subcontracted 98% of the electrical work to a subcontractor, Phase Tech. However, in Circle C’s submission of payroll certifications to the government, Circle C failed to include any of Phase Tech’s employees, nor did Circle C ensure that Phase Tech complied with the Davis-Bacon prevailing wage requirements. Because Phase Tech did not pay the prevailing wage, the trial court found that the Army would not have paid Circle C the entire amount of electrical work under the contract – $553,807.71 – if the government had known about the false certifications. Accordingly, the trial court concluded that pursuant to the FCA, Circle C was liable for $1,661,423.13 (three times the amount of the government’s alleged damages).

On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed and found Circle C liable for FCA violations, but reduced the award based on a finding that the government’s actual damages were $9,916—the difference between what Phase Tech was required to pay its workers and the amounts that were actually paid. The Sixth Circuit refused to accept that the entire sum paid for electrical work constituted the government’s actual damages:

> [A]ctual damages are the difference in value between what the government bargained for and what the government received. Here, the government bargained for two things: the buildings, and payment of Davis-Bacon wages. It got the buildings but not quite all of the wages. The shortfall was $9,916. That amount is the government’s actual damages.

*United States ex rel. Wall v. Circle C Constr., LLC*, 813 F.3d 616, 617 (6th Cir. 2016).
The McNamara-O'Hara Service Contract Act of 1965 (“SCA”), 41 U.S.C. §§ 6701, et seq., requires that applicable contracts with the federal government “include provisions specifying the contract’s ‘wage determination,’ which sets the wage rates and fringe benefits that must be paid to various classes of covered service employees.” Call Henry, Inc. v. United States, 855 F.3d 1348, 1350 (Fed. Cir. 2017). “The SCA insures that service employees who were protected by a collective bargaining agreement with one contractor are not deprived of the wages and benefits negotiated in that collective bargaining agreement when the contract they work on is competitively awarded to a new contractor.” Id. at 1350. “The SCA restricts employee remedies for violations of the Act to administrative channels,” meaning the Act lacks “a private right of action to employees; the Secretary of Labor has the exclusive right to enforcement.” Trowbridge v. Wernicki, 2015 WL 3746346, at *5 (D. Conn. June 15, 2015).

At least one court, however, has determined that *qui tam* relators can bring FCA claims alleging an employer “fraudulently reported to the United States that it was in compliance with the Service Contract Act.” U.S. ex rel. Sutton v. Double Day Office Servs., Inc., 121 F.3d 531, 532 (9th Cir. 1997). Under this theory, an employer can be held to have “violated the FCA when it submitted a claim for payment to the United States falsely stating that it had complied with the SCA.” Id. at 534. See also U.S. ex rel. Contech v. IKON Office Sols., Inc., 27 F. Supp. 3d 80 (D.D.C. 2014) (“[b]ecause it is not the alleged violation of the Service Contract Act, but rather the defendant’s alleged presentment of a false claim and false certification of compliance to the government for payment that implicates the False Claims Act, the plaintiff/relator has standing to bring a qui tam claim under the False Claims Act”).

6. **Statements Made in Relation to Requests for Payment**

The submission of requests for payment to the government are a common administrative function on government contracts. The Federal Acquisition Regulation (“FAR”) provides requirements for the submission of payment requests, which are largely governed by the type of contract. Inherent in the payment process are certifications made by contractors to the government. These certifications, where containing false or fraudulent information “knowingly” made, may result in violations of the FCA.

a. **Bond Premiums**

FAR 52.232-5(g), Payments Under Fixed-Price Construction Contracts, provides for reimbursement of bond premiums “after the contractor has furnished evidence of full payment to the surety.” In Morse Diesel International, Inc. v. United States, 74 Fed. Cl. 601 (2007), the contractor submitted progress payment applications seeking reimbursement for performance and payment bonds procured for the subject project. Those payment requests, however, included rebates that the surety reimbursed to the parent company of the contractor. Therefore, the requests for payment containing amounts that were reimbursed by the surety “were false and knowingly used by Plaintiff to get a fraudulent claim paid by the Government in violation of the False Claims Act.” Id. at 625.

b. **Payments to Subcontractors and Suppliers**

FAR 52.232-5(c) provides a certification requirement for fixed-price construction contracts requiring contractors to certify that “[a]ll payments due to subcontractors and suppliers from previous payments received under the contract have been made, and timely payments will be made from the proceeds of the payment covered by this certification ... This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract.” Falsely certifying compliance with this clause in order to receive payment from the government can result in liability under the FCA.
In *Lamb Engineering & Construction Co. v. United States*, 58 Fed. Cl. 106 (2003), Lamb Engineering and Construction, Co. ("Lamb") entered into a fixed price contract for the construction of an electrical substation. During performance, Lamb submitted five progress billings and certified that payments had been made to its subcontractors and suppliers. With respect to its fifth invoice, Lamb requested $1,121,073.03, certified that all subcontractors had been paid from previous progress payments, and that Lamb was not withholding any amounts. However, Lamb had not fully paid its subcontractors from funds provided under previous progress payments.

The court found that Lamb’s inclusion of clauses in its subcontracts “providing for it to retain funds in violation of the FAR and [Prompt Payment Act] PPA, which require that subcontractors be paid within seven days,” satisfied the FCA *scienter* requirement. Id. at 110–11. In addition, the court held that Lamb’s submission of a certified invoice, despite having failed to pay its suppliers and subcontractors, convinced the court that Lamb “acted knowingly, or in deliberate ignorance with reckless disregard of falsehoods, when it certified this final progress billing.” Id. The court also found that “the certification provided with Progress Billing No. 5 was also, on its face, false. It therefore will be treated as a separate violation of the FCA.” Id. Accordingly, the court held that each request for payment containing the false certification was a separate claim for which civil penalties under the FCA should be assessed.

7. **Failure to Disclose Organizational Conflict of Interest**

Organizational conflicts of interest are addressed in FAR part 9.5. The FAR requires agency officials to “identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible.” FAR 9.504(a)(1). In addition, FAR 9.504(b) provides that “contracting officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts.” The three main categories of OCIs that have been recognized are: (a) impaired objectivity; (b) biased ground rules; or (c) unequal access to information. FAR 9.505; see also *L-3 Servs., Inc.*, B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171; *Aetna Gov’t Health Plans*, B-254397 et al., July 27, 1995, 95-2 CPD ¶ 129. Most solicitations require offerors to certify no OCI exists or the solicitation may include a provision requiring the offeror to identify a potential OCI.

Companies failing to disclose organizational conflicts of interest ("OCI") in proposals are subject to liability under the FCA. Failure to disclose OCIs may constitute an implied false certification under the FCA. *United States v. Sci. Applications Int’l Corp.*, 555 F. Supp. 2d 40, 51 (D.D.C. 2008); see also *United States ex rel. Ervin & Assoc., Inc. v. Hamilton Sec. Grp., Inc.*, 370 F. Supp. 2d 18, 51-52 (D.D.C. 2005) (“A government contractor’s failure to disclose an organizational conflict of interest constitutes a false claim under the False Claims Act”).

FCA liability can also attach when a contractor mistakenly certifies no OCIs exist. *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003). In *Harrison*, just one of a contractor’s employees knew of the OCI, but that employee did not know that a different employee certified no OCI existed, without knowledge of the OCI. Id. at 919-20. According to the court, through a single employee “alone” the contractor knew “that the substance of the no-OCI certification was false” when the contractor submitted the certification to the government. Id. at 120.

On December 17, 2018, DOJ announced a $100,000 settlement with an offeror that falsely certified no OCI existed when bidding on a defense contract.15 The company did not admit liability. But the settlement confirms DOJ’s interest in FCA claims arising from OCIs and provides a valuable reminder that contractors should implement processes to screen for OCIs.

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8. **Buy American Act (“BAA”) Compliance**

The Buy American Act (“BAA”), 41 U.S.C. § 8301 et seq., creates a preference for domestic construction material and products and applies to the supply of goods and services on supply and construction contracts with the federal government. Beginning in 2016, and for the foreseeable future, compliance with the BAA will likely be an area of increased emphasis. On April 18, 2017, President Trump issued an executive order seeking to “maximize” use of laws, such as the BAA, for all Federal procurements. Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 18, 2017). The order requires agencies to “scrupulously” monitor and enforce laws such as the BAA. As a result, FCA actions could increase because non-compliance with the BAA may serve as a basis for FCA violations. See, e.g., *United States v. Rule Indus., Inc.*, 878 F.2d 535 (1st Cir. 1989); *S.J. Amoroso Constr. Co. v. United States*, 12 F.3d 1072, 1077 (Fed. Cir. 1993).

In *United States ex rel. Kress v. Masonry Sols. Int’l, Inc.*, 2015 WL 3604760 (E.D. La. June 8, 2015), a relator alleged Masonry Solutions, Inc. (“MSI”) violated the FCA by seeking payment for products furnished to a federally funded construction project that were not compliant with the BAA. MSI was a subcontractor on a project to reinforce masonry walls of pumping stations in New Orleans, LA. The relator alleged that MSI violated the BAA by supplying certain spiral bars that were packaged with the label “Made in the USA” when in fact the bars were from England. MSI countered that bars were purchased from England, but England is a designated county exempt from BAA requirements and also that the bars came in a kit that contained materials manufactured in MSI’s Maryland facility. With respect to other material that was purchased from China and supplied by MSI, MSI argued that such material went through a “substantial transformation, without which the product would be useless, and thus created a new construction component that is manufactured in the United States.” *Id.* at *7 (citing 48 C.F.R. § 52.225–11).

On MSI’s motion for summary judgment seeking to have the case dismissed, the court found that no genuine issue of material fact existed as to MSI’s liability under the FCA. However, under different facts, it is clear that BAA violations could have produced FCA consequences for MSI.

9. **Contracting Set-Aside Issues**

According to the Small Business Administration (“SBA”), the current, government-wide procurement goal stipulates that at least 23% of all federal government contracting dollars should be awarded to small businesses. There are additional goals for certain categories of small business such as 8(a) businesses, Women Owned Small Businesses, and Service Disabled Veteran Owned Small Businesses. However, contractors found to have falsely certified compliance with SBA programs may be subject to FCA penalties and debarment from government contracting.

a. **Service Disabled Veteran Owned Small Business (“SDVSOB”)**

In March 2015, the Gilbane Building Company agreed to pay the government more than $1.1 million to settle false claims allegations that a company with which it merged, W.G. Mills Incorporated (“WGM”) violated the FCA by creating a front company, Veteran Constructors Incorporated (“VCI”), to receive a Coast Guard contract that was designated for Service Disabled Veteran Owned Small Businesses (SDVOSBs). The government alleged VCI did not perform the work required under the Coast Guard contract and instead the work was performed by WGM. Further, the government alleged that if the Coast Guard was aware WGM would be performing the work, it would not have awarded the contract to VCI. See also *LW Construction of Charleston, LLC v. United States*, 139 Fed. Cl. 254, 287-92 (2018) (holding government’s allegation of contractor’s misrepresentation regarding contractor’s SDVOSB status at bid and contract award sufficient to meet materiality requirement necessary to proceed with prosecution of government FCA counterclaim); *United States v. Strock*, 2018 WL 647471 at *6-*10 (W.D.N.Y. Jan. 31, 2018) (dismissing government FCA counts due to failure to plead materiality of contractor’s alleged false certifications of SDVOSB qualifications to government’s decision to pay; granting government leave to amend complaint to adequately plead materiality).
b. SBA 8(a) Program


c. Historically Underutilized Business Zone

Lusk Mechanical Contractors, Commonwealth Technologies and the companies’ owners were alleged to have made false certifications to the SBA representing that it was a small business within a Historically Underutilized Business Zone (“HUBZone”) and then used such certification to obtain Army contracts to build a courthouse in Fort Knox, KY. According to the government’s allegations, Commonwealth applied for status as a HUBZone contractor but operated out of Lusk’s offices, which were not located in a HUBZone. Further, the government noted that Commonwealth did not disclose on its SBA application that it shared facilities, equipment, personnel, insurance and bonding with Lusk. To settle the allegations, Lusk, Commonwealth and their owners agreed to pay $3.7 million and forfeit another $2.5 million seized by federal agents.

10. Multiple Award Schedule Compliance Issues

“The General Services Administration of the United States (‘GSA’) negotiates, awards, and manages Multiple Award Schedule (‘MAS’) contracts, which provide federal agencies with a simplified process for obtaining commercial supplies and services at fair and reasonable prices.” United States ex rel. Frascella v. Oracle Corp., 751 F. Supp. 2d 842, 844 (E.D. Va. 2010) (citing 48 C.F.R. § 8.402). Through the MAS program, which is also known as the Federal Supply Schedule (“FSS”) program, “GSA negotiates and administers long-term, government-wide contracts, ensuring at the time of negotiation that these contract prices are fair and reasonable.” K-Lak Corp. v. United States, 98 Fed. Cl. 1, 2 n.3 (2011). Participating contractors agree to provide supplies and services “at stated prices for given periods of time,” 48 C.F.R. 8.402(a), and to publish a listing of the items offered, “as well as the pricing, terms, and conditions applicable to each item.” Sharp Elecs. Corp. v. McHugh, 707 F.3d 1367, 1369 (Fed. Cir. 2013).

Contractors who participate in the MAS program can face liability under the FCA, often as a result of the information they must provide to GSA during the negotiation or performance of MAS contracts. See, e.g., United States ex rel. Ubl v. IIF Data Solns., 650 F.3d 445, 449 (4th Cir. 2011) (qui tam action alleging contractor “made various material false representations about its prior pricing and discounting practices” when applying for MAS contract); United States ex rel. Shemesh v. CA, Inc., 89 F. Supp. 3d 36, 42 (D.D.C. 2015) (qui tam action alleging contractor made false statements in “the process of negotiating the GSA MAS contract ... and as a result, all claims submitted by [the contractor] pursuant to the contract ... were false.”); United States v. Second Chance Body Armor Inc., No. 04-280 (RWR), 2016 WL 3033937(D.D.C. Feb. 11, 2016) (involving allegations contractor sold defective body armor through MAS program).
a. CSP submission


b. Price Reduction Clause Compliance

GSA contracts also typically include a Price Reductions Clause (“PRC”), GSAR 552.238-75, “which requires GSA contractors to maintain a static relationship between GSA’s negotiated discounts or prices and those for a designated customer or category of customers.” United States ex rel. Frascella v. Oracle Corp., 751 F. Supp. 2d 842, 845 (E.D. Va. 2010). Such designated customers are known as Basis of Award (“BOA”) customers and are identified and agreed upon during contract negotiations. Id. “If the relationship between the prices charged to the government and those charged to the BOA customer changes during the life of a MAS contract, the contractor must disclose the change to GSA and offer discounts or prices that restore the static relationship.” Id.

FCA charges can arise if a contractor knowingly fails to comply with the Price Reduction Clause. Id. at 847; see also United States ex rel. Morsell v. Symantec Corp., 130 F. Supp. 3d 106 (D.D.C. 2015) (qui tam action involving allegations contractor violated Price Reduction Clause by failing to disclose discounts larger than those extended to GSA). For example, in Frascella, the government brought FCA charges alleging “Oracle breached the PRC in its Contract by failing to report or offer to GSA certain software license discounts that Oracle purportedly gave to its commercial customers.” Frascella, 751 F. Supp. 2d at 846-47. According to the government, Oracle “routinely” granted its commercial customers discounts exceeding the discounts disclosed to GSA, and knowingly submitted false certifications that its commercial discount and pricing practices had remained consistent. Id. Additionally, the government alleged Oracle “consistently manipulated its sales of software licenses to Commercial End Users” to evade PRC reporting obligations. Id. at 847.

c. Buy American Act (“BAA”) / Trade Agreements Act (“TAA”) Compliance

In addition, noncompliance with these statutes is not *per se* material to the government’s payment decision under the standard set out by the Supreme Court in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). To state a viable FCA claim, “it is not enough that [defendant’s] products failed to comply with the TAA[;]” the plaintiff “must also show that ... TAA compliance was material to the government’s decision to pay.” *Scutellaro*, 2017 WL 1422364, at *19. In 2018, the U.S. District Court for the District of Columbia held that a *qui tam* relator had failed to plead materiality when alleging sales of TAA-noncompliant goods because *Escobar*’s materiality requirement had not been met:

> [T]he relator provides no factual allegations that the ‘Government consistently refuses to pay claims ... based on noncompliance with the particular statutory, regulatory, or contractual requirement,’ as set out in *Escobar*s second factor. ... Instead, the Third Amended Complaint, which was filed after the government was fully informed for years about the relator’s allegations ... is silent as to whether the government took any action whatsoever against the defendants, or took steps to cancel the FSS contracts at issue upon finding out about submission of claims for non-TAA compliant items, or even sent notices regarding TAA non-compliance to the defendants. Any of those steps by the government could have supported a plausible claim that compliance with regulatory or contractual obligations is material to the government’s decision to pay in this case.


The alleged fraudulent scheme must also be identified with particularity in the complaint, including specific sales of non-compliant products and associated false claims. This can be a difficult standard to meet, particularly for *qui tam* relators who are basing a claim on internet research regarding country of origin data for listed goods. Nevertheless, lack of specificity will result in dismissal under Rule 9(b) of the Federal Rules of Civil Procedure for failure to plead fraud with particularity. As the Seventh Circuit recently explained:

> Though Berkowitz alleges the defendants defrauded the government ... the third amended complaint does not contain the underlying details of the fraud scheme. What the complaint fails to allege are any specific facts demonstrating what occurred at the individualized transactional level for each defendant. ... The fact that the defendants may have sold non-compliant products during a certain time period in violation of the TAA does not equate to the defendants making a knowingly false statement in order to receive money from the government.

*United States ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834, 841-42 (7th Cir. 2018); *see also* *U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455 (4th Cir. 2013) (“fraud claims under the Act must be pleaded with particularity pursuant to Rule 9(b) of the Federal Rules of Civil Procedure.”).

### 11. False Estimates

The act of underbidding a job does not by itself create liability under the FCA. However, where a contractor “knowingly” underbids a contract solicitation to increase the chances of winning an award, then the contractor may be liable for violations of the FCA. In *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037 (9th Cir. 2012), a relator brought an action against Lockheed alleging, *inter alia*, that Lockheed “submit[red] a fraudulently low bid, based on knowing underestimates of its costs, to improve its chances of winning the Air Force RSA IIA contract.” *Id.* at 1047. In a matter of first impression for the Ninth Circuit Court of Appeals, the court, relying on precedent from the First and Fourth Circuits, held “that false estimates, defined to include fraudulent underbidding in which the bid is not what the defendant actually intends to charge, can be a source of liability under the FCA, assuming that the other elements of an FCA claim are met.” *Id.* at 1049.
Part Three: Enforcement Trends and Notable Cases

The federal government remains very active in pursuing FCA cases against contractors it believes have submitted false or fraudulent claims.

A. 2018 Enforcement Statistics

In the 2018 fiscal year, DOJ obtained over $2.8 billion in settlements and judgments from civil cases involving fraud and false claims against the government. From 1986 to the end of fiscal year 2018, civil False Claims Act recoveries now total more than $59 billion.16

1. Targeted Industries

The $2.8 billion of 2018 recoveries was heavily weighted towards the health care industry, with $2.5 billion coming from companies and individuals allegedly providing unnecessary or inadequate care, paying kickbacks to health care providers to induce the use of certain goods and services, or overcharging for goods services paid for by Medicare, Medicaid, and other federal health care programs. Housing and mortgage fraud came in second, with approximately $150 million recovered from Deloitte & Touche LLP, related to its role as the independent outside auditor of a failed originator of mortgage loans insured by the Federal Housing Administration. The DOJ also aggressively pursued a variety of procurement fraud matters, with recoveries exceeding $106 million. Finally, the FCA was used in 2018 to redress avoidance of antidumping duties (levied to protect against unfair trade practices of foreign nations), with a Virginia-based home furnishings company paying $10.5 million to resolve allegations it knowingly made false statements on customs declarations to avoid paying such duties.17

2. Qui tam statistics

Of the $2.8 billion recovered in fiscal year 2017, $2.1 billion related to qui tam matters, and the government paid out $301 million to relators. Total qui tam recoveries fell by 34% from 2017 to 2018, and qui tam recoveries were also a lower percentage of the 2018 total (73%) as compared to 2017 (92%). There were 645 qui tam lawsuits filed in fiscal year 2018, or an average of more than 12 new cases each week.18

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17 Id.

B. 2018 Developments

1. Department of Justice Guidance Memoranda

   a. The Granston Memorandum

On January 10, 2018, Michael Granston, Director of DOJ’s Commercial Litigation Branch, Fraud Section, issued a memorandum (the “Granston memo”) identifying a non-exhaustive list of factors for DOJ to use in evaluating whether to dismiss meritless FCA cases in accordance with 31 U.S.C. § 3730(c)(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.”).19 As DOJ noted in the Granston memo, the provision is invoked “sparingly.” According to DOJ, however, section 3730(c)(2)(A) remains an “important tool to advance the government’s interests, preserve limited resources, and avoid adverse precedent,” permitting DOJ to seek dismissal of an action if the government determines the lawsuit is not in its best interests, provided the relator has an opportunity for a hearing on the government’s motion to dismiss.

Section 3730(c)(2)(A) appears clear in providing DOJ with full authority to dismiss a qui tam action, and most courts have recognized this. See, e.g., Swift v. United States, 318 F.3d 250, 252 (D.C. Cir. 2003) (provision gives “the government an unfettered right to dismiss an action,” meaning the government’s decision is “unreviewable”); Hoyte v. Am. Nat. Red Cross, 518 F.3d 61, 65 (D.C. Cir. 2008) (discussing “the Government’s virtually ‘unfettered’ discretion to dismiss the qui tam claim”); Riley v. St. Luke’s Episcopal Hosp., 252 F.3d 749, 753 (5th Cir. 2001) (“the government retains the unilateral power to dismiss an action notwithstanding the objections” of the relator). Nevertheless, under Ninth Circuit precedent, courts apply a two-step process, requiring DOJ to have a valid purpose for dismissing the action. United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139 (9th Cir. 1998). In United States v. Academy Mortgage Corp., No. 16-cv-02120-EMC, 2018 WL 3208157 (N.D. Cal. June 29, 2018), for example, the court denied the government’s motion to dismiss under Section 3730(c)(2)(A). The government had declined to intervene and “the complaint [had] not been fully investigated.” Id. at *3. The court refused to dismiss the qui tam action because the “criteria for granting the Government’s motion to dismiss” is similar to a “‘good cause’ requirement.” Id.

The factors enumerated in the Granston memo therefore provide a useful roadmap for FCA defendants to advocate for dismissal under section 3730(c)(2)(A). Those factors include: (1) “curbing meritless cases;” (2) “preventing parasitic or opportunistic” cases providing “duplicitative information already known to the government;” (3) “preventing interference with agency policies and programs;” (4) controlling litigation to “avoid the risk of unfavorable precedent;” (5) “safeguarding classified information and national security interests;” (6) “preserving government resources” “when the government’s expected costs are likely to exceed any expected gains;” and (7) addressing relators’ “egregious procedural errors.” In addition to these factors, the memorandum instructs DOJ attorneys to consult closely with affected agencies to determine whether dismissal is warranted, as well as relators – informing relators on perceived deficiencies in their cases and assisting them in making informed decisions as to whether to proceed with their action.

Although the extent of the Granston memo’s influence on DOJ policy was difficult to perceive at the time it was issued, DOJ has since moved to dismiss FCA suits described by the factors enumerated in the memorandum. Specifically, on December 17, 2018, DOJ filed motions to dismiss ten separate FCA cases rooted in alleged violations of the federal Anti-Kickback Statute. Consistent with the Granston memo, DOJ argued that relators lacked inside knowledge of the alleged fraud, raising concerns of opportunistic relators seeking windfalls. DOJ also argued that the suits would interfere with federal healthcare policy and the government’s administration of healthcare programs. Additional factors raised in the Granston memo also supported DOJ’s decision to seek dismissal. For example, DOJ noted that the suits would unduly

burden the government, including the costs of monitoring the litigation and placing additional burdens on the courts. DOJ also noted the cost to defendants in responding to potentially meritless claims. These motions were consistent with DOJ increasingly seeking to dismiss meritless qui tam actions as recommended in the Granston memo.

b. The Brand and Sessions Memoranda

On January 25, 2018, Associate Attorney General Rachel Brand published a memorandum (the “Brand memo”) addressing a November 16, 2017 memorandum previously issued by Attorney General Jeff Sessions (the “Sessions memo”).

The Sessions memo prohibited DOJ from issuing guidance documents that effectively adopt new regulatory requirements or amend the law. The Sessions memo serves to prevent DOJ from evading rulemaking requirements through guidance documents. The Sessions memo also directed the Associate Attorney General, as Chair of DOJ’s Regulatory Reform Task Force, to identify existing guidance documents that should be repealed, replaced, or modified.

The Brand memo extended the Sessions memo to guidance documents produced by other government agencies that may be used by DOJ in the course of affirmative civil enforcement (“ACE”). The Brand memo explained that “the Department may not use its enforcement authority to effectively convert agency guidance documents into binding rules. Likewise, Department litigators may not use noncompliance with guidance documents as a basis for proving violations of applicable law in ACE cases.” The Brand memo made clear that this policy extends to enforcement of the FCA.

Though the Brand and Sessions memos are not as influential as the Granston memo, they could also have a substantial effect on future FCA enforcement. Agencies often publish internal guidance and guidelines that do not meet the Administrative Procedure Act’s (“APA”) notice-and-comment rulemaking requirement. These memoranda make clear that contractors will not be presumed to have violated the FCA where noncompliance with such internal guidance and guidelines is alleged, nor can such allegations be used to prove FCA violations.

Deputy Associate Attorney General Stephen Cox underscored this point on February 28, 2018, in prepared remarks at the American Bar Association Qui Tam Conference. During his speech, Deputy Associate AG Cox noted that the FCA is DOJ’s “most important civil enforcement tool to protect the taxpayer from fraud,” while quoting the Supreme Court’s observation in Escobar that the FCA “is not an all-purpose anti-fraud statute, or a vehicle for punishing garden-variety breaches of contract or regulatory violations.” Thus, DOJ must “avoid any attempts to push the envelope by seeking to regulate through our enforcement efforts.” Deputy Associate AG Cox reiterated that, under the Brand memo, DOJ will not use “noncompliance with a guidance document to prove a violation” of the FCA. For example, if an agency issues a guidance document expanding upon a regulatory requirement – by suggesting there are additional requirements or prohibitions beyond the regulation’s actual language – DOJ will not use noncompliance with those supposed “requirements” to argue a contractor violated the regulation.

Deputy Associate AG Cox also reinforced that DOJ will follow the Granston memo by exercising its authority under the FCA to dismiss qui tam cases that are not in the best interests of the United States. Dismissing meritless FCA cases conserves DOJ and judicial resources and will help to avoid bad cases, which can produce bad law. Dismissal is also “warranted if the government does not believe that it suffered harm, regardless of whether a false claim was submitted.” Deputy Associate AG Cox noted that consistent with Escobar, DOJ will work to understand an agency’s views on materiality. DOJ will determine if the agency administering the program takes the position that it was not defrauded or that the alleged false claim was immaterial to payment.


2. Senate Judiciary Committee Chairman Comments on Escobar’s Materiality Standard

After the Supreme Court issued its Escobar decision in June 2016, Smith Pachter McWhorter practitioners noted at the time that “it was too much to expect the Court to reject implied certification outright.” Specifically, Senator Charles Grassley (R-Iowa), Judiciary Committee chairman, had made implied threats of legislative reversal in his amicus brief submitted to the Court.23 In his brief, Senator Grassley forcefully argued in favor of implied certification. He reminded the Court that Congress has reacted swiftly to overrule Supreme Court decisions in response to what Congress deems “narrowing interpretations” of the FCA. According to Senator Grassley, implied certification was “congressionally reaffirmed” as an FCA theory of liability, and he warned against “the Court den[y]ing the theory altogether.”

On February 13, 2018, Senator Grassley read a prepared statement on the Senate floor addressing what he described as “troubling developments in the courts’ interpretation of the False Claims Act.”24 Although the Supreme Court in Escobar accepted the notion of implied certification that is not tied to violation of an express condition of payment, Senator Grassley noted his disagreement with how lower courts have interpreted the decision. Senator Grassley first described his efforts in the mid-1980s to eliminate the “government knowledge bar,” under which a relator's suit would be barred under any circumstance if the government had been previously made aware of the fraud at issue. Senator Grassley then fast-forwarded to the Supreme Court's decision in Escobar – the holding of which he endorsed – and described concerns that Escobar's materiality standard is now being misapplied by lower courts. In Senator Grassley’s view, lower courts are “applying [the Court’s] analysis inappropriately or as strictly as possible – to the point of absurdity,” the practical effect of which is to revive the “government knowledge bar” that he had worked to remove.

The senator continued that taxpayers should not be penalized where “someone, somewhere in the bowels of bureaucracy might have heard the allegations that the contractor may have done something wrong.” Essentially, Senator Grassley advocated a position that fraud allegations should not be deemed to fail the Escobar materiality standard simply because rumors of fraud may circulate in the lower levels of an agency. In concluding his statement, the senator reiterated his view that (1) the government's behavior in response to fraud is not the only factor for assessing materiality; (2) the materiality standard is limited to “actual knowledge;” (3) the government may pay a false claim, even in light of knowledge of fraud, due to critical need of the items or services at hand; and (4) the courts should not read a requirement into Escobar’s materiality standard that the government must immediately stop paying claims or first pursue a remedy when it receives a false claim.

Senator Grassley’s disapproval of decisions applying Escobar raises the prospect that Congress may amend the FCA to reverse the decision, which, according to Congress, has caused the lower courts to stray too far from the Act. Congress had done so in the past. For example, Congress passed the Fraud Enforcement and Recovery Act of 2009 (FERA),25 which responded to United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004) by amending the FCA to no longer require that a false claim be presented directly to the federal government. Earlier, 1986 amendments to the FCA responded to United States ex rel. State of Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984), which held that the state of Wisconsin could not be a qui tam relator because the suit was based on information in the U.S. government’s possession when the suit was filed, notwithstanding that Wisconsin was the source of the information. Congress amended the FCA to permit qui tam suits brought by relators whose independent investigation uncovered the alleged fraud. In 1943, Congress amended the FCA in response United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943), eliminating jurisdiction over qui tam suits based on evidence known by the government at the time of filing.

3. Confirmation of Brett M. Kavanaugh as an Associate Justice of the U.S. Supreme Court

On July 9, 2018, President Trump nominated Judge Brett M. Kavanaugh to be Associate Justice on the U.S. Supreme Court.26 Judge Kavanaugh had served as a judge on the U.S. Court of Appeals for the District of Columbia Circuit for twelve years. During his time on the D.C. Circuit, Judge Kavanaugh joined several panel decisions that enhanced protections afforded FCA defendants. For example, he joined the D.C. Circuit’s opinion in U.S. ex rel. Purcell v. MWI Corp., 807 F.3d 281 (D.C. Cir. 2015), reversing a $22.5 million verdict for the government. As Smith Pachter McWhorter attorneys noted at the time, the decision will likely place reasonable restraints on qui tam relators and the Department of Justice. See John S. Pachter and Todd M. Garland, Encouraging Signs for False Claims Act Litigation: Recent Decisions Aligned to Guide Supreme Court Review, 105 Fed. Cont. Rep. (BNA) No. 3, at 67 (Jan. 26, 2016). In addition, Judge Kavanaugh joined a panel that faithfully followed the Supreme Court’s Escobar decision in United States ex rel. McBride v. Halliburton Co., 848 F.3d 1027 (D.C. Cir. 2017), affirming summary judgment for an FCA defendant because the qui tam relator failed to offer evidence that any misrepresentation by defendant was material to the Government’s decision to pay.

Judge Kavanaugh also joined several other panel decisions that rejected expansive theories presented by plaintiffs under the FCA. See, e.g., U.S. ex rel. Schneider v. JPMorgan Chase Bank, Nat’l Ass’n, 878 F.3d 309 (D.C. Cir. 2017) (rejecting claims FCA defendant falsely claimed complaint with requirements of a settlement to avoid payments to the government); U.S. ex rel. Folliard v. Gov’t Acquisitions, Inc., 764 F.3d 19 (D.C. Cir. 2014) (affirming summary judgment in favor of GSA schedule holder, agreeing with district court that contractor did not falsely certify compliance with TAA’s COO requirements because the contractor reasonably relied on supplier’s certification).27

On October 6, 2018, the Senate voted to confirm Kavanaugh as associate justice. He was sworn in the same day.

C. Notable Cases and Settlements

As described in further detail below, there have been a number of notable, recent developments in FCA case law since publication of our last Guide.

1. The Supreme Court Granted Certiorari to Address Whether the FCA’s “Government Knowledge” Statute of Limitations Applies Only if the Government Intervenes


On November 16, 2018, the Supreme Court granted certiorari to address two issues related to the FCA’s statute of limitations. As discussed above, the FCA includes a two-tier statute of limitations. The government or qui tam relators can file suit within six years of an alleged violation. 31 U.S.C. § 3731(b)(1). The FCA also includes a tolling provision if defendant conceals fraudulent activity when violating the FCA, resulting in a delay in the government’s knowledge of the wrongdoing. Id. § 3731(b)(2). In Hunt, the Court will address whether the tolling provision, which is based on government knowledge, applies if the government declines to intervene. The Court will also address whether a qui tam relator is an “official of the United States” for purposes of the FCA’s tolling provision.

26 White House, Remarks by President Trump Announcing Judge Brett M. Kavanaugh as the Nominee for Associate Justice of the Supreme Court of the United States (July 9, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-announcing-judge-brett-m-kavanaugh-nominee-associate-justice-supreme-court-united-states/.

Hunt involved allegations that two contractors violated the FCA while performing a contract to clean up excess munitions in Iraq. Hunt alleged defendants engaged in a kickback scheme from February through September 2006. On November 30, 2010, the FBI interviewed Hunt about his role a separate kickback scheme. During that interview, he informed the FBI about the alleged fraud involving the contract to remediate munitions in Iraq. The FBI charged Hunt for his role in the separate kickback scheme. After pleading guilty, Hunt served ten months in prison.

After he was released from prison, Hunt filed the complaint at issue on November 27, 2013. He filed his complaint more than six years after the alleged fraud occurred. But he filed his complaint within three years of when he disclosed the fraud to the FBI. The district court held that the three-year tolling period in the FCA's statute of limitations, which is based on the government's knowledge, does not apply when the government declines to intervene. The district court dismissed Hunt's complaint as time barred.

On appeal, the Eleventh Circuit held that section 3731(b)(2)'s “three year limitations period applies to an FCA claim brought by a relator even when the United States declines to intervene.” Applying the FCA's text, the court determined that nothing in section 3737(b)(2) “says that its limitations period is unavailable to relators when the government declines to intervene.” Absent language limiting section 3731(b)(2) to cases in which the government intervenes, relators can rely on the provision. The court also interpreted the provision in the FCA's “broader statutory context.” The court rejected defendant's arguments that allowing section 3731(b)(2) to apply in non-intervened cases would lead to absurd results or render the six-year limitations period superfluous.

The court also held that the relator's knowledge does not affect when the period begins to run. Thus “when the relator learned of the fraud is immaterial for statute of limitations purposes” under section 3731(b)(2). Instead “it is the knowledge of a government official, not the relator, that triggers the limitations period” in section 3731(b)(2). Again applying the statutory text, the court held that nothing in the FCA “or broader context suggests that the limitations period is triggered by the relator's knowledge.” Because the court considered the statutory language to be “plain,” the court refused to rewrite the statute.

2. Consistent with the Granston Memo, DOJ Requests to Court to Deny Certiorari in U.S. ex rel. Campie v. Gilead Sciences, Inc.

In the 2017 Guide, we discussed U.S. ex rel. Campie v. Gilead Sciences., Inc., 862 F.3d 890 (9th Cir. 2017). Campie involved alleged fraud under federal health care programs. But the case addressed issues that frequently arise in the federal government contracts context. The court held that relators' complaint stated a claim that Gilead provided “nonconforming goods” to the government, meaning Gilead misrepresented the goods it provided. Even if the items supplied by Gilead under its contract were as good as the ones for which the government contracted, the court held Gilead could still be liable if it attempted to deceive the agency.

At the end of 2017, Gilead petitioned the Supreme Court for certiorari. Gilead asked the Court to review whether an FCA allegation fails when the government continued to approve and pay for products after learning of alleged regulatory infractions. On April 16, 2018, the Supreme Court invited the Solicitor General to file a brief expressing the government’s views of the case. On November 30, 2018, the government filed its amicus curiae brief.28 The government urged the Court to decline to grant certiorari. The case, according to the government, would be a “poor vehicle” for considering whether the complaint met the FCA's materiality requirement as set forth in Escobar. Thus, the government informed the Court that further review “is not warranted.”

The government also informed the Court that the Department of Justice will move to dismiss relators’ *qui tam* complaint if the case is remanded to the district court. The FCA authorizes the government to dismiss *qui tam* suits over a relator’s objection. 31 U.S.C. § 3730(c)(2)(A). The government typically does so where continuation of the case interferes with agency work. In *Campie*, the government considers continued prosecution of the case to be “not in the public interest.” The government informed the Court that allowing the suit to proceed “would impinge on agency decisionmaking and discretion and would disserve the interests of the United States.” The government also expressed concern that “both parties might file burdensome discovery and *Touhy* requests for FDA documents and FDA employee discovery (and potentially trial testimony), in order to establish exactly what the government knew and when.” These requests, according to the government, would distract from the FDA’s public-health responsibilities.

*Campie* appears to be the most prominent case in which DOJ has, consistent with the Granston memo, sought to end an FCA case that would interfere with government operations. DOJ’s concerns about “burdensome discovery” could prove useful to FCA defendants urging the government to dismiss meritless *qui tam* complaints.

On January 7, 2019, the Supreme Court declined to grant *certiorari*. *Gilead Scis., Inc. v. U.S. ex rel. Campie*, 2019 WL 113075 (U.S. Jan. 7, 2019) (No. 17-936). The case will thus be remanded to U.S. District Court for the Northern District of California. In June 2015, the district court granted defendant’s motion to dismiss, dismissing relator’s complaint with prejudice. As stated, the Department of Justice is expected to seek dismissal, which relators can challenge. But the Ninth Circuit’s employs a deferential standard when the U.S. government moves to dismiss a *qui tam* action. Under 31 U.S.C. § 3730(c)(2)(A), courts in the Ninth Circuit grant request by the U.S. government to dismiss *qui tam* actions over relator’s objections if “the government offers reasons for dismissal that are rationally related to a legitimate government interest.” *U.S. ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1147 (9th Cir. 1998).

3. **The Supreme Court Denied *Certiorari* in *Trinity Industries*, Refusing to Invalidate the Fifth Circuit’s Decision Overturning a $663 Million Jury Verdict**

In *U.S. ex rel. Harman v. Trinity Industries Inc.*, 872 F.3d 645 (5th Cir. 2017), the Fifth Circuit applied the FCA materiality requirement, reinforcing the “demanding” standard established in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). Specifically, the Fifth Circuit overturned a $663 million jury verdict. The court entered judgment in favor of defendant, holding the alleged fraud was not material to the government’s payment decision.

The case arose from Trinity’s manufacture and sale of a system designed to make guardrails safer during head-on collisions. In 2000, the Federal Highway Administration (“FHWA”) approved Trinity’s system. In 2005, Trinity modified the system to accommodate increased use of SUVs. Trinity’s report to FHWA addressing the modifications discussed some, but not all, of the changes. There was uncontradicted testimony, however, that the changed units were tested in 2005. FHWA approved Trinity’s modified system.

Relator filed a *qui tam* complaint alleging Trinity failed to disclose changes in the modified system, which was “a completely new product” from the original system approved by FHWA. Before trial, FHWA released an official memorandum stating that Trinity’s system had been tested, met federal safety requirements, and remained eligible for reimbursement from 2005 to the present. After the jury returned a verdict for Harman, but before the district court entered judgment, an independent joint task force of state, federal, and foreign transportation officials examined over one thousand guardrails installed with Trinity’s system. The federal government confirmed that Trinity’s system was compliant with federal safety standards.

After the task force released its findings and the federal government affirmed its approval of Trinity’s system, the district court entered a $663,360,750 judgment against Trinity.
The Fifth Circuit reversed the trial court, holding relator could not meet the FCA’s materiality requirement. Allegations of fraud are not material when agencies affirm approval of a product after learning of FCA allegations. In those instances, allowing an FCA claim to proceed would “turn the FCA into a tool with which a jury of six people could retroactively eliminate the value of agency approval and effectively require that a product be withdrawn from the market even when the agency itself sees no reason to do so.” The FCA “exists to protect the government from paying fraudulent claims, not to second-guess agencies’ judgments about whether to rescind regulatory rulings.”

On January 7, 2019 – the same day the Supreme Court declined to grant certiorari in Gilead Sciences – the Supreme Court denied certiorari in Trinity Industries. In allowing the Fifth Circuit’s decision to stand, Trinity Industries affirms that the Supreme Court’s insistence on strict enforcement of the FCA’s materiality requirement has become a powerful defense for contractors accused of fraud.

4. Consideration of FCA Materiality Standard

There have been several interesting decisions interpreting Escobar’s materiality standard. Similar to Campie (discussed above), courts have focused on an agency’s continued payment of claims once it learns of the alleged noncompliance, or failure to take other contractual actions to remedy the violation, as an indicator that the alleged violation was not material to the government’s payment decision – as required by Escobar. This reasoning is precisely the sort that Senator Chuck Grassley (R-IA), Chairman of the Senate Judiciary Committee, identified as problematic in his February 2018 comments.

a. Marsteller et al. v. Tilton, 880 F.3d 1302 (11th Cir. 2018)

In Marsteller, the Eleventh Circuit reinstated a qui tam suit alleging defendants overcharged the government for military helicopters. According to the Eleventh Circuit, the district court dismissed the case in a “profoundly uncertain legal environment” before the Supreme Court issued its Escobar decision.

Relators alleged a helicopter manufacturer and others provided material false or incomplete information during pre-contract negotiations and that defendants submitted false claims for payment. The complaint also described other improprieties between the colonel who managed the program on the Army’s behalf and defendants. These alleged improprieties included gifts and an offer of prospective employment to the colonel. Before the Supreme Court issued its decision in Escobar, the district court dismissed the complaint. The district court held that relators “failed to establish liability under the implied certification theory, because the relators had not alleged adequately that a defendant had violated an express condition of payment or a material contractual requirement.”

On appeal, the Eleventh Circuit reversed, holding “the district court must revisit whether the relators alleged facts sufficient to support a theory of implied certification as articulated in Escobar.” In dismissing the complaint before Escobar, the district court had “faced a daunting legal landscape” due to the circuit split regarding whether implied certification was a viable theory of liability under the FCA. In that environment, the district court held that “the FCA is violated only where compliance with a law, rule, or regulation is a prerequisite to payment” and a participant makes a claim for payment despite a knowing failure to comply with that condition. The court of appeals remanded the case because “Escobar makes clear that the district court’s principal method for evaluating implied certification claims ... is no longer appropriate.”

In Cressman, the Eastern District of Pennsylvania granted a defendant solid waste services company’s motion for summary judgment, finding an alleged environmental regulatory violation immaterial to the federal government customer’s decision to pay invoices for waste transport. Relying on an implied false certification theory of liability, a qui tam relator brought FCA claims against Solid Waste Services, Inc. (“SWS”), his former employer, alleging its compliance with all federal environmental public safety laws was an express or implied condition of its waste removal service contracts with federal agencies.

SWS generally provided two services to federal agencies: picking up and transporting solid waste and running a “transfer” station that temporarily stores certain types of waste to be disposed of at other facilities. The operation at one of SWS’ transfer stations generated leachate. Leachate is a liquid that passes through or is generated by trash at a solid waste facility, and its collection and treatment is a requirement of Pennsylvania Department of Environmental Protection (“DEP”) permitted solid waste facilities. The relator observed two SWS employees discharge some transfer station leachate onto a grassy area of the property, in violation of environmental regulations. Once the relator brought the violation to the attention of his superiors, DEP was notified, corrective measures were taken, and DEP and SWS executed a “Consent Assessment of Civil Penalty” in lieu of a formal administrative proceeding. Seventeen days following that agreement, however, plaintiff filed his qui tam complaint, alleging that SWS violated the FCA by submitting invoices to federal agencies without disclosing its violation of environmental laws or regulations related to the “Discharge Incident/Violation.”

Characterizing the FCA’s materiality standard as “rigorous,” the court granted the defendant’s motion for summary judgment, explaining the relator “overstate[d] the scope of existing law with respect to [FCA] claims …, particularly with respect to the materiality requirement.” The court focused on several issues as it considered materiality: 1) SWS never transported trash from federal agencies to the transfer station where the violation occurred, such that the violation was “not remotely related to Defendant’s service contracts with the federal agencies;” and 2) the court found no connection between the alleged violation and the decision to pay the invoices, particularly because for four years following the suit, as well as after DOJ conducted an investigation and declined to intervene, the agencies at issue continued to pay SWS invoices. Given the agencies’ waste was never physically in the transfer station at issue, and the government continued to pay SWS’ invoices once the government learned of the violation, the court found there was no connection or nexus between the regulatory violation and the waste collection performed, and the alleged omission did not meet the Escobar materiality standard.


Citing United States ex rel. Harman v. Trinity Industries Inc., 872 F.3d 645 (5th Cir. 2017), covered in the 2017 Guide, the Middle District of Florida overturned judgments of almost $350 million that had been based on the theory that defendant nursing home operators had submitted false claims by billing for Medicaid services without maintaining a “comprehensive care plan” required by regulation. As the court explained, the relator “offered no meaningful and competent proof that the federal or the state government, if either or both had known of the disputed practices (assuming that either or both did not know), would have regarded the disputed practices as material to each government’s decision to pay the defendants and, consequently, that each government would have refused to pay the defendants.” Ruckh, 304 F. Supp. at 1260. The court noted this was a failure to meet the requirements “required emphatically” by Escobar, and further explained:

The evidence and the history of this action establish that the federal and state governments regard the disputed practices with leniency or tolerance or indifference or perhaps with resignation to the colossal difficulty of precise, pervasive, ponderous, and permanent record-keeping in the pertinent clinical environment. The evidence shows not a single threat of non-payment, not a single complaint or demand, and not a single resort to an administrative remedy or other sanction for the same practices that result in the enormous verdict at issue.


As described above, the District Court of the District of Columbia dismissed an FCA case based on alleged sales of goods not compliant with the Trade Agreements Act ("TAA"), as required under the relevant GSA Federal Supply Schedule ("FSS") contract, again based on lack of materiality:

> [T]he relator provides no factual allegations that the ‘Government consistently refuses to pay claims … based on noncompliance with the particular statutory, regulatory, or contractual requirement,’ as set out in Escobar's second factor. ... Instead, the Third Amended Complaint, which was filed after the government was fully informed for years about the relator's allegations … is silent as to whether the government took any action whatsoever against the defendants, or took steps to cancel the FSS contracts at issue upon finding out about submission of claims for non-TAA compliant items, or even sent notices regarding TAA non-compliance to the defendants.


5. **Other Case Developments**

a. **Sentencing – United States v. Michael Hendrickson**

On February 13, 2018, an Idaho man was sentenced to one year of confinement, including six months of imprisonment and six months of home detention, and three years of supervised release. He was also ordered to pay $337,000 in restitution and a $5,000 fine.

Michael Hendrickson, 56, was an employee of Paramount Supply, which sold equipment to the Department of Energy ("DOE"). While employed by Paramount, Hendrickson created another business entity in April 2009, which also sold equipment to the DOE. The government alleged that in June and July 2010, Hendrickson ordered equipment from Paramount for the DOE’s Idaho National Laboratory ("INL"), invoiced the contractor who operates the INL for the DOE, but falsely represented on the invoices that Hendrickson’s second business sold the items, not Paramount. Hendrickson’s business was paid approximately $80,000 for the items actually supplied by Paramount. Hendrickson pleaded guilty to the charge of filing a false claim with the DOE in November 2017. This matter provides a good example of a criminal FCA matter, as the government believed the necessary intent to defraud was present.


In an FCA suit filed in 2004, the United States alleged Second Chance Body Armor, Inc., and Toyobo Co. Ltd., and their subsidiaries, knowingly sold defective bulletproof vests to federal, state, and local police departments. The Government's investigation into both companies arose after two officers were shot through bulletproof vests manufactured by the defendants. A relator alleged both companies knew the vest contained ballistic material that degraded more quickly than was made known to the government.

Second Chance and its executives named in the suit settled in 2012, leaving Toyobo to continue defending the case. In September 2015, Toyobo successfully moved for partial summary judgment on the Government's allegations pre-dating 2002 – the first year in which Second Chance’s guarantee of product performance was incorporated into its contract with government agencies. However, after the Supreme Court’s decision in *Escobar*, the Government moved for reconsideration of its claims predating 2002 on the basis that the defendant's omissions met the standard for implied certification as enunciated by the Supreme Court – that is, that Toyobo omitted information material to the government's decision to make payment on claims, which rendered those claims false regardless of whether the company provided a specific
performance guarantee. The government’s motion was granted in part in July 2017, allowing a number of those previously dismissed claims, and those others still before the court, to move forward to trial.

On February 22, 2018, Toyobo made an offer of settlement to the government in the amount of $66 million dollars, which was accepted.

c. Settlement – Deloitte & Touche LLP

On February 28, the Department of Justice announced a settlement with Deloitte & Touche LLP, which agreed to pay $149.5 million to resolve potential FCA liability. Deloitte’s potential liability interestingly did not arise from its own direct fraudulent conduct, but out of its role as the independent outside auditor of a failed originator of mortgage loans insured by the Federal Housing Administration (“FHA”). Deloitte served as the outside auditor for Taylor, Bean & Whitaker Mortgage Corp. (“TBW”) and issued its audit reports for fiscal years 2002 to 2008. During that time, TBW is alleged to have been running a fraudulent scheme, which involved, in part, “the purported sale of fictitious or double-pledged mortgage loans,” which concealed the distress on its financial statements.

The government contended Deloitte failed to detect TBW’s fraudulent conduct and enabled TBW to continue originating FHA-insured mortgage loans until its collapse and bankruptcy, through audits that allegedly “knowingly deviated from applicable auditing standards.” In its announcement of the settlement DOJ stressed the government’s reliance on auditors to detect fraud, waste, or abuse, and that the consequences of their failure to do so “are significant to federal programs, and, ultimately, to the American taxpayer.”

d. Complaint alleging FCA violation by private equity firm – United States of America et al v. Diabetic Care RX, LLC, et al. (0:15-cv-62617-BB S.D. Fl. 2015)

DOJ filed a complaint alleging false claims stemming from an illegal kickback scheme against Diabetic Care Rx LLC (“DCRX”) d/b/a Patient Care America (“PCA”), a compounding pharmacy, and two pharmacy executives, Patrick Smith and Matthew Smith. The complaint is also against Riordan, Lewis & Haden Inc. (“RLH”), a private equity firm that manages both the pharmacy and the private equity fund that owns the pharmacy. The prescriptions giving rise to the alleged violations were for compound formulas, such as those for pain and scar creams or vitamins. The complaint alleges that “the compound formulas were manipulated by the Defendants and the marketers to ensure the highest possible reimbursement from TRICARE,” and that the pharmacy billed Tricare around $68 million over the course of eight months in 2014 and 2015, accounting for the majority of the company’s revenue during that period. The complaint further alleges the Defendants and marketers paid doctors to prescribe the creams and vitamins without seeing patients, and directly paid patients to accept the prescriptions.

RLH, through a private equity fund, made a controlling investment in DCRX in July 2012. In its capacity as the manager of that private equity fund, the government has alleged that “RLH controlled and directed the conduct of DCRX on behalf of investors in the fund.” The complaint further alleged that at the time of its acquisition, RLH’s plan was to increase DCRX’s value and sell it at a profit, but the primary source of DCRX’s revenue was Medicare reimbursement rates for the nutritional therapy DCRX provided, rates which dropped shortly after the acquisition. According to the government, RLH’s primary objective became restoring DCRX’s profitability in order to complete its plan to sell the company at a profit, and in line with this motive, in November 2013, “RLH initiated DCRX’s entry into the business of non-sterile compounding of topical creams for ‘pain management,’ to capitalize on the ‘extraordinarily high profitability of this therapy,’ ” (Compl. at ¶41). The government claimed that for these compound prescriptions, reimbursement ranged from $1,000 to $8,000 per prescription, and RLH anticipated a gross profit margin of 90 percent, but knew it was overcharging for the products and that the high profit margin would not last.

Finally, the government alleged that with RHL’s knowledge and approval, DCRX entered into “independent contractor” agreements with three marketing companies to generate prescriptions for the topical creams, by referring patients to the pharmacy for the prescriptions or “arranging for or recommending patients’ ordering of compounding drugs from the pharmacy.” Allegedly, RHL knew the marketers were earning commissions on prescriptions reimbursed by Tricare, and periodically funded commission payments to the marketers.

This case is notable because, although *qui tam* relators have brought in parent companies as additional defendants when their subsidiaries allegedly make false claims, cases against private equity owners of companies accused of making false claims is rarer.
The Authors
Mr. Hartigan practices exclusively in the areas of federal and international law, specializing in white collar defense and compliance counseling. In the domestic context he focuses on the False Claims Act (FCA), Procurement Integrity Act, Federal Acquisition Regulation (FAR), and other statutes and regulations governing the conduct of government contractors and their employees. In the international compliance context Mr. Hartigan concentrates on the Foreign Corrupt Practices Act (FCPA).

Mr. Hartigan has represented corporate clients in the course of numerous internal and government investigations, including before the Department of Justice, Securities and Exchange Commission, and Office of the Inspector General. With bilingual skills, he has conducted several FCPA investigations in Spanish. Mr. Hartigan has also led teams in planning and conducting corporate compliance audits and program reviews, and provides counseling with respect to FCA/FCPA compliance. Mr. Hartigan has substantial in-house experience with a major government contractor in the areas of contract negotiation, investigation of potential voluntary and mandatory disclosures, and analysis of FAR clauses for flow-down to business partners.

Mr. Hartigan clerked for the Honorable Jacques L. Wiener, Jr. of the United States Court of Appeals for the Fifth Circuit.

University of Michigan Law School (J.D., 2003, cum laude); Book Review Editor, Michigan Law Review
University of Michigan – Gerald R. Ford School of Public Policy (M.P.P., 2003)
Dartmouth College (B.A., 1994)
Mr. Rounds provides counsel on a wide range of federal and state government contract, construction, and grant issues, including contract negotiation, contract changes and claim preparation, contract termination settlements, and regulatory compliance including Buy American and other domestic preference regulations. Mr. Rounds’ regulatory compliance work has included advising clients on issues relating to potential or actual False Claims Act liability.

Mr. Rounds has experience litigating complex government contract and construction disputes. He has assisted clients with matters in Federal and State courts, in Contract Appeal Boards, in domestic arbitration, and in international arbitration.

Mr. Rounds is admitted to the Bars of Virginia, Maryland, and the District of Columbia.

College of William & Mary (J.D., 2007; B.A., 2004, *cum laude*)
Todd M. Garland  
Associate

Mr. Garland represents clients in the government contracts, white collar, and construction practice areas. His government contracts experience includes responding to DCAA audits, counseling contractors on GSA federal supply schedule compliance, contract changes and claim preparation, and cost allowability issues. In the white collar area, Mr. Garland performs internal investigations, provides Foreign Corrupt Practices Act compliance counseling, helps clients address potential False Claims Act issues, and provides guidance on the Federal Acquisition Regulation (FAR) and other statutes and regulations governing federal government contractors.

Mr. Garland’s litigation experience includes representing corporate clients in federal and state courts and before federal boards of contract appeals. He represents prime contractors, subcontractors, and engineers in litigation involving public and private projects, including acceleration, delay, and disruption claims, contract formation, and breach of contract. Mr. Garland’s commercial litigation experience also includes disputes relating to government contracts, construction matters, disputes between prime contractors and subcontractors, teaming agreement issues, issues between joint venture members, and defective specifications.

During law school, Mr. Garland served as a law clerk in the compliance department for a leading private security firm that worked for the U.S. government in a contingency contracting environment.

University of Louisville Brandeis School of Law (J.D., 2012, cum laude); Moot Court Board  
College of William and Mary (B.A., Public Policy, 2003)

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Smith Pachter McWhorter FCA Practitioners
Edmund M. Amorosi

Member

Mr. Amorosi represents clients in the government contracts and construction industries, and private property owners in takings cases against the U.S. Government. He has appeared in federal and state courts, before administrative agencies and boards, and in alternative dispute resolution settings including mediation and arbitration, both domestic and international.

Mr. Amorosi's government contracts practice includes procurement, regulatory, compliance and litigation matters for government contractors in a variety of industries. Mr. Amorosi has experience in bid protests, audits, investigations into whistleblower allegations, overseas construction contracting, preparation of requests for equitable adjustments and contract claims and disputes, small business issues (including size protests and appeals), resolution of prime-subcontract disputes, contract appeals before Boards of Contract Appeals, alternative dispute resolution, review of prime contracts and subcontracts, False Claims Act matters, contractor responsibility and integrity issues, terminations for default and terminations for convenience, debarment and suspension, task order contracting, commercial products, and schedule contracts. Mr. Amorosi has represented contractors in bid protests and contract disputes before the Government Accountability Office, the U.S. Court of Federal Claims, and various federal and state courts. Mr. Amorosi has also served as an expert witness in government contract law.

Mr. Amorosi’s practice also includes commercial litigation and counseling relating to the government contracts and construction industries, including disputes between prime contractors and subcontractors, teaming and confidentiality agreements, joint ventures, and non-compete and non-disclosure agreements.

Mr. Amorosi clerked for the Honorable Loren A. Smith, Senior Judge, U.S. Court of Federal Claims.

George Mason University School of Law (J.D., 2001)
University of Colorado (B.A., International Affairs, 1987)
Iris E. Bennett

Member

Ms. Bennett has deep experience counseling clients on the investigation, defense, and resolution of white collar matters, as well as the corporate compliance programs designed to avoid such liabilities. She has represented numerous Fortune 100 corporate and individual clients in matters relating to potential violations of criminal or civil fraud statutes, including the False Claims Act (FCA), the Foreign Corrupt Practices Act (FCPA), the Anti-Kickback Act, and antitrust laws. She has also represented companies in matters implicating the federal mandatory and voluntary disclosure rules and brought those matters to successful resolution. She has conducted internal investigations in cases across the globe and represented companies before the Criminal and Civil Divisions of the Department of Justice as well as the Securities and Exchange Commission, in all phases of U.S. government investigations and settlement. Ms. Bennett’s fluency in Spanish has enabled her to conduct many investigations in that language. In addition to her extensive investigation and defense experience, Ms. Bennett has years of FCPA and FCA compliance counseling experience. She regularly advises corporate clients on their anti-corruption and anti-fraud compliance programs and on specific policies, procedures and compliance questions. She has also designed and led large-scale corporate compliance reviews and audits.


New York University School of Law (J.D., 1999; *magna cum laude*); Order of the Coif; New York University Law Review
Harvard College (A.B., 1989; *summa cum laude*); Phi Beta Kappa
Cormac Connor

Member

Cormac Connor is a trial lawyer and litigator with experience in a wide variety of criminal and civil litigation matters. Cormac has assisted clients during or in anticipation of investigations by agencies including the Department of Justice, various United States Attorneys’ Offices, Department of Homeland Security, Department of Defense, Office of Foreign Asset Control, Department of Veterans Affairs Office of Inspector General, Internal Revenue Service, the National Credit Union Administration and several State investigative agencies. These investigations have involved allegations related to mail and wire fraud, the False Claims Act, embezzlement, accounting fraud, procurement fraud, criminal antitrust violations, obstruction of justice, income tax evasion, money laundering, import/export and custom violations. Cormac has assisted clients in a variety of industries including: oil and gas, automotive manufacturing, pharmaceuticals, banks, credit unions, casino, automotive, government contractors, chemical manufacturing and distribution, freight shipping, and textiles as they manage and respond to government criminal and civil investigations.

Before joining the Firm, Cormac served as an Assistant United States Attorney for nearly four years with the U.S. Attorney’s Office for the District of Columbia. Cormac was the lead prosecutor on 24 criminal trials and was responsible for investigating hundreds of criminal cases. As part of his investigative work, which included dozens of Grand Jury investigations, Cormac interacted regularly with law enforcement personnel, located and interviewed witnesses, evaluated evidence and coordinated analysis of evidence by forensic expert witnesses.

Beyond his prosecutorial experience, Cormac was a partner in the government investigations practice at one of the most prominent law firms in the country. Cormac also has worked as a civil litigator at law firms in Washington, D.C. and in Denver, Colorado. While in private practice, Cormac appeared and argued numerous cases before state and federal trial courts and courts of appeal, as well as private arbitrators and mediators. Throughout his career, Cormac has represented clients in a broad range of industries and practice areas that have included commercial contracts, intellectual property issues and tort claims.

Georgetown University Law Center (J.D., 2002)
Davidson College (B.A. History, 1995)
Joseph P. Covington
Member

Mr. Covington has over 35 years of white collar litigation and counseling experience in the domestic and international marketplaces, with expert knowledge of the False Claims Act (FCA), the Foreign Corrupt Practices Act (FCPA), the Anti-Kickback Act, and other criminal and civil fraud statutes and regulations. Mr. Covington has two decades of experience with the FCA and its qui tam provisions. He has investigated and litigated numerous FCA cases, identifying and implementing strategies to resolve these cases. He has represented corporate and individual clients involving a range of other federal statutes and regulations, including those governing conflicts of interest, procurement integrity, and anti-competitive behavior. Mr. Covington is also well-versed in the mandatory and voluntary disclosure obligations of government contractors and has represented numerous clients in those matters.

Mr. Covington’s FCPA experience began in 1977 as a trial attorney in the Fraud Section at the Department of Justice investigating foreign bribery cases, and later served as head of DOJ’s FCPA prosecution unit, after which Mr. Covington entered private practice. Mr. Covington has successfully represented hundreds of corporate clients in FCPA internal investigations, government investigations, and compliance matters, in countries ranging from Albania to Zimbabwe. He has counseled clients on post-violation remediation, guided them in establishing and maintaining compliance programs, and advised on third-party due diligence and contracting issues. Mr. Covington recently was appointed by the International Bank for Reconstruction and Development and International Development Association (World Bank) as the Independent Compliance Monitor for SNC-Lavalin Group Inc., with a mandate to review and evaluate the company’s global anti-corruption compliance program.

Mr. Covington has represented companies before government agencies including the Department of Justice Civil and Criminal Divisions, the Securities and Exchange Commission, the Special Investigator General for Afghan Reconstruction, and other investigatory bodies as well as suspension and debarment officials.

Mr. Covington is AV Peer Review Rated, Martindale-Hubbell’s highest peer recognition for ethical standards and legal ability. In 2012, Mr. Covington was named a DC Super Lawyer in White Collar Defense. Before his legal career, he served in the United States Army in combat in Vietnam and received a Purple Heart.

University of Virginia School of Law (J.D., 1973)
University of Virginia (B.A. History, 1968)
Stephen D. Knight
Member

Mr. Knight counsels and represents clients in litigation on all aspects of government contracts. Mr. Knight places special emphasis on claims and disputes, government contract cost accounting, cost allowability, Cost Accounting Standards, defective pricing, government audits, and contract compliance.

He has substantial expertise in performance issues, including defective specifications, delay and disruption, changes, and terminations. Mr. Knight also has significant experience in procurement fraud matters, representing clients during grand jury and Inspector General criminal investigations, as well as civil investigations and litigation pursuant to the Civil False Claims Act.


Mr. Knight is bilingual in English and French. As an adjunct professor of law with the George Washington University Law School, Mr. Knight teaches in the university's LL.M. in Government Procurement Law Program.

University of Virginia School of Law (J. D., 1978)
University of Virginia (B.A. with Honors, 1975)
Michael K. Lowman

Member

Michael Lowman has over 25 years of securities law experience. He has represented clients in matters involving a broad array of securities law issues, including regulatory and internal investigations, 10A investigations, criminal parallel proceedings, SEC enforcement actions, civil litigation and securities law disclosure and compliance. Mr. Lowman has represented domestic and global public companies, their officers and directors, and board committees, including in the aviation, aerospace, automotive, defense contracting, construction, health insurance, technology, telecommunications, mining, solar, home health care, broker-dealer and investment management industries. He is a recognized expert who has served as an expert witness on behalf of Canadian securities regulators on cross-border securities law investigations, guest-lectured law school classes on securities law topics, and written extensively on topics that include the FCPA, insider trading and SEC enforcement trends. Mr. Lowman has been a Securities Litigation “Super Lawyer” since 2012.

Relying on his deep trial and litigation experience, Mr. Lowman has also handled high-stakes corporate and commercial cases, including insurance coverage, complex multi-party construction disputes and consumer class actions. He was named a “recommended” lawyer to handle complex commercial disputes in the 2018 Legal 500.

Before entering private practice, Mr. Lowman served as both as Senior Counsel and Assistant Chief Litigation Counsel with the SEC’s Division of Enforcement. During this time, he was primary trial counsel in a wide variety of civil and administrative enforcement actions. He investigated and tried complex financial fraud, insider trading, FCPA, broker-dealer and offering fraud cases. Michael also teamed with federal, state and foreign criminal law enforcement agencies in parallel criminal proceedings and cross-border securities law matters. He received two Division Director Awards for his contributions to the Commission’s enforcement program.

Washington College of Law, The American University, Summa Cum Laude (J. D., 1992)
The State University of New York at Buffalo, Summa Cum Laude (B.A., 1989)
Jennifer A. Mahar

Member

Ms. Mahar’s practice focuses on commercial disputes in the government contracting and construction industries. She represents contractors, subcontractors, owners and sureties in all phases of project development and construction including contract formation, project management and dispute resolution. Her experience includes the prosecution and defense of claims in litigation, as well as the successful resolution of claims through various forms of ADR. She is Chair of the Construction Law and Public Contracts Section of the Virginia State Bar.

Ms. Mahar served as an Assistant Commonwealth’s Attorney for the City of Portsmouth, Virginia.

Catholic University of America, Columbus School of Law (J.D., 1995; cum laude); Journal of Contemporary Health Law and Policy
The College of William and Mary (B.S. Biology, 1991)
Kathryn T. Muldoon Griffin

Member

Ms. Griffin represents contractors across a range of industries on federal, state, and private projects. She has extensive experience assisting government contractors with the full spectrum of contracting issues including those involving audits and investigations and procurement fraud allegations. Her experience includes assisting contractors in developing and evaluating their ethics and compliance programs, as well as representing contractors who have been suspended or proposed for debarment. In addition, she is experienced in the conduct of internal investigations and employee interviews pertaining to compliance issues and in support of independent monitor engagements.

Ms. Griffin also regularly represents contractors in resolving contract claims and disputes with the federal government and prime-subcontractor disputes. She has a depth of experience in claim analysis and presentation, including work with technical experts, scheduling experts, and cost and pricing experts. In addition, she has worked with national, international, and local construction and engineering firms on major contracting issues including defective specifications, differing site conditions, constructive changes, contractor performance evaluations, and liquidated damages. She currently serves as the Vice President of the Board of Contract Appeals Bar Association.

Pepperdine University School of Law (J.D., 2006)
University of Virginia – McIntire School of Commerce (B.S. Commerce – Accounting Concentration, 2002)
John S. Pachter
Member

A practitioner of government contract law for more than 40 years, Mr. Pachter has engaged in substantial litigation before the Boards of Contract Appeals, the United States Court of Federal Claims, Federal District Courts, and the United States Court of Appeals for the Federal Circuit. He has prosecuted bid protests before the Government Accountability Office, the General Services Board of Contract Appeals, the United States Court of Federal Claims and Federal District Courts.

Mr. Pachter has represented and counseled clients on fraud and compliance investigations, audits, corporate governance and ethics, and defense of qui tam actions. Other work has included defective pricing, cost determination, requests for equitable adjustment, licensing of intellectual property, subcontractor performance issues, small and small disadvantaged business matters, terminations for default and convenience, GSA schedule contracts, task order contracting, multiple awards, commercial products and requests for government information. His practice has involved dispute resolution in all areas of government contract law, including prime-subcontractor disputes, both in litigation and under alternative dispute resolution procedures. Mr. Pachter has represented a number of clients in the debarment area, and obtained the first reversal in federal court of a Service Contract Act debarment. Federal Food Service, Inc. v. Donovan, 658 F.2d 830 (D.C. Cir. 1981).

In 2012 Mr. Pachter was the first recipient of the Allan J. Joseph Excellence in Leadership Award, conferred by the ABA's Section of Public Contract Law. The award recognizes “exceptional effort and accomplishments” as well as “extraordinary contributions” to the Section.

In October 2007, the Department of the Army appointed Mr. Pachter to serve as Independent Monitor to supervise ITT Corporation’s performance under an Administrative Compliance Agreement, which ITT entered into in connection with a Guilty Plea and Deferred Prosecution Agreement regarding violations of the Arms Export Control Act at the Night Vision component of ITT Defense Electronics & Services.

In 2004, the Legal Times recognized Mr. Pachter as a Leading Lawyer in Government Contracts. He has also been listed in Virginia Super Lawyers, and in Chambers USA, America’s Leading Lawyers for Business and Nationwide Leading Lawyers.

George Washington University (J.D., with honors, 1966)
George Washington University (L.L.M. in Government Procurement Law, 1970)
Tulane University (B.A., 1963)
Armani Vadiee

Member

Mr. Vadiee’s practice focus is government contracts, commercial contracts, compliance, white collar and construction matters. Mr. Vadiee provides counsel to domestic and international clients on a wide range of issues including contract negotiation, contract terms and conditions, bid protests, contract changes and claim preparation, contract termination settlements, regulatory audit and compliance litigation and oversight on independent monitor engagements. Mr. Vadiee provides regulatory compliance counseling on wide range of areas including export controls, subcontractor evaluations and mandatory reporting requirements. Mr. Vadiee has experience litigating contract disputes in federal and state courts and administrative bodies including before the Civilian Board of Contract Appeals, the Armed Services Board of Contract Appeals, the United States Government Accountability Office, the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit.

Prior to law school, Mr. Vadiee was a contracting officer for a U.S. Department of Energy research laboratory and during law school clerked at the U.S. Government Accountability Office.

Mr. Vadiee is multi-lingual in English, Farsi (Bilingual Proficiency), and Spanish (Limited Working Proficiency). As an active member of the American Bar Association Section of Public Contract Law and the Federal Bar Association’s Government Contracts Section, Mr. Vadiee instructs courses in Cost and Price Realism in Government Contracts, Government Contracts Ethics and Compliance, and Cybersecurity and the impact on law firms.

University of Maryland School of Law (J.D., 2010)
University of New Mexico, Anderson Graduate School of Management (M.B.A., 2004)
University of New Mexico, Anderson School of Management (B.B.A., 2002)
Nora K. Brent
Associate

Ms. Brent represents clients in all the firm’s practice areas. In the white collar arena, Ms. Brent has counseled clients regarding internal investigations and subpoena responses related to alleged violations of laws or regulations, including the False Claims Act, the Federal Acquisition Regulation (FAR), and sections of Title 18 of the U.S. Code regarding bribery and conflicts of interest. Ms. Brent’s government contracts experience includes bid protests, contract review, and FAR clause flow-down, contract interpretation disputes, grant counseling, advising clients on contracting authority, defective specifications, small business issues, cost and pricing issues, contractor responsibility and integrity issues, and government audits. Her construction experience includes payment and performance bond disputes, delay issues, and disputes related to negligence.

Ms. Brent has litigated cases in federal and state courts and the boards of contract appeals. She also has experience with e-discovery and production and has been involved in alternate dispute resolution.

Ms. Brent is co-Chair of the Fairfax Bar Association Government Contracts Section. During law school, Ms. Brent interned at the Fairfax County Circuit Court under Judge Grace B. Carroll.

George Mason University School of Law (J.D., 2017); Moot Court Board; Civil Rights Law Journal (Senior Notes Editor; 2016 Best Student Piece)
University of Virginia (B.A., 2010; English)
Erica J. Geibel
Counsel

Ms. Geibel represents clients in both the government contracts and construction practice areas. Ms. Geibel’s government contracts experience includes work on costing and pricing issues involving cost allocability and allowability, contractor responsibility and integrity issues, internal investigations, False Claims Act issues, Foreign Corrupt Practices Act compliance counseling, small business issues, contract claims and disputes, bid protests, Service Contract Act disputes, contract negotiations, contract review and contract drafting. Ms. Geibel has significant experience in the area of compliance and regularly reviews ethics and compliance programs, assists in training, and evaluates and tests internal controls.

Ms. Geibel has represented major national and international contractors, as well as local contractors on a wide variety of construction issues. Her construction experience includes work on general negligence, differing site conditions, defective specifications, design changes, payment and performance bond disputes, contract interpretation issues, payment disputes, insurance and warranty issues, delay, constructive changes, and analysis of contractor claims. She has litigated disputes at the federal, state, city and private levels and has been involved in dispute resolution through negotiation and mediation. She is an active member of the ABA Section of Public Contract Law and is Co-Chair of the Fairfax Bar Association Government Contracts Section.

Prior to joining Smith Pachter McWhorter, Ms. Geibel served as a law clerk for the United States Attorney’s Office for the District of Columbia.

George Mason University School of Law (J.D., 2009; cum laude); Moot Court Board; Trial Advocacy; Writing Fellow
George Mason University (B.A., 2005; Government & International Politics, Departmental Honors, cum laude)
Sean K. Griffin’s practice areas include government contracts, construction, and white collar law. Prior to joining Smith Pachter McWhorter in 2015, he served as a Law Clerk, and then as an Honors Attorney, for the United States Civilian Board of Contract Appeals, focusing on government contract claims under the Contract Disputes Act. Mr. Griffin is experienced in the mediation and litigation of government contracts and construction disputes involving terminations, constructive changes, equitable adjustments, and delay damages. Mr. Griffin is also practiced in e-discovery collection, review, and production for internal investigations and audits, and False Claims Act matters.

Mr. Griffin is a graduate of the American University, Washington College of Law, where he worked as a Dean’s Fellow for the Business Law Program, and as Student Attorney for the Community and Economic Development Law Clinic. During law school, he served on the American Bar Association’s Administrative Law Review, the Alternative Dispute Resolution Honor Society, and the Business Law Society’s Executive Board.

American University, Washington College of Law (J.D., 2014)
University of California, Santa Cruz, Political Science (B.A., 2008)