The False Claims Act and Parallel Proceedings
Huntsville-Madison County Bar Association Last-Chance Seminar
December 1, 2017

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The False Claims Act ("FCA"), 31 U.S.C. § 3729, *et al.*, imposes treble damages and a civil penalty from $5,500 to $11,000 per claim[1] on anyone who *knowingly* submits or causes the submission of a false or fraudulent claim payable by the United States government or related entities. 31 U.S.C. § 3729(a)(1). In particular, the government has a civil cause of action against any person or entity who:

> "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;" *Id*. at § 3729(a)(1)(A),
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> "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;" *Id*. at § 3729(a)(1)(B),
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> "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;" *Id*. at § 3729(a)(1)(D),
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> "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[;]" *Id*. at § 3729(a)(1)(G), or
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> "conspires to commit [one of these violations]." *Id*. at § 3729(a)(1)(C).

This statutory language reflects the 2009 Fraud Enforcement and Recovery Act of 2009 (

[1] For violations that occurred from November 3, 2015 to February 2, 2017, the penalty is increased to $10,781 to $21,563. For violations that occurred from February 3, 2017 to date, the penalty is $10,957 to $21,916.

"FERA") amendments to 31 U.S.C. § 3729. *See* Pub. L. No. 111-21, § 4(a)(1)(a). The amendments generally expanded liability under the FCA and were not made retroactive—with the exception of the revised 31 U.S.C. § 3729(a)(1)(B)'s application to all cases pending on or after June 7, 2008. *Id*. at § 4(f). Claims for violation of the FCA can be brought by the government or as *qui tam* actions on the government's behalf by a private individual, known as a relator. 31 U.S.C. § 3730(b). These type suits are often called "whistleblower" suits and provisions applying to whistleblowers will be discussed in more detail below.

I. Elements

To state a claim under the FCA, the government generally must make at least four showings by a preponderance of the evidence. 31 U.S.C. § 3731(d). First, the government must establish the existence of a claim actionable under the FCA. Second, the government must establish that the claim was false, either factually or legally. Third, the government must demonstrate that the falsity was material to the payment of the claim. Finally, the government must establish that the defendant acted with knowledge of the falsity. Each requirement for FCA liability is briefly considered below.

A. Claim

The existence of a claim is "the *sine qua non* of a False Claims Act violation." *U.S. ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002). The FCA broadly defines "claim" as "any request or demand . . . for money or property whether or not the United States has title to the money or property" either (a) "presented to an officer, employee or agent of the United States" or (b) "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 the Government has provided or will reimburse for any portion of the money or property requested. 31 U.S.C. § 3729(b)(2). Entities that routinely receive payment through government programs or contracts—namely government contractors, health care suppliers and providers and financial services companies—are the most likely to find themselves targets of an FCA claim or investigation.

B. Falsity

To establish a violation of the FCA, the government must show the existence of a "false or fraudulent claim." 31 U.S.C. § 3729(a)(1). A claim may be considered false under the FCA if it is factually or legally false. *See U.S. ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295, 305 (3d Cir. 2011). The **factually false claim** is one "in which a contractor or other claimant submits information that is untrue on its face." *United States v. Kellogg Brown & Root Servs., Inc.*, 800 F. Supp. 2d 143, 154 (D.D.C. 2011) (citing *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010)). A factually false claim generally involves "an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided." *Sci. Applications Int'l Corp.*, 626 F.3d at 1266 (quoting *Mikes*, 274 F.3d at 697).

In contrast, a **legally false claim** or certification is one that is "predicated upon a false representation of compliance with a federal statute or regulation or a prescribed contractual term." *Mikes*, 274 F.3d at 696-97. Courts further divide legally false claims into those claims made legally false by an "express certification" and those claims made legally false by an "implied certification." *Mikes*, 274 F.3d 697-700. In an ***express* false certification claim**, the claim "falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment." *Id.* at 698. False certification claims based on broad and vague certifications of compliance with law may be found insufficient to give rise to FCA liability. *See, e.g.*, *U.S. ex rel. Conner v. Salina Reg'l Health Ctr.*, 543 F.3d 1211, 1218–23 (10th Cir. 2008) (holding that annual certification of compliance with "laws and regulations regarding the provision of health care services" was too general to impose liability) *but see U.S. ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148 (11th Cir. May 26, 2017) (holding that "[s]cienter is not determined by the ambiguity of a regulation, and can exist even if a defendant's interpretation is reasonable.").

An ***implied*** **false certification claim** "is 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. Significantly, the United States Supreme Court recently clarified this theory of FCA liability. *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (U.S. June 16, 2016). In *Escobar*, the Court held that the "implied certification theory can, at least in some circumstances, provide a basis for liability . . ." and did not require that the government "expressly designated" compliance as a condition for payment. *Id.* at 2001. The circumstances under which this theory may apply, however, were limited by the Court to circumstances where two conditions are satisfied. *Id.* *First*, a claim must make specific representations about a good or service (as opposed to merely requesting payment). *Second*, the defendant's failure to disclose noncompliance with the material statutory, regulatory or contractual requirements makes those specific representations "misleading half-truths."

In the health-care context, prior to the Affordable Care Act, the government often argued that violations of the Anti-Kickback Statute caused any resulting claims submitted to be false under an implied false certification theory. The Affordable Care Act codified this theory by amending the Anti-Kickback Statute to explicitly state that any claim "that includes items or services resulting from a violation of [the Anti-Kickback Statute]" constitutes a false claim under the FCA. 42 U.S.C. § 1320a-7b(g).

C. Materiality

The FCA also requires that false statements be "material" to a false claim. Since the 2009 amendments[2], materiality has been 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 Supreme Court also addressed the materiality requirement of the FCA in the *Escobar* decision defining it as "demanding." *Escobar*, 136 S.Ct. at 2003. The Court stated that the materiality standard turns on the "likely or actual behavior of the recipient of the alleged misrepresentation." *Id.* at 2002. It is not enough for the government or relators to show that "government would be entitled to refuse payment were it aware of the violation." *Id.* The Court did not find that an express designation as a condition of payment was required to state a claim but found this to be relevant to the materiality inquiry. *Id.* The government's past practices in paying such claims are relevant to the determination. *Id.*

While the government and relators may argue that the "materiality" analysis was unaffected by the *Escobar* decision, many post-*Escobar* decisions are applying a heightened materiality standard. This heightened scrutiny is resulting in courts requiring more facts supporting materiality to be pled and a closer examination of the government's actions. *See, e.g., Abbott v. BP Exploration & Production, Inc.*, No. 16-20028, 2017 WL 992506 (5th Cir. Mar. 14, 2017) (finding that the Interior Department's decision to allow Atlantis to continue drilling after its substantial investigation into relator's allegations was strong evidence that engineer approval

[2]Prior to the FERA amendments, the statute did not include a materiality requirement at all, but every circuit court to decide the issue had determined materiality to be an element of the FCA. *See Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 785, 788 (4th Cir. 1999); *U.S. ex rel. Marcy v. Rowan Co.,* 520 F.3d 384, 389 (5th Cir. 2008); *U.S. ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc.,* 400 F.3d 428, 442 (6th Cir. 2005); *Luckey v. Baxter Healthcare Corp.,* 183 F.3d 730, 732 (7th Cir. 1999); *U.S. ex rel. Costner v. URS Consultants, Inc.,* 317 F.3d 883, 886-87 (8th Cir. 2003); *U.S. ex rel. Hendow v. Univ. of Phx.,* 461 F.3d 1166, 1172-73 (9th Cir. 2006); *Conner,* 543 F.3d at 1219 n.6 (10th Cir. 2008); *United States v. TDC Mgmt. Corp.,* 24 F.3d 292, 298 (D.C. Cir. 1994). *Cf. Mikes,* 274 F.3d at 697 (2d Cir. 2001) (declining to address whether the FCA contains a materiality requirement).

at various stages of construction was not material); *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027 (D.C. Cir. 2017) (finding DCAA's award of a fee for exceptional performance to KBR after investigating relator's allegations was "very strong evidence" that allegedly inflated headcounts were not material); *United States ex rel. Kolchinsky v. Moody's Corp.*, No. 12CV1399, 2017 WL 825478 (S.D.N.Y. Mar. 2, 2017) (dismissing allegations of false claims based on inaccurate credit ratings where, despite awareness of the alleged fraud, government continued to pay Moody's for its credit-ratings products each year).

The *Escobar* materiality requirement is also being raised at the pleading stage under Rule 9(b), with some courts requiring additional facts to be pled on the materiality element or dismissing complaints. *Escobar,* 136 S. Ct. 1989, 2004 n.6 (2016). *See, e.g., Carlson v. DynCorp Int'l, LLC*, 657 F. App'x 168 (4th Cir. 2016) (Relator could not show alleged violations of accounting regulations or best practices was material); *U.S. ex rel. Scharff v. Camelot Counseling*, No. 13-CV-3791, 2016 WL 5416494 at *8 (S.D.N.Y. Sept. 28, 2016) (finding that the plaintiff had failed to allege facts sufficient to meet the demanding materiality requirement where the complaint did not "explain why the purportedly fraudulent conduct was material to the payment of reimbursements."); *U.S. ex rel. Schimelpfenig v. Dr. Reddy's Labs. Ltd.*, No. CV 11-4607, 2017 WL 1133956, at *7 (E.D. Pa. Mar. 27, 2017) (dismissing FCA complaint for failure to allege materiality); *U.S. ex rel. Se. Carpenters Reg. Council v. Fulton County*, Ga., No. 1:14-CV-4071-WSD, 2016 WL 4158392, at *8 (N.D. Ga. Aug. 5, 2016) (dismissing false certification claims for failing to "show[] that Defendants misrepresented matters 'so central' . . . that the government 'would not have paid [Defendants'] claims had it known of these violations.'"); *United States ex. rel. Dresser v. Qualium Corp.*, No. 5:12-CV-01745-BLF, 2016 WL 3880763, at *6 (N.D. Cal. July 18, 2016) (dismissing false certification claim because the complaint "d[id] not explain why" false certifications were material, and granting leave to amend because the complaint was filed pre-Escobar).

D. Knowledge

To establish an FCA violation, the government must show that the defendant acted "knowingly." To act "knowingly," the individual may, but need not, have actual knowledge of the claim's falsity or have a specific intent to defraud the government. 31 U.S.C. § 3729(b)(1)(B). Rather, the individual need only "act[] in deliberate ignorance" (31 U.S.C. § 3729(b)(1)(ii)) or "in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(iii). Further, the statute expressly provides that the government is not required to prove that a defendant specifically intended to defraud. 31 U.S.C. § 3729(b)(1).

Reckless disregard under the FCA is "an extension of gross negligence or an extreme version of ordinary negligence." *Urquilla-Diaz v. Kaplan University*, 780 F.3d 1039, 1058 (11th Cir. 2015). As the Supreme Court explained in an analogous context, to show recklessness the government must show that the party's conduct entailed "an unjustifiably high risk of harm that [was] either known or so obvious that it should [have] be[en] known." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68 (2007) (citing *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)). Determining whether conduct raises an "unjustifiably high risk" of violating the law depends on a variety of factors. Relevant factors cited by various courts include:

- the personal knowledge of the defendants and their familiarity with governing legal rules and obligations; *U.S. ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 833–34 (7th Cir. 2011); *U.S. ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 950–51 (10th Cir. 2008); *U.S. ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 416 (6th Cir. 2002);

- the clarity of existing statutory, regulatory, and contractual guidance addressing the conduct at issue; *Safeco*, 551 U.S. at 69; *Burlbaw*, 548 F.3d at 957–58; *K & R Ltd. P'ship*, 530 F.3d at 983;

- the defendant's justifiable reliance on experts, attorneys, or other entities in making the challenged statements; *U.S. ex rel. Folliard v. Govplace*, 930 F. Supp. 2d 123 at 130-37 (D.D.C. 2013);

- the defendant's compliance with industry practice in taking the challenged actions; *Williams*, 696 F.3d at 531;
- the government's knowledge of or acquiescence towards the challenged conduct; *U.S. ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 544–55 (7th Cir. 1999).

II. Liability for "Reverse False Claims"

The FCA also creates liability for a defendant that "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G). An "obligation" is "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).

Prior to the 2009 FERA amendments, liability only arose under this section if the defendant "knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7) (2008). Thus, while the pre-FERA FCA required active use of a "false record or statement" to conceal, decrease, or avoid an obligation to pay money to the government, the post-FERA FCA premises liability simply on any knowing and improper avoidance or decrease of the defendant's obligation to pay or transmit money or property to the government.

After FERA, a failure to pay or transmit money or property to the government may be an FCA violation if the company failing to pay acted in reckless disregard or deliberate ignorance of an obligation to do so, even if the company did not actively make any false representations with regard to the obligation. This is undoubtedly an expansion in the scope of the "reverse false claims" provision of the FCA. It does not appear, however, that courts will accept redundant pleading that simply recasts a traditional direct false claim as actionable as a reverse false claim.

See U.S. ex rel. Ligai v. ETS-Lindgren, Inc., 2014 WL 4649885, at *13 (S.D. Tex. Sept. 16, 2014); *U.S. ex rel. Thomas v. Siemens AG*, 708 F. Supp. 2d 505, 514 (E.D. Pa. 2010).

In the health-care context, the Affordable Care Act has established an obligation to repay overpayments of federal healthcare dollars within the latter of 60 days of identification of the overpayment or the due date for the corresponding cost report. 42 U.S.C. § 1320a-7k(d)(2). It could be argued that a repayment not made within this established timetable constitutes an FCA violation. In one recent case, a court allowed a relator's FCA claims to proceed, finding that the defendant medical center's repayment of certain identified overpayments without going back to attempt to identify other overpayments constituted an intentional refusal to investigate the possibility that it was overpaid. *U.S. ex rel. Keltner v. Lakeshore Med. Clinic, Ltd.*, No. 11-cv-00892, 2013 WL 1307013 (E.D. Wis. March 28, 2013). Another recent case allowed an FCA claim to proceed based upon a whistleblower having sent an email to management listing claims that he believed were incorrectly billed. *Kane ex rel. U.S. v. Healthfirst, Inc.*, No. 11-2325, 2015 WL 4619686 (S.D.N.Y. Aug. 3, 2015). The court held that "the sixty day clock begins ticking when a provider is put on notice of a potential overpayment, rather than the moment when an overpayment is conclusively ascertained." *Id.* at *11.

III. Whistleblower Provisions

Procedurally, a private individual, known as a relator, may bring a *qui tam* action and enforce the FCA on the government's behalf. 31 U.S.C. § 3730(b). The relator may be anyone with knowledge of the allegations—such as a current or former employee, a competitor, a customer, or a consultant. When brought by a relator, a complaint is filed under seal and remains unserved on the defendant until the presiding federal court orders otherwise. 31 U.S.C. § 3730(b)(2). While the complaint is under seal, the government may investigate the relator's claims and decide whether it will elect to intervene and take responsibility for prosecuting the action or decline to intervene, leaving the relator to litigate his or her complaint. 31 U.S.C. § 3730(b)(4). The FCA incentivizes private relators to bring claims by providing them with a share of any proceeds of the action or settlement—15% to 25% if the government intervenes and 25% to 30% if the government does not intervene. 31 U.S.C. § 3730(d).

The government may settle an action brought by a relator, notwithstanding any objection by the relator, "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B).

A. Public Disclosure Bar

There are some jurisdictional restrictions on who can bring a *qui tam* action as a relator. Unless opposed by the government, the statute directs courts to dismiss FCA actions where "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." 31 U.S.C. § 3730(e)(4)(A). However, only certain types of disclosures trigger this jurisdictional bar, namely disclosures "in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party," "in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation," or "in the news media." *Id.*

This provision was changed under the Affordable Care Act to be less restrictive for the relator—limiting the applicable hearings, reports, audits and investigations to those by the federal government; requiring that the government or its agent be a party to any such hearing for the public disclosure bar to trigger; and providing the government with the option of opposing dismissal regardless of public disclosure. Courts' interpretation of the public-disclosure bar continues to be highly fact dependent. *See, e.g., U.S. ex rel. Heath v. Wisconsin Bell, Inc.*, 760 F.3d 688 (7th Cir. 2014) (even though details of at-issue pricing structure available on public website, relator's allegations not barred by public disclosure bar because they were dependent on independent investigation and analysis); *Malhotra v. Steinberg*, 770 F.3d 853 (9th Cir. 2014) (suit based on referral scheme disclosed at deposition in bankruptcy case were barred by public-disclosure bar); *U.S. ex rel. Oliver v. Phillip Morris USA, Inc.*, 763 F.3d 36 (D.C. Cir. 2014) (holding that "government's own internal awareness" of information does not constitute public disclosure or trigger § 3730(e)(4)(A)).

B. Original Source Exception

Even where a suit would be otherwise barred for public disclosure, a relator may still proceed with an FCA claim if he or she is an "original source" of the information. 31 U.S.C. § 3730(e)(4)(B). To be an original source, an individual must have either "voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based" prior to their public disclosure or have "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions" and have provided that information voluntarily to the government before filing an FCA action. *Id*. The Affordable Care Act also revised this section of the statute to make it easier for relators to bring claims. Prior to the Affordable Care Act, the statute required an original source have "direct and independent knowledge of the information on which the allegations are based."

IV. Remedies

The statute provides for treble damages and civil penalties from $5,500 to $11,000 per claim for violations of the FCA. 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.3(a)(9). For violations that occurred from November 3, 2015 to February 2, 2017, the penalty is increased to $10,781 to $21,563. For violations that occurred from February 3, 2017 to date, the penalty is $10,957 to $21,916. Generally, the government does not need to pay a claim to recover civil penalties under the FCA. The mere submission of the false claim may trigger liability for civil penalties. *See, e.g.*, *Harrison*, 176 F.3d at 785 n.7 (4th Cir. 1999) (recognizing that "there is no requirement that the government have suffered damages as a result of the fraud"); *U.S. ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) (same).

The FCA allows an award of three times the amount of any damages sustained by the government because of each false claim. 31 U.S.C. § 3729(a)(1). In calculating damages, federal courts follow different approaches. Most courts follow a net-trebling approach that subtracts any value actually received by the government prior to tripling the damages figure. *See, e.g.*, *United States v. Anchor Mortg. Corp.*, 711 F.3d 745, 750 (7th Cir. 2013) (citing cases from Second, Sixth, D.C. and Federal Circuits adopting net-trebling approach). Other courts apply the gross-trebling approach, tripling the damage figure before applying any offsets. *See, e.g.*, *United States v. Eghbal*, 548 F.3d 1281, 1285 (9th Cir. 2008) (refusing to subtract the value of collateral before trebling).

In order to recover damages, some courts have required the government to establish that the subject matter of the false statement was the direct proximate cause of the loss. *See, e.g.*, *United States v. Hibbs*, 568 F.2d 347, 351 (3d Cir. 1977); *Fargo*, 518 F. Supp. 2d at 122 ("[I]f the subject matter of the alleged misrepresentation is unrelated to the ultimate reason for the borrower's default (and the claim against HUD flows from that default) Plaintiff cannot recover any damages . . . ."). Other courts, however, have rejected a proximate causation requirement and simply require the government to show that it would not have made the payment if it had been aware of the statement's falsity. *See, e.g.*, *United States v. First Nat'l Bank of Cicero*, 957 F.2d 1362, 1374 (7th Cir. 1992) (rejecting proximate-cause requirement and requiring only but-for causation).

V. Statute of Limitations

The statute of limitations for an FCA violation is the later of: (a) six years after the date on which the violation is committed, or (b) three years after "facts material to the right of action are known or reasonable should have been known by the official of the United States charged with the responsibility to act in the circumstances." 31 U.S.C. § 3731(b). In no event may an action be brought under the FCA more than ten years after the violation was committed. *Id*.

VI. Government Investigations

A. Civil Investigative Demands

The FCA allows for the Department of Justice to issue subpoena-like Civil Investigative Demands ("CID") for information "relevant to a false claims law investigation." 31 U.S.C. § 3733(a)(1). CIDs may request the production of documents, answers to written interrogatories, or oral testimony from the recipient. *Id*. These are unilateral discovery powers provided by Congress to the Department of Justice.

B. Parallel Proceedings

Because false claims may also be prosecuted criminally under 18 U.S.C. § 287, companies may find themselves targets of investigations by both the civil and criminal divisions of the Department of Justice ("DOJ"). In fact, the Attorney General of the United States has stated that "criminal prosecutors and civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and permissible by law, whenever an alleged offense or violation of federal law gives rise to the potential for criminal, civil, regulatory, and/or agency administrative parallel (simultaneous or successive) proceedings." Memorandum, Eric Holder, U.S. Attorney General, Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings (Jan. 30, 2012).

Further, it is DOJ policy to consider investigative strategies that "maximize the government's ability to share information among criminal, civil and agency administrative teams." *Id*. This means that the government may be more likely to seek information via a civil CID under the FCA—which does not restrict its ability to share information with criminal prosecutors and attorneys from administrative agencies—than via a grand jury subpoena—which would restrict the government's ability to share the information received. By having its civil and criminal divisions working in parallel, the DOJ "secure[s] the full range of the government's remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion and debarment)." *Id*.

In September 2014, then Assistant Attorney General Leslie Caldwell amplified the potential for criminal investigation in *qui tam* matters when she announced that criminal prosecutors would automatically review all new *qui tam* complaints filed under the civil FCA. At that time, Caldwell referred to "stepping up" review of *qui tam* cases for criminal prosecution, and the shift will likely lead to further and earlier coordination between civil and criminal investigators. More recently, current Deputy Attorney General Rod Rosenstein stated in a September 2017 speech that the "Yates memo," issued under the former administration and requiring an assessment of individual culpability in corporate wrongdoing, was under review by the DOJ. Rosenstein stated that an announcement would be made in the "near future about what changes [the DOJ is] going to make" in the Yates memo, but in the same speech, Rosenstein emphasized that, in some instances, individual prosecution is necessary. Likewise, Attorney General Jeff Sessions has also expressed support for prioritizing individual prosecutions.

As a result, companies or individuals faced with a government FCA investigation should be keenly aware that they may be subject to parallel proceedings, and information provided in a civil context could become evidence in a criminal action. Such parallel proceedings often present highly complex issues for consideration by counsel with experience in both white collar criminal and FCA civil litigation—for example, analysis of the need for separate representation or of the Fifth Amendment protection against self-incrimination.