ADG Insights

Roadmap for False Claims Act enforcement in 2019

January 2019

Hogan Lovells

Introduction

The pace of False Claims Act (FCA) litigation remained furious over the past year. Aerospace, Defense, and Government Services (ADG) companies continue to face the ever-present threat that the government, or more likely a whistleblower, will allege an FCA violation. Understanding how recent changes in enforcement policies and case law could affect your business is critical. In this edition of our ADG Insights series, we analyze and discuss in detail the key developments from 2018 and how the most important cases and issues are shaping FCA enforcement now – and in the years to come.

Department of Justice adopts new policies and priorities

In 2018 the U.S. Department of Justice (DOJ) made several significant policy announcements that are poised to significantly impact FCA enforcement.

Dismissal of declined qui tams

On 10 January 2018 Michael Granston, the director of DOJ's civil fraud section, issued a memorandum providing guidance about when and how prosecutors should consider moving to dismiss a relator's FCA complaint under section 3730(c)(2)(A) of the FCA (Granston Memo). The Granston Memo, which many view as a signal that DOJ will increasingly move to dismiss FCA claims, has since been incorporated into DOJ's revised Justice Manual (formerly the United States Attorneys' Manual).

The Granston Memo acknowledges that "[h]istorically" DOJ has been "sparing" and "circumspect" in using its power to dismiss qui tam cases and identifies the following "non-exhaustive" and "not mutually exclusive" factors that have, in the past, supported DOJ's dismissal of such cases:

- Curbing meritless claims.
- Preventing parasitic or opportunistic qui tam actions.
- Preventing interference with agency policies and programs.
- Controlling litigation brought on behalf of the United States.
- Safeguarding classified information and national security interests.
- Preserving government resources.
- Addressing egregious procedural errors.

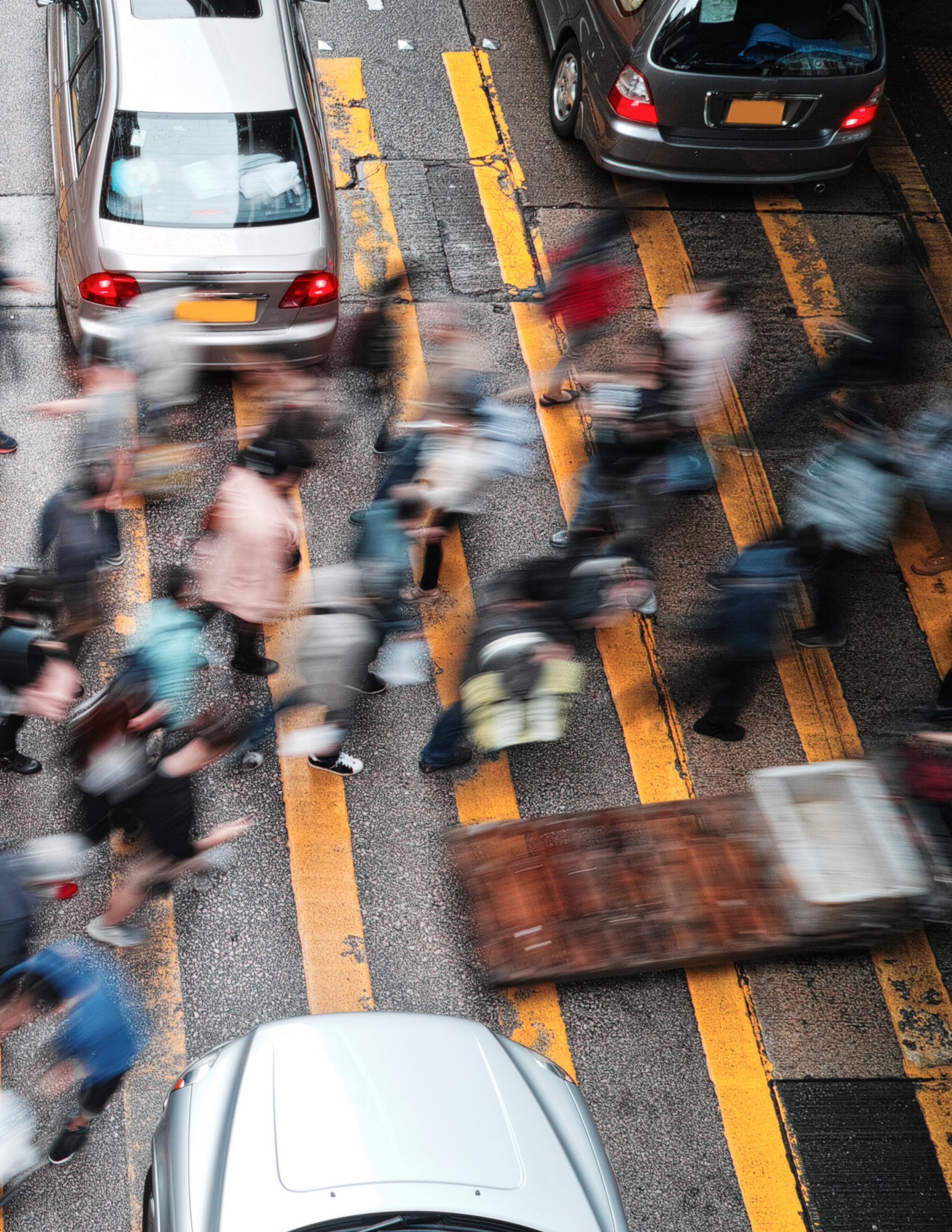
A 14 June 2018 speech, delivered by acting Associate Attorney General Jesse Panuccio, offers additional insight. In remarks made at the American Bar Association's 12th National Institute on the Civil False Claims Act and Qui Tam Enforcement, Mr. Panuccio explained that declined FCA cases still consume DOJ and agency resources. Moreover, he noted that frivolous cases can lead to bad case law and undermine future enforcement. Thus, he explained that when declining intervention, and even throughout the life of the case, DOJ attorneys are now instructed to consider whether moving to dismiss an action would be an appropriate exercise of the department's prosecutorial discretion. His remarks suggest that DOJ should exercise such discretion in order to free up DOJ's resources for matters in the public interest. This increased interest in flexing DOJ's dismissal authority may be linked to the fact that in recent years, fueled in part by litigation financing firms and significant relator recoveries in declined cases, relators are less likely to voluntarily dismiss qui tam complaints after the government declines to intervene.

DOJ's apparent interest in making more motions to dismiss under section 3730(c)(2)(A) is evidenced by the fact that it filed at least 16 such motions in 2018, an increase from two such motions in 2017[1] and three in 2016[2]. The significance of this increase is somewhat undercut by the fact that 11 of the 2018 motions were filed in related cases brought by the same professional relator against drug companies and rely on the same argument to justify dismissal – the time required to respond to massive discovery requests related to the hundreds of thousands of prescriptions at issue would interfere with "important policy prerogatives of the federal government's healthcare programs."[3] Nonetheless, even if those cases are counted as a single motion to dismiss, when combined with the other five motions made in 2018,[4] there is still a modest increase. Moreover, DOJ leadership has repeatedly confirmed its intent to carefully consider when such motions are appropriate and thus a continued uptick in such motions is expected. We expect that, if confirmed by the Senate, newly appointed Attorney General William Barr will guide DOJ to actively shape the enforcement of FCA in declined qui tams through means that include the increased use of these dismissal motions.

Moving away from sub-regulatory guidance as de facto regulations

On 25 January 2018 then-Associate Attorney General Rachel Brand issued a public memo (Brand Memo) that dictates that DOJ "litigators may not use noncompliance with [agency] guidance documents as a basis for proving violations of applicable law" in FCA and other affirmative civil enforcement cases. The Brand Memo builds on a prior memo issued by former Attorney General Jeff Sessions that prohibits DOJ from promulgating its own guidance documents to create binding rights or obligations on regulated parties. The Brand Memo extends this principle to other agencies' guidance essentially prohibiting agencies from short-circuiting the rule-making process by issuing guidance that serves as "de facto regulations."

The Brand Memo explains that to the extent agency guidance documents simply explain or paraphrase legal mandates found in existing statutes or regulations, DOJ may continue to "use evidence that a party read such a guidance document to help prove that the party had the requisite knowledge of the mandate." Thus, even after the Brand Memo, DOJ may point to agency guidance as evidence that the subject of an FCA investigation *knowingly* presented[5] a false or fraudulent claim, or *knowingly* caused a false or fraudulent claim to be presented. It remains to be seen whether and how the Brand Memo will shape DOJ's decisions to bring, or intervene in, FCA claims against companies operating in the ADG industry sector.



Additional DOJ enforcement priorities

In the speech referenced above, acting Associate Attorney General Jesse Panuccio identified two additional DOJ enforcement priorities that may impact ADG companies. First, he reported that DOJ is committed to enforcing FCA against those who misrepresent their eligibility for small business contracts. Increased scrutiny of companies claiming eligibility as a small, woman-owned, or veteran-owned entity may extend beyond the entities that claim such eligibility. The complexity of the regulations dictating such eligibility, including those relating to independence from larger companies, could extend this increased scrutiny to larger companies that associate with these entities. Second, Mr. Panuccio underscored DOJ's commitment to bring FCA actions against companies flouting U.S. customs laws and noted that over the last five years, DOJ recovered more than US$100 million in settlements involving the evasion or underpayment of import duties for a wide variety of merchandise. An increased focus on customs and import duties is important for many in the ADG industry that rely on complex, global supply chains.

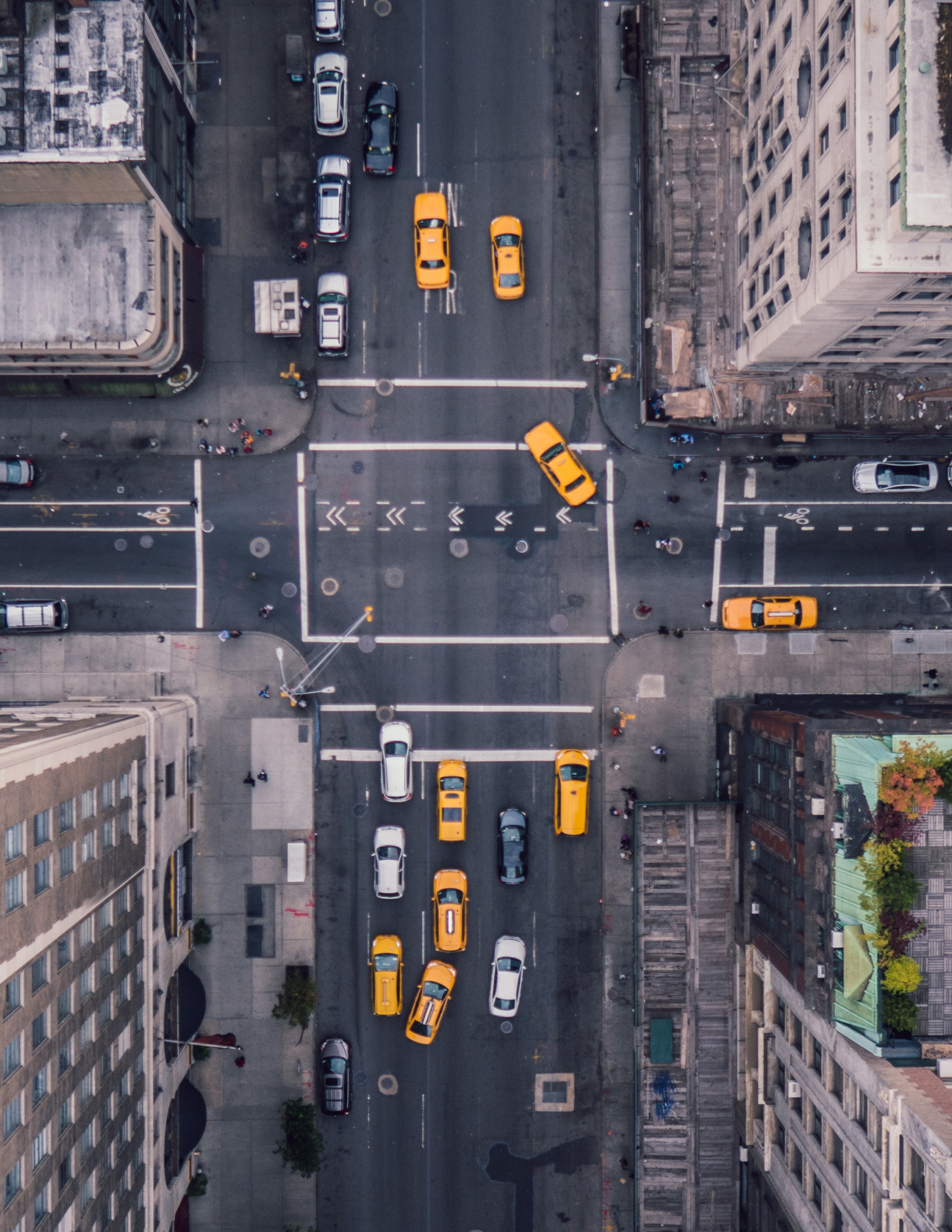
Obtaining cooperation credit from DOJ

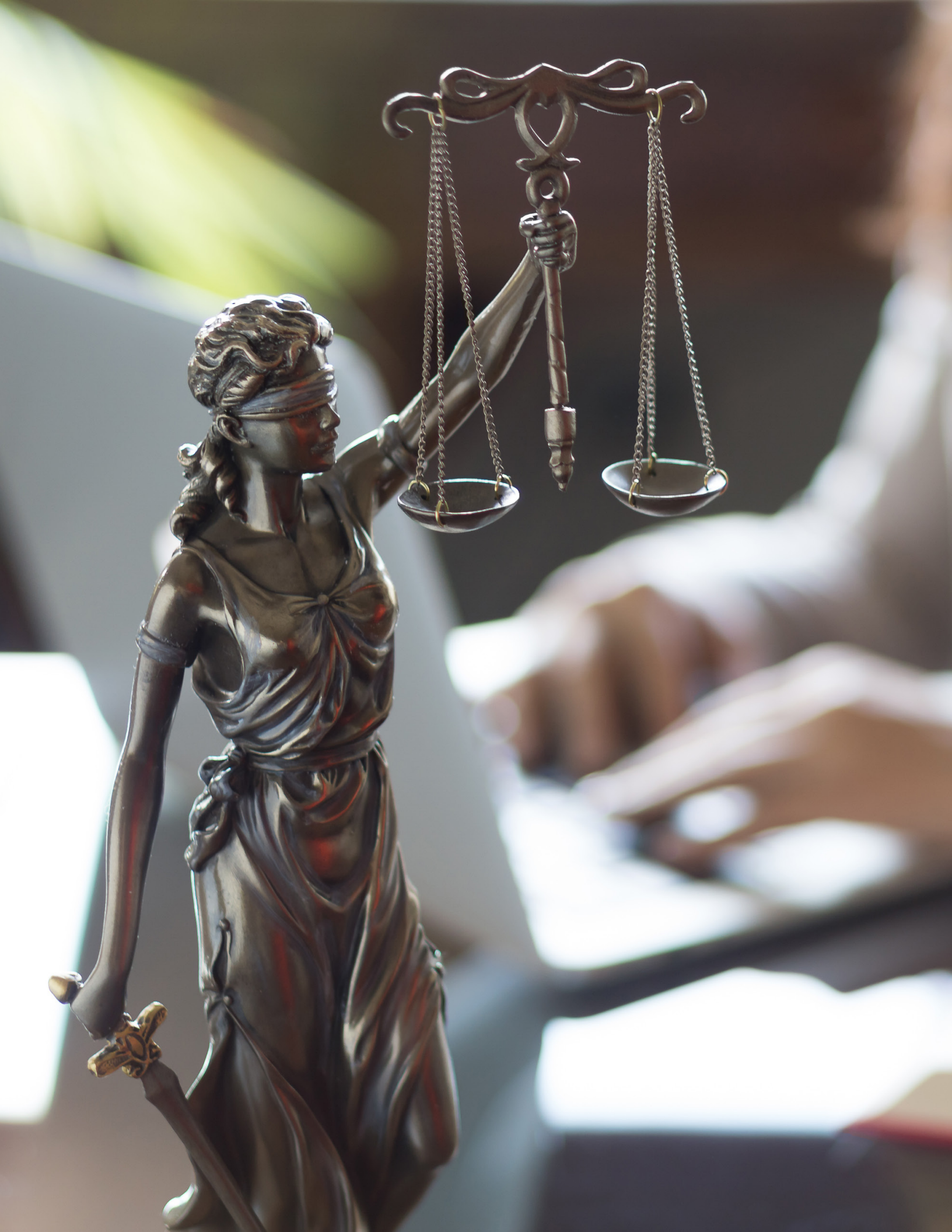
Finally, Deputy Attorney General Rosenstein announced additional changes to DOJ policy that relate to cooperation credit in a 29 November 2018 speech.[6] As memorialized in the 2015 memo titled "Individual Accountability for Corporate Wrongdoing" (known as the "Yates Memorandum"), DOJ has been requiring that "to be eligible for any credit for cooperation, a company must identify all individuals involved in or responsible for the conduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct." Rosenstein announced that the department would move away from this "all or nothing" approach. He drew a clear line between criminal and civil cases. In criminal investigations, companies must provide information on all individuals who were substantially involved in the criminal conduct at issue, regardless of level of seniority. But, he acknowledged that "[c]ivil cases are different" and concluded the "all or nothing" approach has been inefficient and counterproductive to FCA's main goals: deterrence and the reimbursement of victims (which, in FCA cases, is the government). DOJ now appears to realize that pursuing judgment-proof, lower-level employees does not efficiently advance these goals.

The new policy Rosenstein announced allows DOJ prosecutors resolving civil FCA cases to award the following:

- Maximum cooperation credit to corporations that identify "every individual person who was substantially involved in or responsible for the misconduct."
- Some discretionary cooperation credit to corporations that meaningfully assist in the government's investigation, "without the need to agree about every employee with potential individual liability."
- No cooperation credit to corporations that do not "identify all wrongdoing by senior officials, including members of senior management or the board of directors."

The policy moves away from the binary choice – full credit or no credit – that previously delayed the resolution of cases without any real benefit to the government. However, a company must still identify all wrongdoing by senior officials, including members of senior management or the board of directors, if it wants to earn any credit for cooperating in a civil case.





Enforcement policies in action: FCA enforcement continues

DOJ recovered a total of more than US$2.8 billion in settlements and judgments from civil cases involving fraud and false claims against the government in fiscal year 2018, which ended 30 September 2018. Although the majority of recoveries continue to come from the health care industry, a number of significant recoveries were also made in the ADG industry sector. DOJ also reports US$2.1 billion of the US$2.8 billion recovered was linked to suits originally filed by a whistleblower through FCA's qui tam provisions. The FCA investigations resolved in 2018 that involved ADG companies include the following:

Company	***Allegations***	***Settlement amount***
Fiber manufacturer	Defective Zylon fiber used in bulletproof vests that the United States purchased for federal, state, local, and tribal law enforcement.	US$66,000,000
Defense contractor	Employees who deployed to an air base in the Middle East defrauded the Air Force by overbilling for time worked.	US$27,450,000
Ship husbanding provider	Overbilled the U.S. Navy for goods and services provided at ports in several regions throughout the world.	US$20,000,000
Power company and owner/president	Submitted claims for fraudulent costs for reimbursement under a cooperative agreement with the Department of Energy.	US$14,400,000
Communications company	Entered into multiple Small Business Innovation and Research contracts with government defense agencies for which it was not eligible.	US$12,177,632
Defense contractor	Knowingly sold defective combat earplugs to the Defense Logistics Agency.	US$9,100,000

Teachings of *Escobar* continue to fence in FCA liability

For two and a half years now, courts have been applying the guidance issued by the U.S. Supreme Court in *Universal Health Services, Inc. v. United States ex rel. Escobar* (*Escobar*).[7] That decision validated an implied false certification liability theory under FCA in some circumstances, but left two key issues open to interpretation. First, the *Escobar* court declined to explain whether the two-part test laid out by the justices for implied certification liability is mandatory. Second, although the court underscored FCA's materiality requirement and noted that it was "demanding," it did not articulate a clear materiality standard. Although there is not yet universal agreement on these issues, there is a growing consensus on both fronts to apply the teachings of *Escobar* in ways that significantly cabin FCA liability.

Appellate courts trend towards requiring specific representations to trigger implied certification FCA liability

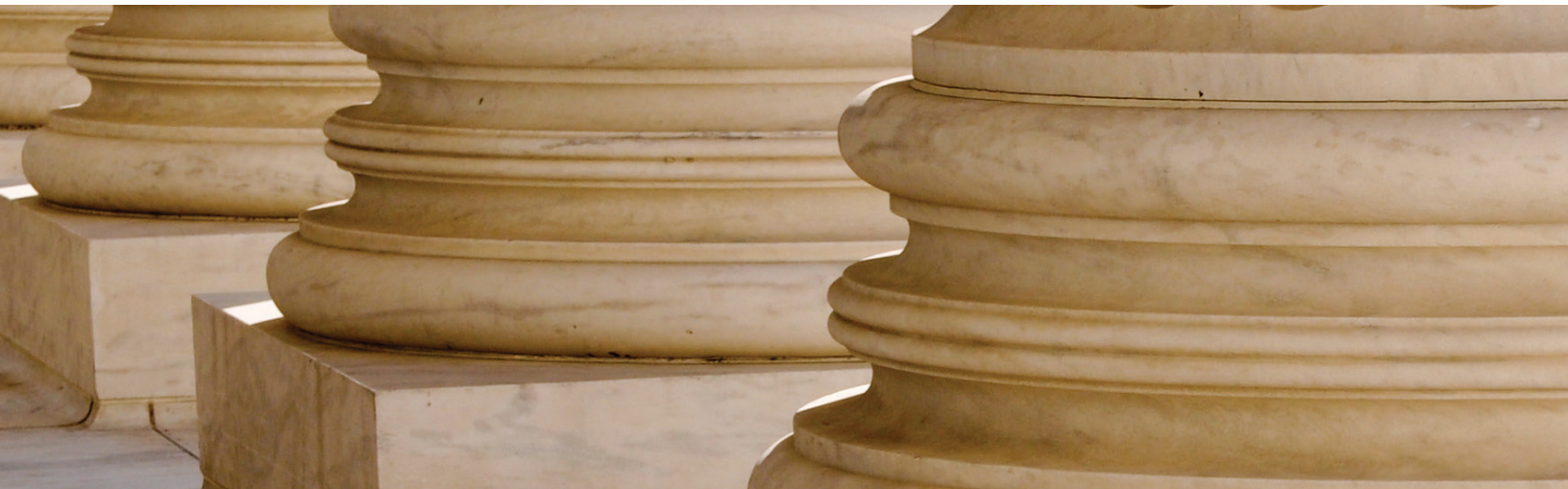
The *Escobar* court affirmed that an implied false certification theory of liability under FCA is a valid theory "at least where" the defendant (i) made *specific* representations about the goods or services provided and (ii) failed to disclose noncompliance with material statutory, regulatory, or contractual requirements that renders those specific representations misleading or false. The facts in *Escobar* included "specific representations," but, since that decision, courts have split over whether establishing both conditions is necessary for a viable implied false certification claim. This past year, the Ninth Circuit joined the First[8] and Seventh[9] Circuits in indicating that FCA liability for implied false certification attached *only* where *Escobar's* two-part test is satisfied. The Ninth Circuit reached this conclusion reluctantly, however, after concluding that it was bound by two other post-*Escobar* decisions rendered by the Ninth Circuit that treated *Escobar's* two conditions as mandatory.[10] In contrast, the Fourth Circuit held in *United States ex rel. Badr v. Triple Canopy, Inc.* that a "misleading half-truth" consistent with that in *Escobar* could establish implied false certification liability even in the absence of a clear, specific representation.[11] Two D.C. District Court cases similarly held that "the D.C. Circuit's broader statement of the implied certification theory remains good law after *Escobar*,"[12] but no other courts of appeals have joined the Fourth Circuit.

Demanding materiality requirement poses a challenge for FCA plaintiffs

The *Escobar* court emphasized that FCA's materiality requirement is a "demanding" standard, but did not announce a clear rule or standard for determining materiality. As a result, the requirement that an alleged falsity that forms the basis for an FCA claim must be "material" to the government's decision to pay has been hotly litigated for the past two and a half years. The *Escobar* court did discuss a number of illustrative examples of what should and should not be deemed material. It noted, for instance, that "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are *not material*."[13]

Some lower courts point to this this example from *Escobar* to conclude that evidence of continued payment by the government when agency officials are aware of the alleged falsity indicates that the alleged falsity is immaterial.[14] Even where there is no evidence that the government continued to pay with knowledge of the alleged falsity, courts frequently find that a relator has not adequately alleged or proven that the government would *not have paid* if it had known about the falsity.[15] Several FCA claims against government contractors were dismissed in 2018 after the court concluded materiality had not been adequately pleaded.

In *Hutchins et al. v. DynCorp International Inc. et al.*, a district court dismissed FCA claims based on the relators' allegations that DynCorp knowingly supplied and billed the Army for vehicles that were "not up to specifications required by the military," "not mission capable," and "older than ordered."[6] The court dismissed many of the relator's



allegations because they lacked factual specifics. However, with regard to the age of certain vehicles provided, the court noted that even if DynCorp knowingly failed to disclose the age of certain vehicles, the relators had not "connect[ed] the vehicles' model years to any performance issues" and "the lack of alleged performance failures renders [these allegations] non-material" for FCA purposes.[17]

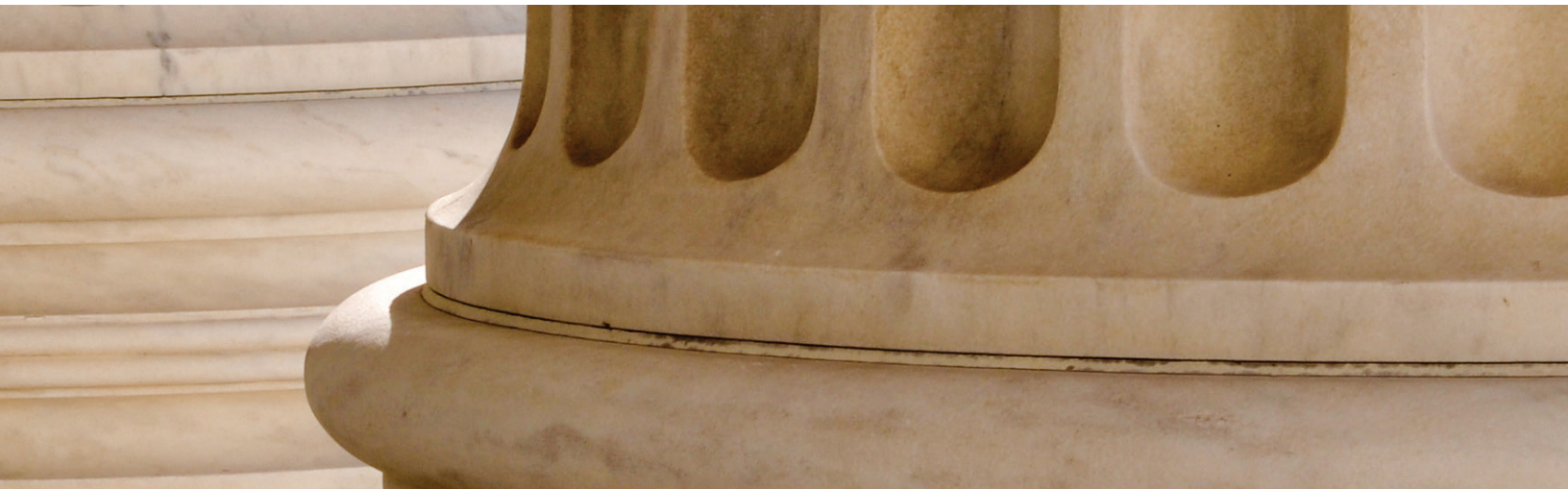
Similarly, in *United States ex rel. Folliard v. Comstor Corporation*, a relator alleged that the defendant sold the federal government products through the federal supply schedule that were not compliant with the Trade Agreements Act (TAA) and violated FCA by falsely certifying TAA compliance.[18] The court scrutinized the relator's allegations about materiality on a motion to dismiss, and again in ruling on a motion for reconsideration, and concluded the relator had not adequately alleged materiality or scienter. With regards to materiality, the court noted that after *Escobar* it was not sufficient that the relator allege the defendants failed to comply with the TAA and that the government had identified compliance with TAA as a condition of payment. Moreover, the court noted the relator "undermined materiality by alleging that the government does not outright refuse payment for TAA non-compliance, but rather views such problems as reason to *'work with [vendors] to address compliance issues.'*"[19]

The relator argued, among other things, that he should not be faulted for failing to plead that the government quickly moved to cancel the defendant's federal supply schedule contracts upon finding out about the TAA noncompliance because "essentially requir[ing] Government payors to immediately terminate payments to contractors based solely on relators' allegations of fraud" is manifestly unjust. The court ruled that a decision dismissing the relator's claim for failure to allege materiality had not worked as such a requirement because the relator could have adequately alleged materiality in many ways.[20]

In a third case, *United States v. Strock*, DOJ alleged the defendants violated FCA when they falsely certified or verified that their company qualified as a service-disabled veteran owned small businesses (SDVOSB). DOJ alleged these false certifications fraudulently induced the U.S. Department of Veterans Affairs, the Army, and the Air Force to award contracts to the defendants' company and thus the claims submitted for the work performed by the company were also false.[21] The district court granted the defendants' motion to dismiss on materiality grounds. In doing so, the court distinguished between the impact of the alleged falsity on the decision to award the contracts and the decision to make payments under the contracts once awarded.[22]

This decision is in tension with the Ninth Circuit's decision in *United States ex rel. Campie v. Gilead Sciences, Inc.*,[23] which involved allegations that a pharmaceutical company made false statements in the course of obtaining U.S. Food and Drug Administration (FDA) approval for several HIV drugs. There, the Ninth Circuit was not persuaded that the FDA's failure to retract its approval of the drugs and continuing payment for the drugs by government health care programs necessarily meant the alleged false statements were immaterial to payment decisions.[24]

Finally, the Ninth Circuit recently affirmed dismissal of a long-running FCA claim based on alleged false certifications of compliance with contract requirements related to a sensor for a satellite system. The court found the relator did not allege falsity or materiality with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure because the complaint did not plead the "what," "when," and "how" of the alleged false claims. The court noted that alleged noncompliance related to the defendant's alleged failure to perform complete tests and retests of component parts and of assembled hardware, but the relator did not identify which tests, which component parts, and whether any tests were done at all or if they were done incompletely.[25]



Looking forward

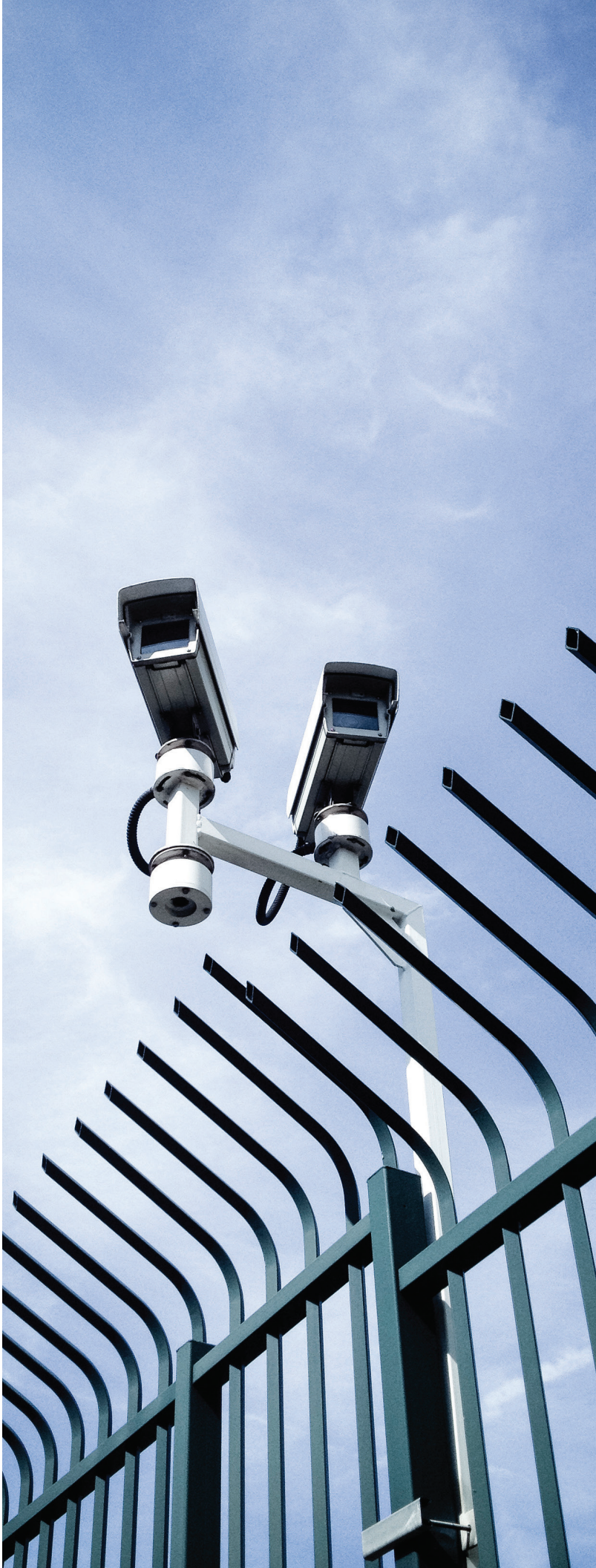
We expect courts to continue to apply the teachings of *Escobar* in ways that narrow the circumstances that give rise to FCA liability. We also expect increased discovery relating to the extent and timing of government knowledge and to government payment practices because courts continue to indicate that these issues are relevant to materiality of an alleged falsity.

The U.S. Supreme Court could still take up the *Gilead* case or other pending petitions for certiorari and provide additional guidance about the FCA materiality standard. But it is equally possible that the court will allow the questions surrounding materiality to continue to percolate in the district and appellate courts. In fact, an appeal of *Ruckh v. Salus* is pending before the Eleventh Circuit Court of Appeals and that decision could shape the appellate court landscape.

In addition, the U.S. Supreme Court's decision in *Digital Realty Trust, Inc. v. Somers*, could have implications for interpreting the anti-retaliation provisions of FCA. In that decision, the court unanimously resolved a split between the Second, Ninth, and Fifth Circuits, concluding the anti-retaliation provision of the Dodd-Frank Act protects only those individuals who provide information relating to a violation of the securities laws to the Securities and Exchange Commission (SEC). Individuals who report such violations to their employer or another entity receive no protection under Dodd-Frank unless they *also* report to the SEC.[26] Various other federal statutes, including FCA, provide anti-retaliation provisions. Under FCA, "[a]ny employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter."[27] Lower courts have historically interpreted the "other efforts" language to protect employees who engage in internal reporting.[28] Whether this interpretation holds following *Digital Realty* remains to be seen.

Conclusion

Staying informed on these topics is incredibly important given the potential for impactful case law. Please visit our Aerospace, Defense, and Government Services page at hoganlovells.com for updates on these and other issues affecting the industry in 2019.



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Endnotes

1. *See United States v. Acad. Mortg. Corporation*, No. 16-CV-02120-EMC, 2018 WL 1947760, at *4 (N.D. Cal. 25 Apr. 2018) *appeal filed* No. 18-16408 (9th Cir. filed 27 July 2018); *United States ex rel. Eanes v. O'Hanlan*, No. 3:16-CV-10563, 2017 WL 1196468, at *1 (S.D.W. Va. 7 Mar 2017), *report and recommendation adopted*, No. CV 3:16-10563, 2017 WL 1193732 (S.D.W. Va. 29 Mar. 2017).

2. *United States ex rel. Mesi v. Nat'l Default Servicing Corp.*, No. 315CV00508RCJVPC, 2017 WL 3749677, at *3 (D. Nev. 30 Aug. 2017); U*nited States ex rel. Johnson v. Ferguson*, No. 3:16-CV-08838, 2017 WL 1196466, at *1 (S.D.W. Va. 7 Mar. 2017), *report and recommendation adopted*, No. CV 3:16-8838, 2017 WL 1196448 (S.D.W. Va. 29 Mar. 2017); *United States ex rel. Dreyfuse v. Farrell*, No. 3:16-CV-05273, 2017 WL 1173976, at *1 (S.D.W. Va. 7 Mar. 2017), *report and recommendation adopted*, No. CV 3:16-5273, 2017 WL 1170867 (S.D.W. Va. 28 Mar. 2017).

3. *See United States ex rel. Health Choice Group, LLC v. Bayer Corp.*, 5:17-CV-126-RWS-CMC, Doc. 116, at *14 (E.D. Tex. 17 Dec. 2018); *United States ex rel. Health Choice Alliance, LLC v. Eli Lilly & Co.*, 5:17-CV-123-RWS-CMC, Doc. 192 (E.D. Tex. 17 Dec. 2018); *United States ex rel. Health Choice Advocates LLC v. Gilead Sciences, Inc.*, 5:17-CV-121-RWS-CMC, Doc. 70 (E.D. Tex. 17 Dec. 2018); *United States ex rel. Miller v. AbbVie, Inc.*, 3:16-CV-2111-N, Doc. 52 (N.D. Tex. 17 Dec. 2018); *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 3:17-CV-00765-SMY-DGW, Doc. 63 (S.D. Ill. 17 Dec 2018); *United States ex rel. Clare v. Otsuka Holdings Co.*, 17-CV-00966, Doc. 30 (N.D. Ill. 17 Dec. 2018); *United States ex rel. SCEF, LLC v. AstraZeneca PLC*, 2:17-CV-01328-RSL, Doc. 15 (W.D. Wash. 17 Dec. 2018); *United States ex rel. SMSF LLC v. Biogen Inc.*, 1:16-cv-11379-IT, Doc. 52 (D. Mass. 17 Dec. 2018); *United States ex rel. SAPF LLC, v. Amgen Inc.*, 2:16-CV-05203-GJP, Doc. 18 (E.D. Pa. 17 Dec. 2018); U*nited States ex rel. SMSPF LLC v. EMD Serono Inc.*, 2:16-cv-05594-TJS, Doc. 23 (E.D. Pa. 17 Dec. 2018); *United States ex rel. NHCA-TEV LLC v. Teva Pharmaceutical Products Ltd.*, 2:17-cv-02040-JD, Doc. 30 (E.D. Pa. 17 Dec. 2018).

4. *United States ex rel. Vanderlan v. Jackson HMA, LLC*, No. 3:15-CV-767-DPJ-FKB, Doc. 81 (S.D. Miss. 5 Nov. 2018); *United States ex rel. Sibley v. Delta Regional Medical Center*, 4:17-cv-00053-GHD-RP, Doc. 61 (N.D. Miss. 5 Nov. 2018); *United States ex rel. Stovall v. Webster Univ.*, No. 3:15-CV-03530-DCC, 2018 WL 3756888, at *1 (D.S.C. 8 Aug. 2018); *United States ex rel. Maldonado v. Ball Homes, LLC*, No. CV 5:17-379-DCR, 2018 WL 3213614, at *1 (E.D. Ky. 29 June 2018); *United States ex rel. Chang v. Children's Advocacy Ctr. of Delaware*, No. CV 15-442-GMS at *4 (Doc. No. 56) (D. Del. 14 May 2018).

5. 31 U.S.C. § 3729(a)(1).

6. Press Release, *Deputy Attorney General Rod J. Rosenstein* Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (29 Nov. 2018) https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0

7. 136 S.Ct. 1989 (2016).

8. *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 37 (1st Cir. 2017) (highlighting the importance of the existence of specific representations as a basis for potential FCA liability in an implied false certification context without explicitly holding the *Escobar* two-part test is mandatory).

9. *United States v. Sanford-Brown, Ltd.*, 840 F.3d 445, 447 (7th Cir. 2016).

10. *United States ex rel. Rose v. Stephens Institute*, 901 F.3d 1124, 1130 (9th Cir. 2018) (citing *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 332 (9th Cir. 2017) and *United States ex rel. Campie v. Gilead Sciences, Inc.*, 862 F.3d 890, 901 (9th Cir. 2010)).

11. 857 F.3d 174 (4th Cir. 2017).

12. *United States v. DynCorp Int'l LLC*, No. 16-1473, 2017 WL 2222911, at *100 (D.D.C. May 19, 2017); *accord United States ex rel. Landis v. Tailwind Sports Corp.*, No. 10-cv-00976, 2017 WL 573470 (D.D.C. 13 Feb. 2017).

13. *Id.* (emphasis added).

14. One district court overturned a US$350 million jury verdict after concluding that the evidence at trial indicated the government continued to make payments to a nursing home operator, despite long being aware of alleged record-keeping violations and some "upcoding" on claims for reimbursement. *See United States v. Salus Rehab., LLC*, 304 F. Supp. 3d 1258 (M.D. Fla. 2018). *See also United States ex rel. Berg v. Honeywell Int'l, Inc.*, No. 17-35083, 2018 WL 3237518 (9th Cir. 3 July 2018) (affirming summary judgement for defendant partially on materiality grounds where government continued to pay claims up to five years after it became aware of fraud allegations and up to four years after it conducted its own audit); *United States ex rel. Mei Ling v. City of Los Angeles*, No. CV 11-974 PSG (JCX), 2018 WL 3814498 (C.D. Cal. 25 July 2018) (granting motion to dismiss – with leave to amend – FCA claim where the U.S. Department of Housing and Urban Development awarded grants to city housing agencies throughout the relevant claims period despite knowledge of noncompliance); *United States ex rel. Cressman v. Solid Waste Servs., Inc.*, No. CV 13-5693, 2018 WL 1693349 (E.D. Pa. 6 Apr. 2018) (granting summary judgment to defendant where federal agencies continued to pay for years after learning of plaintiff's allegations, DOJ investigated and declined to intervene in the case).

15. See, e.g., U*nited States v. Catholic Health Initiatives*, 312 F. Supp. 3d 584, 605 (S.D. Tex. 2018) (granting motion to dismiss FCA allegations where complaint failed to allege misrepresentations were material to the government's decision to pay for medical care provided by the hospital); *United States ex rel. Mei Ling v. City of Los Angeles*, No. CV 11-974 PSG (JCX), 2018 WL 3814498, at *16-*18 (C.D. Cal. 25 July 2018) (collecting cases on this point and granting dismissal where there was evidence that government did continue payment and no allegations government would have withheld funds had it known of alleged noncompliance or that it has previously done so in similar cases of noncompliance). S*ee also United States ex rel. Coffman v. City of Leavenworth, Kansas*, 303 F. Supp.

3d 1101, 1120 (D. Kan. 2018) (granting summary judgment to defendant because relator failed to show alleged implied false certification with environmental laws was material because no evidence agencies would have refused to pay had they been aware of violations).

16. No. CV 15-355 (RMC), 2018 WL 4674577, at *13 (D.D.C. 28 Sept. 2018).

17. *Id.* at 14.

18. No. CV 11-731 (BAH), 2018 WL 5777085, at *1 (D.D.C. 2 Nov. 2018).

19. *Id.* at *6.

20. *Id.* at *8 ("Not pleading that the government cancelled defendants' contracts did not doom the relator's Third Amended Complaint. Omitting any fact from which materiality could plausibly be inferred did.")

21. *United States v. Strock*, No. 15-CV-0887-FPG, 2018 WL 647471, at *3 (W.D.N.Y. 31 Jan. 2018), reconsideration denied, No. 15-CV-887-FPG, 2018 WL 4658720 (W.D.N.Y. 28 Sept. 2018).

22. *Id.* at *10.

23. 862 F.3d 890 (9th Cir. 2017).

24. *Id.* at 906-07 (Noting that "there are many reasons the FDA may choose not to withdraw a drug approval" and concluding relators adequately alleged materiality). A petition for certiorari in this case is pending before the U.S. Supreme Court.

25. U*nited States ex rel. Mateski v. Raytheon Co.*, No. 17-56320, 2018 WL 6519530 (9th Cir. 11 Dec. 2018).

26. *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777, 200 L. Ed. 2d 15 (2018).

27. 31 U.S.C. 3730(h)(1).

28. *Manfield v. Alutiiq Int'l Solutions, Inc.*, 851 F. Supp. 2d 196, 204 (D. Me. 2012) ("Since a plaintiff now engages in protected conduct whenever he engages in an effort to stop an FCA violation, the act of internal reporting itself suffices as both the effort to stop the FCA violation and the notice to the employer that the employee is engaging in protected activity.")

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