

The FCA: *Escobar* and Beyond

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Agenda

- False Claims Act (FCA): continued developments under *Escobar's* materiality standard
- FCA: DOJ policy developments
- Other compliance issues

FCA (31 U.S.C. § 3729-33)

- Primary statute addressing fraud against the government
- Imposes liability on anyone who
 - Submits a false claim for payment to the government
 - Makes a false statement in support of a false claim
 - Avoids or decreases an obligation to pay the government or retains an overpayment
- Total FCA recoveries in FY 2017: \$3.7B
 - Healthcare fraud recoveries: \$2.4B
 - Housing and mortgage fraud recoveries: \$543M
 - Procurement fraud recoveries (DOD): \$220M

FCA (cont.)

- *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016)
 - Confirmed that FCA liability could be based on "implied certification;" blow to contractors . . . but expected
 - Court also emphasized critical need for courts to enforce FCA "materiality" requirement to ensure no liability for non-FCA conduct
- Key trend in FCA cases since mid-2016 is on the issue of "materiality:" is the alleged false claim material to the government's decision to pay?

FCA

Recent Decisions Interpreting *Escobar*

- *United States v. Triple Canopy, Inc.*, 857 F.3d 174 (4th Cir. 2017)
 - Falsified marksmanship test results for guards hired pursuant to a government contract rendered invoices material misrepresentations of core contract requirements
 - The Court cited "common sense," the contractor's attempt to cover-up the noncompliance, and the government's decision not to renew that contract as reasons supporting its conclusion that the misrepresentation was material



FCA

Recent Decisions Interpreting *Escobar* (cont.)

- *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645 (5th Cir. 2017)
 - Continued payment of invoices after notice of alleged noncompliance with Federal Highway Administration guardrail guidelines weighed in favor of finding noncompliance was immaterial
 - Also, requirements that defer to "good engineering judgment" make it difficult to prove falsity

FCA

Recent Decisions Interpreting *Escobar* (cont.)

- *Abbott v. BP Expl. & Prod., Inc.*, 851 F.3d 384 (5th Cir. 2017)
 - Agency approval of drilling rig requirements was strong evidence that relator's allegations that BP's designs were noncompliant were meritless and noncompliance was not material

FCA

Recent Decisions Interpreting *Escobar* (cont.)

- *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027 (D.C. Cir. 2017)
 - Allegation that Halliburton overbilled the government by inflating the number of troops that visited Halliburton recreation centers in Iraq rejected by the Court based on a lack of evidence that the headcount was relevant to payment decision
 - DCAA investigation and decision not to disallow any costs was strong evidence that allegation was not material

DOJ Enforcement Priorities

Granston Memo: Curtailing Meritless *Qui Tam* Suits

- Michael D. Granston, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)* (Jan. 10, 2018)
 - Directs prosecutors to utilize 31 U.S.C. § 3730(c)(2)(A) to seek dismissal of meritless relator suits
 - "Important tool to advance the government's interests"
 - "Record increase" in *qui tam* suits; no corresponding increase in intervention
 - Preserve limited judicial resources; non-intervened cases still require "significant resources"
 - Cases could generate adverse precedent impacting the government's ability to enforce the FCA



DOJ Enforcement Priorities (cont.)

The Brand Memo: More Good News For Contractors

- Associate Attorney General, *Limiting Use of Agency Guidance Documents In Affirmative Civil Enforcement Cases* (Jan. 25, 2018)
 - Second Jan. 2018 DOJ memo with potential to scale back FCA enforcement
 - Expansion of Jeff Sessions Nov. 2017 memo prohibiting DOJ from issuing binding guidance documents without formal rule making
 - Prohibits DOJ from using noncompliance with agency guidance documents to prove a violation of law
 - States that memo applies to FCA implied certification cases
 - Applies to all agency guidance documents (not just DOJ's)
 - Prohibits DOJ from using enforcement authority "to effectively convert agency guidance documents into binding rules"

Other Compliance Areas

Public Corruption

- DOJ announcement (Apr. 25, 2018): employee at Sandia National Laboratories
 - Responsible for managing bidding process on large contract for moving services
 - Set up moving company and prepared bid (for her own procurement)
 - Used competitors' information to ensure winning bid
 - Transferred profits to family-owned business to conceal gains
 - Three-year prison term and forfeiture of \$643K in gains



Questions?