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IMPLIED CERTIFICATION LIABILITY UNDER THE FALSE CLAIMS ACT

By Susan A. Mitchell, Thomas M. Abbott, and Agustin D. Orozco

The civil False Claims Act[1] is a powerful weapon in the Government's arsenal against contractor fraud,[2] but it is often misunderstood or misused. Among its key provisions, the FCA, as most recently amended, imposes treble damages and penalties on federal contractors and other recipients of federal funds that "knowingly" make false claims for approval or payment or "knowingly" make false statements "material" to false claims.[3] FCA actions can be filed either by the Government or by whistleblowers, called *qui tam* relators, who are entitled by statute to a significant share of any judgment or settlement.[4] The Government has a right to intervene and take over prosecution of any *qui tam* action filed by a relator,[5] but if the Government decides not to intervene, the whistleblower is entitled to prosecute the case and reap a larger share of any rewards.[6]

In recent years, legislative changes to the FCA,[7] as well as unsettled case law interpreting the statute, have made the FCA a beacon not only for whistleblowers seeking justice, but for those seeking quick settlements from companies unable or unwilling to incur the enormous litigation costs entailed in FCA actions. In Fiscal Year 2010, *qui tam* filings were up by 75% over FY 2009, and *qui tam* plaintiffs recovered over $386 million as their share of FCA judgments and settlements.[8] Department of Justice statistics show, however, that of the hundreds of *qui tam* actions filed under the FCA last

IN BRIEF

FCA Basics

- Statutory Definition Of "False Claims"
- Statutory Definition Of "False Statement"
- "Knowledge" Under The FCA
- Damages, Penalties & Qui Tam Actions

The Judicial Doctrine Of Legally Implied False Statements

Circuit Split On Implied Certification Theory

Practical Risks Created By The Implied Certification Doctrine

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year, only 7.2% of the judgments and settlements recovered resulted from actions in which the Government did not intervene.[9] It is clear, therefore, that the vast majority of whistleblower actions are ultimately dismissed by the courts—but not until the defendants, and often Government program personnel, have been subjected to disruptive and costly discovery proceedings. Many courts have recognized that whistleblowers "are motivated primarily by prospects of monetary reward rather than the public good" and are far less likely than the Government "to forgo an action arguably based on a mere technical noncompliance" that has no financial impact on the Government.[10]

Recent legislative changes to the FCA have invited further *qui tam* activity by broadening the scope of liability under the statute and narrowing the jurisdictional bar to some types of whistleblowers formerly precluded from filing FCA actions.[11] In addition, increasing numbers of courts have adopted some form of "implied certification" theory, a judicial construct that permits the court, or a jury, to "legally imply" a false statement where no express, factual false statement has been made.[12] This Briefing Paper provides (a) an overview of the FCA, (b) an explanation of the evolution of the "implied certification" doctrine, (c) an analysis of the different circuit court interpretations of that doctrine, and (d) guidance on minimizing the risks of liability for implied false statements.

FCA Basics

The FCA was enacted during the Civil War to combat widespread fraud by Government contractors that were submitting inflated invoices and shipping faulty goods to the Government.[13] As both Congress and the Supreme Court repeatedly have cautioned, however, the FCA is not an all-purpose antifraud statute.[14] Instead, this broad and punitive statute is designed to redress fraud that affects the public fisc.[15]

The FCA currently is codified in five separate places in the U.S. Code,[16] three of which are relevant to FCA "false statement" liability. These provisions, and their application, are discussed below.

■ Statutory Definition Of "False Claims"

The first prerequisite to FCA liability is a false claim for money or property from the Government. The FCA applies only where there has been a false claim submitted for approval or payment.[17] Contractors should be aware that with respect to the statutory definition of a false claim for payment, two different versions of the FCA are currently in effect, the 1986 version of the statute and the version amended in 2009.

The 1986 version imposes FCA liability on:[18]

> Any person who…knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, a false or fraudulent claim for payment or approval;….

A "claim" under the 1986 version of the statute is defined as follows:[19]

> [A]ny request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

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Amendments to the FCA made in the Fraud Enforcement and Recovery Act of 2009 removed the direct "presentment" requirement for false claim liability.[20] For claims made after May 20, 2009, the date on which Congress enacted the FERA amendments,[21] FCA "false claims" liability is imposed on "any person who…knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," whether or not the false claim is made directly to the Government.[22] This means that persons liable for "false claims" under the FCA can include subcontractors or sub-tier suppliers that cause a prime contractor to submit a false claim to the Government.

FERA also significantly broadened the definition of "claim":[23]

> [A]ny request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—
>
> (i) is presented to an officer, employee, or agent of the United States; or
>
> (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—
>
> (I) provides or has provided any portion of the money or property requested or demanded; or
>
> (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded;….

This definition reinforces the broader sweep of the FCA under the FERA amendments; a "claim" now may apply to any "false" claim on federal funds. It is not yet clear how attenuated that nexus may be.

■ Statutory Definition Of "False Statement"

There are two versions of "false statement" liability under the FCA as well. The 1986 version of the FCA provided that in addition to the requirement that the defendant "know" that the statement or record is "false," the defendant must have made the false record or statement for the purpose of getting a false claim paid or approved. The 1986 version imposes liability on:[24]

> Any person who…knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;….

On June 9, 2008, the Supreme Court resolved a longstanding circuit court split regarding the scope of FCA false statement liability in *Allison Engine Co. v. United States ex rel. Sanders*.[25] The Court held that the plaintiff in an FCA action alleging false statement liability must prove that the defendant *intended* that the false record or statement be material to the Government's decision to approve or pay a false claim.[26] In response, Congress changed the statutory test for false statement liability. Under the 2009 FERA amendments, federal contractors, as well as other recipients of federal funding, are liable under the FCA if they knowingly use a false record or statement that proves to be "material" to a false claim. Under FERA, false statement liability is imposed on:[27]

> [A]ny person who . . . knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;….

FERA extended false statement liability to persons who knowingly use false records or statements "material to an obligation to pay or transmit money or property to the Government," or to improperly "avoid[ ] or decrease[ ] an obligation to pay or transmit money or property to the Government."[28] FERA also codified a definition for "material," which reflected the test adopted by many courts of appeal at that time:[29]

> [M]aterial means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

This amendment reflects the pre-FERA case law in some circuits that held that "materiality" is defined by the "natural tendency" test. That test asks whether the false statement either makes the Government "prone to a particular impression," or has the "ability to effect the Government's actions."[30] FERA's revision of the FCA to remove the specific intent element from false statement liability, coupled with this reduced threshold for materiality, significantly broadened the scope of actionable FCA claims based on false or fraudulent statements or records.

To further complicate matters, Congress made the FERA amendments to false statement liability retroactive to June 7, 2008—two days before

the Supreme Court's *Allison Engine* decision was issued.[31] Courts have reached different conclusions as to whether FERA's retroactivity provision applies to claims for payment pending as of June 7, 2008,[32] or cases pending as of that date,[33] or whether the provision even is constitutional.[34] Until that issue is clarified by the judiciary, contractors should assume the worst case scenario when assessing litigation risks—that FERA's expanded test for false statement liability applies to both claims for payment made on or after June 7, 2008, and cases pending on that date involving earlier claims for payment.

In short, contractors must be aware that statements and records made in connection with allegedly false claims for payment are subject to differing standards for false statement liability, depending on which version of the FCA applies to the claims for payment.

■ "Knowledge" Under The FCA

The FCA's standard for "knowing" misconduct has not changed since 1986. To prove that the defendant acted "knowingly," the Government must prove that the defendant:[35]

(1) had "actual knowledge" of the falsity of relevant information;

(2) "act[ed] in deliberate ignorance of the truth or falsity of the information"; or

(3) "act[ed] in reckless disregard of the truth or falsity of the information."

This requirement reflects the underlying principle that the FCA is not intended to be a "general enforcement device" for federal statutes, regulations and contracts.[36] Courts repeatedly have held that whistleblowers may not "shoehorn" breach of contract allegations or ordinary violations of statute or regulation into FCA complaints.[37] The FCA does "not punish honest mistakes or incorrect claims submitted through mere negligence."[38] The "reckless disregard" and "deliberate ignorance" standards for knowing conduct have been described by courts as "gross negligence-plus."[39]

With respect to a contractor's interpretation of a requirement in a statute, regulation or contract, some courts have adopted an "objective" standard where the requirement reasonably can be construed in one or more ways. For example, the U.S. Court of Appeals for the Fourth Circuit ruled that an FCA defendant did not make a false statement in executing task order forms promising compliance with all contract terms because the contract's description of "maintenance" tasks was unclear as to what would constitute "adequate" maintenance. The court held that the defendant's interpretation could not be deemed "objectively false."[40] Contractors should be aware, however, that in some jurisdictions, notably the Ninth Circuit, controlling case law holds that even ambiguous requirements have only one "true" interpretation.[41]

As a practical matter, contractors should bear in mind that in some jurisdictions, and under some fact patterns, a fundamentally meritless FCA action may be subject to dismissal by the court at the pleading stage, or at least prior to trial.[42] In other jurisdictions, or under a different set of facts, the matter of FCA "knowledge" may be an issue of fact that can be decided only by a jury at trial.

■ Damages, Penalties & Qui Tam Actions

The FCA is a punitive statute, designed to deter fraud by imposing severe consequences for financial fraud against the Government.[43] The FCA currently imposes treble damages and penalties ranging from $5,500 to $11,000 per claim.[44]

The FCA provides that whistleblowers may file an action in the name of the Government.[45] The action must be filed under seal, providing the Government with time to decide whether to intervene and take over prosecution of the action before the complaint is served on the defendant.[46] If the Government intervenes, the whistleblower is entitled to 15 to 25% of the proceeds of any settlement or judgment, depending on the extent to which the whistleblower "substantially contributed to the prosecution of the action."[47] If the Government does not intervene, the whistleblower is entitled to 25 to 30% of the proceeds.[48] In either case, if the defendant is found liable, the whistleblower is entitled to recover his attorneys' fees and costs.[49] The prospect of a windfall recovery, and the lack of any downside financial

risk, is a powerful incentive to *qui tam* plaintiffs to file marginal or even meritless actions, knowing that the risks and costs of FCA litigation are likely to prompt an early settlement from the defendants.[50]

In 1986, the FCA was amended to preclude whistleblowers from filing *qui tam* actions based on information already in the Government's possession, unless the whistleblower was the "original source" for information that had not been "publicly disclosed."[51] The purpose of these amendments was "to minimize the potential for parasitic lawsuits by those who learn of the fraud through public channels and seek remuneration although they contributed nothing to the exposure of the fraud."[52] In 2010, Congress lowered this threshold so that whistleblowers now have greater latitude to mine public records for evidence of potential wrongdoing, as long as they have "independent" knowledge that "materially adds" to the publicly disclosed information.[53]

During 2010, there were significant circuit court splits on the interpretation of several elements of the limitations on the FCA's "jurisdictional bar." One such case from the Second Circuit will be decided by the Supreme Court this year, which may provide more clarity to the criteria for whistleblower participation in FCA actions where the *qui tam* relator bases the action on information obtained from sources such as a Freedom of Information Act request.[54] In that action, the whistleblower alleged that an elevator manufacturer had committed fraud in failing to file reports identifying the number of qualified veterans employed under the Vietnam Era Veterans Readjustment Assistance Act and its implementing regulations.[55] The whistleblower who filed the action, in which the Government did not intervene, had no personal knowledge of the company's reporting practices; he based his lawsuit on data from a publicly accessible Government website and on the Government's responses to his wife's FOIA requests to the Department of Labor.[56] If the Supreme Court does not clarify and limit FCA "reports" on which whistleblowers may base *qui tam* actions, contractors can expect continued increases in the number of whistleblower filings.

The Judicial Doctrine Of Legally Implied False Statements

The "implied certification" doctrine evolved in case law to address a perceived gap in FCA coverage when claims for payment are made by a contractor that "knows" it is in noncompliance with a fundamental requirement of the contract but has made no affirmative misrepresentation of compliance. For "express" false certifications, the claim for payment is false because it contains an express misrepresentation as to whether the goods or services delivered conform to the contract, regulation, or statutory requirement at issue.[57] "Legally implied false certifications," a category of FCA liability adopted in some circuits, extends FCA liability to claims for payment where no express misrepresentation has been made. Instead, the court—or a jury—finds that the contractor's failure to disclose a "known" noncompliance with a statute, regulation, or contract term that is central to the Government's decision to pay a claim, or allow continued participation in a program, is an implied false certification.

The implied certification doctrine has its roots in the common-law theory of promissory fraud, also known as "fraud in the inducement." Under the promissory fraud theory, FCA liability can be imposed for each claim submitted to the Government under a contract when the contract or extension of Government benefit was obtained originally through false statements or fraudulent conduct.[58]

For example, in a prominent promissory fraud case, the Supreme Court held that the defendants were liable under the FCA for claims submitted under Government contracts that the defendants won through collusive bidding. The court imposed liability because the "initial fraudulent action and every step thereafter taken, pressed ever to the ultimate goal—payment of Government money to persons who had caused it to be defrauded."[59] This logic has been applied in cases involving an allegedly false certification that the contractor was a Small Business Administration § 8(a) business;[60] a contractor that bid on and won a Federal Emergency Management Agency installation contract allegedly requiring a state license;[61] and a contract allegedly procured with knowingly defective pricing estimates.[62]

As Medicare fraud became increasingly visible in the late 1990s, false certification theory was extended to situations in which the contractor was required by a specific statute, regulation, or contract provision to certify compliance each time a request for payment was made.[63] These cases proliferated after 2000, primarily but not exclusively in the context of health care claims made under federal statutes or regulations.

A third category of implied certification cases has arisen in some jurisdictions where the contractor fails to disclose noncompliance with a "material" requirement for ongoing participation in a Government program. This broad and subjective category of cases includes alleged noncompliance with a fundamental premise of the program, such as an alleged failure to restrict enrollment incentive compensation on a university's participation in a federally funded student loan program.[64]

Circuit Split On Implied Certification Theory

The implied certification doctrine has not been adopted by all courts of appeal; the First, Third, Fifth, and Eleventh Circuit Courts of Appeal have not yet directly addressed the issue, although they have signaled that they would limit implied certification cases to those in which the contractor must certify compliance with a statute, regulation, or contract provision as an express precondition to payment.[65]

Those courts that have adopted the implied certification doctrine are split on the scope of its application. The Second Circuit has limited implied certification theory to cases in which certification of compliance with a statute, regulation, or contract provision is an express precondition to payment.[66] In the leading Second Circuit case, for example, the court refused to apply the implied certification doctrine to allegations of Medicare fraud. The Medicare statute states that no payments may be made to a health care provider for any items or services that are not "reasonable and necessary" for the diagnosis or treatment."[67] The court affirmed the district court's decision to grant the defendant's motion for summary judgment since the plaintiff could not prove that the defendants' performance of the medical tests for which the defendant sought payment were not reasonable and necessary.[68] In the Fourth Circuit, the court dismissed a *qui tam* complaint in which the plaintiff alleged that subcontractors under a LOGCAP contract in Iraq had inflated "headcounts" for meals served at various facilities.[69] The court found that plaintiff had not alleged an expressly false certification of compliance with the alleged condition, and that the complaint failed to allege the predicate to an implied certification claim, "payment contingent on compliance with a particular condition."[70]

In 2010, the Ninth Circuit joined its "sister circuits" in recognizing a theory of implied certification under the FCA, but it did so in the context of the Stark Act, Medicaid regulations, and home health agency regulations, all of which expressly state that the health care provider must comply with the requirements at issue to be paid.[71] The Ninth Circuit loosely stated in its conclusion that "[i]mplied false certification occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process of submitting the claim."[72] The facts underlying the complaint, however, fell squarely within the "express condition precedent" line of cases, where the Government expressly conditions its payment on the provisions of medical care and other services that meet a certain standard. The Ninth Circuit also stated that under the implied certification theory, "materiality is satisfied…only where compliance is a 'sine qua non of receipt of state funding.'"[73]

The Tenth Circuit also published an opinion implicitly adopting a materiality standard for implied certifications in a case involving waste disposal contracts.[74] The defendants allegedly violated regulatory and contractual obligations by improperly disposing of the waste. The court's opinion provided little visibility into the reasoning behind its decision, stating only that "materiality does not require a plaintiff to show conclusively that, were it aware of the falsity, the government would not have paid," only a showing that the Government "*may* not have paid."[75]

In December 2010, the D.C. Circuit created a sharper circuit split by adopting a broad implied certification theory that is in marked contrast to the "express precondition to payment" test adopted by several other circuits. In *United States v. Science Applications International Corp.* (*SAIC*),[76] the D.C. Circuit extensively analyzed implied certification theory and held that a plaintiff under the FCA need show only that a contractor withheld information from the Government about noncompliance with a "material" contract requirement, regardless of whether that requirement was an express precondition to payment.

The *SAIC* case arose out of a pair of contracts held by SAIC for consulting services to be provided to the Nuclear Regulatory Commission. Among other things, the NRC solicitations required the successful bidder to certify compliance with organizational conflicts of interests provisions, such as a limitation on the contractor's ability to "work for others" during the contract term.[77] The contract also required the contractor to immediately disclose potential conflicts if they were discovered after contract award, but the contracts did not require SAIC to make these certifications each time it sought payment.[78] After the NRC discovered that SAIC had certain contractual relationships with other companies in the nuclear field, the NRC deemed those relationships to be OCIs and terminated the contracts. Nonetheless, the NRC continued to use the SAIC's work product delivered under the contracts.[79]

The Government subsequently filed an action for violation of the FCA and for breach of contract. At trial, the jury imposed breach of contract damages of just $78. On the FCA counts, however, the district court instructed the jury that it could find a legally implied "false" certification, and the jury awarded single damages of $1,973,839. The court trebled damages and assessed penalties for a total judgment of $6,499,096.[80]

The D.C. Circuit remanded the case to the district court for further proceedings, providing the following test for implied certification liability:[81]

> [W]e hold that to establish the existence of a "false or fraudulent" claim on the basis of implied certification of a contractual condition, the FCA plaintiff—here the government—must show that the contractor withheld information about its noncompliance with material contractual requirements. The existence of express contractual language specifically linking compliance to eligibility for payment may well constitute dispositive evidence of materiality, but it is not, as SAIC argues, a necessary condition. The plaintiff may establish materiality in other ways, such as through testimony demonstrating that both parties to the contract understood that payment was conditional on compliance with the requirement at issue.

The D.C. Circuit took pains in the opinion to emphasize the importance of the materiality and knowledge requirements for FCA liability, stating these principles were important limits on the reach of the "implied certification" theory. However, the court held that the jury could make the materiality decision based on such evidence such as the Contracting Officers' after-the-fact testimony that *if they had known* of the potential OCIs, they would not have awarded the contracts to SAIC.[82] This broad and subjective test for implied certification liability creates great risk for contractors sued in the D.C. Circuit.

Practical Risks Created By The Implied Certification Doctrine

As a practical matter, the current state of the law concerning "implied" certifications as the basis for FCA actions places contractors at risk for allegations of fraud based on alleged noncompliance with a far broader range of contract requirements than in past years. In light of the multitude of contract, regulatory and statutory requirements to which contractors must "turn square corners" every day, the extension of the implied certification theory poses a significant risk that a contractor's failure to comply with *any* contract requirement, whether or not identified by the contract as a condition of payment, later may be characterized as "critical" or "material" to the CO's decision to approve or pay an invoice.

After the D.C. Circuit's December 2010 decision in *SAIC*, the risk created by the "implied certification" theory places a premium on Government contractors' compliance efforts, including both processes and implementation. Because the Government or a *qui tam* plaintiff may allege liability under the FCA for *any* noncompliance with a

"*material*" provision of a contract, companies must understand that a far wider range of requirements related to contract performance may now be implicated. Even in circuits that adopt the "express condition precedent to payment" standard for legally implied false statements, contractors in some industries, particularly health care, are regularly required to certify ongoing compliance with a host of statutes and regulations in connection with each request for payment.[83]

While the D.C. Circuit contrasted "material" contract provisions with "provisions that are merely ancillary to the parties' bargain,"[84] the court did not provide a practical definition that would easily permit a contractor to distinguish a "material" contract provision from a "minor" or "ancillary" contract provision. Moreover, the "materiality" test for implied certifications ignores completely the practical and legal difficulty of establishing at trial that a particular provision is not material. Under the *SAIC* test, materiality can be, and often is, an issue of fact, not law, which means that a jury with limited knowledge of the contract may be asked to make that decision. Contractors should look vigilantly for opportunities during contract negotiation and contract performance to highlight agreements with the Government on which terms are "material" to participation in the program or payment requests and which are not.

Even in jurisdictions that do not limit the implied certification theory to statements by the defendant that are express preconditions to payment under the contract, contractors can expect plaintiffs to argue that the implied certification test for materiality is not limited to materiality objectively determinable from the contract, statute, or regulation at issue. Instead, plaintiffs will argue that the determination of what is "material" is subject to after-the-fact evidence, including opinions from COs. This introduces both additional litigation risk and litigation cost. To mitigate that risk, contractors can establish, by documenting their course of conduct and dealing, the parties' true belief concerning the materiality of various contract provisions during the performance of the contract, before allegations limit the CO's willingness or ability to recognize the difference between wheat and chaff.

Contractors also should continue to be prepared to argue that compliance with a particular statute, regulation or contract provision is not a true prerequisite to the Government's payment decision. Because the FCA is a punitive statute, the contract should objectively and clearly link compliance with the contract, statute, or regulation requirement and the CO's payment of a voucher. To hold otherwise would put contractors unfairly at risk that any noncompliance with a requirement later might be found by a jury to have been "material" to the CO's payment decision, whether or not any relationship between the requirement and payment was discernible by the contractor at the time. Contractors can and should argue that the FCA's requirement for a "knowing false statement" should not effectively be replaced by a "knowing contract violation" standard. Courts long have held that violation of a statute, regulation or contract provision—even if the contractor is aware of its noncompliance—does not warrant the punitive remedies of the FCA, unless the contractor makes a knowingly false claim for payment or approval or makes a false statement about compliance on which the CO relies in approving or paying a false claim.[85]

Another significant risk under current case law imposing the "materiality" standard for implied certifications is the subjective nature of that determination. In 2009, Congress revised the FCA to codify the definition of "material" as "having a natural tendency to influence, or be capable of influencing" the CO's payment decision.[86] That test is, at best, specific to the facts of each case, and at worst, it is a dangerously subjective standard. As a practical matter, contractors must recognize that the implied certification doctrine, coupled with this relaxed statutory standard for materiality, not only increases litigation risk, but reduces opportunities for obtaining judicial dismissal of the case before trial.

COs also should recognize the inherent cost to Government programs reflected in DOJ statistics regarding the hundreds of meritless whistleblower cases each year that are dismissed by the courts before trial. Such lawsuits drive up contractors' overall costs for doing business with the Government, and costly discovery often is directed by *qui tam* plaintiffs for information

not only from defendants, but from Government records and personnel. Government solicitations and contracts typically contain dozens, or hundreds of requirements, either specified directly or incorporated by reference. Not all are material to the Government's payment decisions. It is in the Government's interest to be specific about which requirements are true conditions to payment decisions or to ongoing participation by the contractor in the program.

GUIDELINES

These *Guidelines* are designed to assist you in assessing and mitigating the risks of liability under the False Claims Act for implied false certifications. They are not, however, a substitute for professional representation in any specific situation.

1. Make sure, when bidding on a Government contract or applying for federal funding, that you understand all terms and conditions of the solicitation, whether or not those requirements appear to relate directly to the product, service, or activity at issue.

2. Be mindful that federal contractors, and other direct or indirect recipients of Government funds, need to educate their employees that failure to comply with contract terms potentially can subject the company to serious litigation costs. Employees who communicate with the CO and other Government personnel should understand that FCA liability arguably can be based on either an affirmative misrepresentation or a failure to convey information about a known "material" contract noncompliance.

3. Remember that subcontractors and sub-tier suppliers under Government contracts can be liable for false claims for approval or payment through Government funds, as well as for false statements that are material to false claims. No matter how small your company is, you can be liable under the FCA. The version of the FCA in effect since 2009 also potentially applies to any recipient of federal funds.

4. Be aware that at this time, there are a number of significant differences between courts of appeal on the scope of FCA liability and the prerequisites for would-be FCA plaintiffs. You may not be able to tell during contract performance where an FCA action might be filed, so it is wise to assume that the broadest interpretation of FCA liability, and the most permissive threshold for FCA plaintiffs, may apply to your company.

5. Recognize that both federal contractors and COs are well served by a clear mutual understanding of the requirements of contract terms, including statutes and regulations called out in the contract. If the parties do not share a common interpretation of the scope of the contractor's obligations, attempt to resolve those differences and memorialize your communications.

6. For the Government contracting community, consider identifying the conditions of participation or performance that are truly material through required certifications in connection with payment requests. Clarity in contracting mitigates the risk of meritless *qui tam* actions that are disruptive for the Government's programs as well as for the contractor.

7. Keep in mind that contract compliance is only as good as the systems and controls designed to monitor compliance. If the contract requires initial or periodic certifications of ongoing compliance with a specific statute or regulation, you should ensure that the company has procedures reasonably calculated to assure compliance and promptly identify incidents of noncompliance.

8. To achieve consistent contract compliance, develop and maintain a robust ethics and compliance system. If your employees understand the importance of prompt reporting of suspected compliance problems, and your reporting system is clear and thorough, you are far more likely to catch and correct noncompliances with statutes, regulations, or contract terms before those noncompliances become material.

9. Remember that disclosure and transparency are almost always a cure to potential fraud allegations, as well as factors that demonstrate a lack of intent to defraud the Government. Ensure that there is a clear, memorialized, communication of the basis for all assumptions or decisions that support performance or billing actions.

10. If you and the CO disagree on the scope of your contractual obligations, consider pursuing the normal avenues for resolution of contract interpretation disputes promptly to mitigate the risk that a *qui tam* action will be filed. There are several ways in which to reach a definitive interpretation of a contract provision, including a request for a CO's final decision and appeal to the boards of contract appeals or the Court of Federal Claims, or even the Government Accountability Office bid protest process. While the CO is not authorized to decide an issue of fraud, the CO *is* authorized to decide many contract interpretation issues that, if not resolved, can become implicated in an FCA action based on an implied certification allegation.

11. Be aware that the Federal Acquisition Regulation mandatory disclosure rule requires that federal contractors and others make a timely disclosure, among other things, of "credible evidence" of a violation of the FCA or statues in Title 18 of the U.S. Code involving fraud to the relevant Office of Inspector General and the CO.[87] There are many facets to this rule; if your company does not have specific policies and procedures for mandatory disclosures, it is important to consult counsel experienced in this area before deciding whether to make a disclosure.[88]

12. Keep in mind that FCA cases based on implied certification theories, whether filed by a whistleblower or the Government, often are preceded by service of an IG subpoena requesting a broad category of documents. Consider the following actions:

a. Contact the agent identified in the subpoena and discuss the scope of the documents requested; the source and basis for the requests; the type of electronic documents that reasonably can be provided; and the timing of your response. Ask whether a Government attorney (from the DOJ or from a local U.S. Attorney's Office) has been assigned to the matter.

b. Consider whether to respond to the subpoena, or wait for the agency to move to enforce it.

c. Regardless of your course of action with respect to responding to the subpoena, move quickly to secure all records requested by the subpoena. If the categories are unreasonably broad (for example, "all records" pertaining to a particular program), your counsel will be able to guide you on the appropriate scope of a "do not destroy" notice.

d. Note that often the categories of documents requested in a subpoena will give you important information about the subject of the investigation.

e. Mark documents produced in response to the subpoena with appropriate restrictions, including FOIA exemption references.

f. Consider whether relator's counsel should have access to the documents you produce; if not, you will need to negotiate this issue with the IG/DOJ.

g. Conduct a privileged internal investigation to ascertain the merits of any potential FCA violation.

h. Consider whether insurance policies may be implicated in the defense of the allegations.

i. Advise employees that they may be contacted by Government investigators and explain the employees' rights and obligations.

13. Carefully review the FCA provisions dealing with the rights of whistleblowers and ensure compliance with such provisions if the whistleblower, or employee "associated" with the whistleblower, is identified in the complaint and is a current employee.

14. Do not be afraid to respond to the allegations of an FCA complaint on the merits by presenting facts and arguments to the DOJ to convince the Government not to intervene in the action. Many FCA allegations are based on misunderstandings of contract requirements or the failure by the Government to consider all of the applicable language in the contract. In many other cases, there will be evidence that the conduct in question was disclosed to the Government during the course of performance and believed by the parties to be consistent with the requirements of the contract.

15. Most cases in which the Government intervenes are resolved through settlement. While

defendants sometimes view settlement as a means to avoid adverse publicity, be aware that the DOJ always reserves the right to issue a press release regarding the settlement and will not agree to consider input from the defendant on the wording of the release. Many other provisions of the settlement agreement can be negotiated if the defendant is persistent.

★ REFERENCES ★

1/ See 31 U.S.C.A. §§ 3729–3733.

2/ Glover v. Philip Morris USA, 380 F. Supp. 2d 1279, 1298 (M.D. Fla. 2005).

3/ See 31 U.S.C.A. § 3729(a).

4/ See 31 U.S.C.A. § 3730(a), (b), (d).

5/ See 31 U.S.C.A. § 3730(b)(4).

6/ 31 U.S.C.A. §§ 3730(c)(3), (d).

7/ See Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010).

8/ Information derived from Department of Justice, Fraud Statistics, available at http://www.justice.gov/civil/frauds/fcastats.pdf; see also Press Release, Office of Public Affairs, U.S. Dept. of Justice, Department of Justice Recovers $3 Billion in False Claims Cases in Fiscal Year 2010 (Nov. 22, 2010), available at http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html.

9/ Information derived from Department of Justice, Fraud Statistics, available at http://www.justice.gov/civil/frauds/fcastats.pdf; see also Press Release, Office of Public Affairs, U.S. Dept. of Justice, Department of Justice Recovers $3 Billion in False Claims Cases in Fiscal Year 2010 (Nov. 22, 2010), available at http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html.

10/ See, e.g., Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 949 (1997), 39 GC ¶ 301.

11/ Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010). See generally Wimberly, Plunkett & Settlemyer, "The Presentment Requirement Under the False Claims Act: The Impact of Allison Engine & the Fraud Enforcement & Recovery Act of 2009," Briefing Papers No. 09-9 (Aug. 2009); Briggerman, "False Claims Act Amendments: A Major Expansion in the Scope of the Act," 23 Nash & Cibinic Rep. ¶ 58 (Nov. 2009); Laemmle-Weidenfeld & Schaengold, "Feature Comment: The Impact of the Fraud Enforcement and Recovery Act of 2009 on the Civil False Claims Act," 51 GC ¶ 224 (July 8, 2009); 51 GC ¶ 186; Nadler, Chiarodo & Yang, "Feature Comment: The Patient Protection and Affordable Care Act—Congress' Overhaul Of The FCA Public Disclosure Bar," 52 GC ¶ 123 (Apr. 7, 2010).

12/ E.g., United States v. Science Applications Int'l Corp., 626 F.3d 1257 (D.C. Cir. 2010), 53 GC ¶ 25.

13/ See, e.g., United States ex rel. Sanders v. Allison Engine Co., 471 F.3d 610, 614 (6th Cir. 2006), 49 GC ¶ 41, vacated on other grounds and remanded, Allison Engine Co. v. United States ex rel. Sanders, 553 U.S. 662 (2008), 50 GC ¶¶ 208, 251; United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1265–66 (9th Cir. 1996).

14/ See, e.g., United States v. McNinch, 356 U.S. 595, 599 (1958).

15/ See, e.g., Hopper, 91 F.3d at 1266–67.

16/ False Claims Act, 31 U.S.C.A. §§ 3729–3733 (1986); Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010) (revising the jurisdictional limitations on qui tam actions); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A, 124 Stat. 1376, 2077 (2010) (revising FCA provisions prohibiting retaliation against whistleblowers); Medicare and Medicaid Patient and Program Protection Act of 1987, § 2, 42 U.S.C.A. § 1320a-7b (goods or services involving federal antikickback violations expressly constitute false claims under the FCA).

17/ See Allison Engine Co., 553 U.S. at 665; United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997).

18/ 31 U.S.C.A. § 3729(a)(1) (1986).

19/ 31 U.S.C.A. § 3729(c) (1986).

20/ Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009).

21/ Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(f), 123 Stat. 1617, 1625 (2009).

22/ 31 U.S.C.A. § 3729(a)(1)(A) (2009).

23/ 31 U.S.C.A. § 3729(b)(2) (2009).

24/ 31 U.S.C.A. § 3729(a)(2) (1986).

25/ Allison Engine Co. v. United States ex rel. Sanders, 553 U.S. 662 (2008), 50 GC ¶¶ 208, 251.

26/ Allison Engine Co., 553 U.S. at 671–73.

27/ 31 U.S.C.A. § 3729(a)(1)(B) (2009).

28/ 31 U.S.C.A. § 3729(a)(1)(G) (2009).

29/ 31 U.S.C.A. § 3729(b)(4) (2009); see also Allison Engine Co., 553 U.S. at 665 (explaining that under the 1986 version of the FCA, "plaintiff…must prove that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim").

30/ See, e.g., United States ex rel. Longhi v. Lithium Power Techs., Inc., 575 F.3d 458, 470 (5th Cir. 2009), 51 GC ¶ 277.

31/ Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(f), 123 Stat. 1617, 1625 (2009).

32/ See, e.g., Mason v. Medline Indus., Inc., 731 F. Supp. 2d 730, 734–35 (N.D. Ill. 2010).

33/ See, e.g., United States ex rel. Steury v. Cardinal Health, Inc., 625 F.3d 262, 267 n.1 (5th Cir. 2010), 52 GC ¶ 3.

34/ See, e.g., United States ex rel. Sanders v. Allison Engine Co., Inc., 667 F. Supp. 2d 747, 752 (S.D. Ohio 2009). But see United States ex rel. Miller v. Bill Harbert Int'l Constr. Inc., 608 F.3d 871, 878 (D.C. Cir. 2010), 52 GC ¶ 247.

35/ 31 U.S.C.A. § 3729 (b)(1)–(3) (1986); 31 U.S.C.A. § 3729(b)(1)(A)(i)–(iii) (2009).

36/ See, e.g., Cardinal Health, 625 F.3d at 268.

37/ See, e.g., United States ex rel. Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 373 (4th Cir. 2008).

38/ United States ex rel. Hochman v. Nackman, 145 F.3d 1069, 1073 (9th Cir. 1998) (citing S. Rep. No. 99-345, at 7 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5272).

39/ See, e.g., United States v. Krizek, 111 F.3d 934, 941 (D.C. Cir. 1997).

40/ Kellogg Brown & Root, Inc., 525 F.3d at 376–78; see also United States ex rel. K&R Ltd. P'ship v. Mass. Housing Fin. Agency, 530 F.3d 980, 983 (D.C. Cir. 2008), 50 GC ¶ 291 (citing Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 70 (2007)). But see United States v. Estate of Rogers, No. 1:97CV461, 2001 WL 818160, at *3–4 (E.D. Tenn. June 28, 2001) (rejecting the objective falsehood approach).

41/ See, e.g., United States ex rel. Oliver v. Parsons Co., 195 F.3d 457, 463 (9th Cir. 1999), 41 GC ¶ 484.

42/ See, e.g., United States ex rel. Farmer v. City of Houston, 523 F.3d 333, 344 (5th Cir. 2008).

43/ See Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 784–86 (2000), 42 GC ¶ 204.

44/ 31 U.S.C.A. § 3729(a). FERA did not change this provision.

45/ 31 U.S.C.A. § 3730(b) (1986).

46/ 31 U.S.C.A. § 3730(b)(2) (1986).

47/ 31 U.S.C.A. § 3730(d)(1) (1986).

48/ 31 U.S.C.A. § 3730(d)(2) (1986).

49/ 31 U.S.C.A. § 3730(d)(1), (2) (1986).

50/ See, e.g., In re Natural Gas Royalties Qui Tam Litig., 566 F.3d 956, 960 (10th Cir. 2009).

51/ 31 U.S.C.A. § 3730(e) (1986), as amended by False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157 (1986).

52/ Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 130 S. Ct. 1396, 1408 n. 16 (2010), 52 GC ¶ 137 (internal quotation marks omitted).

53/ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010).

54/ United States ex rel. Kirk v. Schindler Elevator Corp., 601 F.3d 94 (2d Cir. 2010), 52 GC ¶ 200, cert. granted, 131 S. Ct. 63 (2010), 52 GC ¶ 200. See generally Meagher & Bareis, "The Freedom of Information Act," Briefing Papers No. 10-12 (Nov. 2010).

55/ 38 U.S.C.A. § 4212(d)(1)(B); FAR 22.1310(b), 52.222-37(e) (2009).

56/ Schindler Elevator Co., 601 F.3d at 101.

57/ See, e.g., United States ex rel. Lisitza v. Johnson & Johnson, No. 07-10288-RGS et al., 2011 WL 673925, at *10 (D. Mass. Feb. 25, 2011).

58/ United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 920 (4th Cir. 2003), 46 GC ¶ 24.

59/ United States ex rel. Marcus v. Hess, 317 U.S. 537, 543–44 (1943).

60/ Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 433 (1994).

61/ United States ex rel. Chabot v. MLU Servs., Inc., No. 6:06-cv-1528-ORL-35KRS, 2010 WL 1539975, at *6 (M.D. Fla. Apr. 18, 2010).

62/ United States v. United Techs. Corp., 626 F.3d 313, 319–21 (6th Cir. 2010), 53 GC ¶ 7.

63/ See generally United States ex rel. Mikes v. Straus, 274 F.3d 687, 696–99 (2d Cir. 2001), 44 GC ¶ 2.

64/ United States ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1169 (9th Cir. 2006).

65/ United States ex rel. Steury v. Cardinal Health, Inc., 625 F.3d 262, 268–69 (5th Cir. 2010), 52 GC ¶ 3; see also Rodriguez v. Our Lady of Lourdes Med. Ctr., 552 F.3d 297, 303–04 (3d Cir. 2008); United States ex rel. McNutt v. Haleyville Med. Supplies, Inc., 423 F.3d 1256, 1259 (11th Cir. 2005).

66/ Straus, 274 F.3d at 700.

67/ Straus, 274 F.3d at 700–701 (citing 42 U.S.C.A. § 1395y(a)(1)(A)).

68/ Straus, 274 F.3d at 701; see also United States ex rel. Augustine v. Century Health Servs., Inc., 289 F.3d 409, 415 (6th Cir. 2002), 44 GC ¶ 211.

69/ United States ex rel. Godfrey v. KBR, Inc., 360 Fed. Appx. 407, 408–09, 2010 WL 55510 (4th Cir. 2010).

70/ Godfrey, 360 Fed. Appx. at 411–12.

71/ See United States ex rel. Ebeid v. Lungwitz, 616 F.3d 993, 996–98 (9th Cir. 2010), cert. denied, 131 S. Ct. 801 (2010).

72/ Lungwitz, 616 F. 3d at 998.

73/ Lungwitz, 616 F. 3d at 998.

74/ United States ex rel. Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1169 (10th Cir. 2010).

75/ Envirocare, 614 F.3d at 1170 (emphasis in original).

76/ United States v. Science Applications Int'l Corp., 626 F.3d 1257 (D.C. Cir. 2010), 53 GC ¶ 25.

77/ Science Applications Int'l Corp., 626 F.3d at 1262.

78/ Science Applications Int'l Corp., 626 F.3d at 1262–64.

79/ Science Applications Int'l Corp., 626 F.3d at 1263.

80/ Science Applications Int'l Corp., 626 F.3d at 1264.

81/ Science Applications Int'l Corp., 626 F.3d at 1269.

82/ Science Applications Int'l Corp., 626 F.3d at 1271.

83/ See, e.g., 42 U.S.C.A. § 1395y(a)(1)(A) ("no payment may be made [under Medicare] for any expenses incurred for items or services which…are not reasonable and necessary for the diagnosis or treatment of illness or injury").

84/ Science Applications Int'l Corp., 626 F.3d at 1271.

85/ See, e.g., United States ex rel. Owens v. First Kuwaiti General Grading & Contracting Co., 612 F.3d 724, 734 (4th Cir. 2010), 52 GC ¶ 351; United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996).

86/ 31 U.S.C.A. § 3729(b)(4) (2009); see also Allison Engine Co. v. United States ex rel. Sanders, 553 U.S. 662, 665 (2008), 50 GC ¶¶ 208, 251 (explaining that under the 1986 version of the FCA, "plaintiff… must prove that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim").

87/ See FAR 9.406-2, 9.407-2, 52.203-13.

88/ See generally West, Richard, Brennan, Barsalona, Koos & Meene, "Contractor Business Ethics Compliance Program & Disclosure Requirements," Briefing Papers No. 09-5 (Apr. 2009).