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Focus

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FEATURE COMMENT: The False Claims Act: Yesterday, Today And Tomorrow—What A Long Strange Trip It's Been—Part II—Today

This is the second installment in our three-part retrospective series of Feature Comments on the False Claims Act (FCA or Act), which has been occasioned by this year's 10th anniversary of the Fraud Enforcement and Recovery Act (FERA) and the third anniversary of the Supreme Court's seminal FCA decision in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016); 58 GC ¶ 219. Our first installment (61 GC ¶ 302) focused on the origins of the FCA dating back to 1863, surveyed the long period of dormancy following, and culminated in a review of the major 1986 amendments and early cases they spawned. Temporally, we last left off at the turn of the current century. This installment will carry the baton forward from that point through the present, with a focus on major legislative and judicial developments that have made the FCA what it is today—one of the Government's most potent fraud-fighting weapons at its disposal.

Pedal to the Metal: Legislative Strengthening of the FCA and Enhanced Executive Enforcement—As covered in our first installment, from its enactment in 1863 through 1986, the FCA remained largely dormant. It was not until 1986 that Congress first undertook to overhaul the Act by substantially amending it to, among other things, enhance the FCA's qui tam relator provisions and usher in the modern "whistleblower" era with an exponential expansion of the breadth of the Act's coverage in tandem with relaxed requirements for relators.

Although the 1986 Amendments achieved their intended effects, a little over two decades later—in 2009 and 2010, Congress enacted significant amendments to the FCA to shore it up in the wake of judicial decisions limiting its scope. Perhaps most notable among these was the unanimous December 2008 Supreme Court decision in *Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662 (2008); 50 GC ¶ 208, which limited FCA liability to false statements or claims made by defendants for the purpose of getting the Government to pay the claim. In *Allison Engine*, the Court held that FCA liability was limited to fraudulent statements that were designed "to get" false claims paid or approved "by the government." Likewise, the Court also found that FCA conspiracy liability was limited to a conspiracy "to get" a false claim paid "by the government." In other words, that the conspiracy actually had to have the purpose of defrauding the Government as its primary goal.

The Fraud Enforcement and Recovery Act—On May 20, 2009, in the wake of and at least partially in response to the Supreme Court's *Allison Engine* decision, the FERA was enacted and signed into law. While it was clear that the FERA was enacted to respond to what was considered to be judicially imposed restrictions of the FCA and to "clarify" Congressional intent in enacting the 1986 Amendments, the timing of the FERA's enactment was conspicuous. Around the time it was passed in 2009, the country was on the heels of an economic downturn and allegations of false claims were cited by many as one of the root causes among the Government's fiscal challenges notwithstanding the fact that the FERA applied broadly to all alleged frauds against the Government. In essence, among other changes making it even easier for the Government and relators as FCA plaintiffs, the FERA revamped the FCA's liability, retaliation, and civil investigative demand (CID) provisions. In conjunction, the FERA effectively eliminated key judicially imposed limitations and defenses that had developed since the 1986 Amendments.

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The FERA redefined key terms within the FCA such as "claim," "materiality" and "obligation," which had both individual and collective effects of expanding FCA liability. Notable among these was that the FERA clarified that the Government need not show that a false claim was presented directly to a Government official or employee and need not show that a false statement was made for the purpose of getting a false claim paid. This was a significant change, which removed the very language relied on by the unanimous Supreme Court in *Allison Engine* to limit FCA liability to false claims or statements made by a defendant *for the purpose of* getting the claim paid *by the Government*.

The FERA also excised out of the FCA "to get" and the "by the government" language. In its stead, the FERA redefined a "claim" as including a nexus to the Government requirement, covering requests for funds to a contractor, grantee, or other recipient if the money requested "is to be spent or used on the government's behalf" or "to advance a government program or interest." And the FERA also makes clear that, under the FCA, false statements needn't have been made with the purpose of getting a false claim paid by the Government. In other words, the key components were distilled to there being a false claim or statement in conjunction with the expenditure of Government funds. (The FERA definition of "claim," however, specifically excludes requests for money that the Government paid "as compensation for federal employment or as an income subsidy," such as Government workers' salaries and Social Security payments.)

Also, of importance are two other amendments brought about by the FERA. One amendment to 31 USCA § 3729(a)(7) expanded the scope of reverse false claims liability to include retention of overpayments (primarily affecting healthcare-related claims) and another amendment also redefined "materiality" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." While the latter apparently reintroduced a concept of "materiality" as an important part of FCA liability, the FERA's language—in particular, "capable of influencing"—seemed to dilute its meaning and effectively emasculate it; that is, until the Supreme Court squarely addressed this very issue in the *Escobar* case (discussed infra).

The FERA also amended the FCA's CID provisions. Previously, only the Attorney General was authorized to approve a CID under the FCA, and information received in response to a CID could not be shared with relators or their counsel. The FERA changed that and amended the CID provision to allow the Attorney General to delegate the authority to issue a CID and to share the information obtained as the fruits of a CID with a qui tam relator if the Attorney General determines that it is "necessary as part of any false claims act investigation."

Lastly, but importantly, the FERA amendments to the FCA were not wholly retroactive and only applied prospectively to conduct occurring after the date of the FERA's enactment, May 20, 2009.

The Affordable Care Act (ACA)—In tandem with the FERA, the ACA also amended the FCA. Most notably, the ACA amendments significantly limited the public disclosure bar and expanded the original source exception to the bar. The public disclosure bar had historically benefited FCA defendants by divesting federal courts of subject matter jurisdiction over qui tam matters where the allegations were the subject of certain areas of public information that had been previously available to the Government. Among the ACA's amendments to the FCA was one, which not only addressed this issue, but effectively reversed a Supreme Court decision (before it was issued) on what "public disclosure" means. While debate remains, the ACA amendments also did away with the public disclosure bar as purely jurisdictional in nature by making it merely a defense that could be asserted and giving the Government a "veto" option to overcome a public disclosure defense raised by an FCA defendant. In connection, the ACA amendments narrowed the breadth of the types of disclosures that could trigger a public disclosure defense from any governmental hearings and investigations to only *federal* hearings and investigations, reversing (prospectively) the Supreme Court's ruling in *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex. rel. Wilson*, 545 U.S. 409 (2005); 47 GC ¶ 310, that state, local and federal hearings and investigations triggered the public disclosure bar. This effectively eliminated defenses based on disclosures from state and local government sources not otherwise disclosed in the news media or through public means.

Of course, the public disclosure bar always had an "escape hatch" of sorts for relators facing public disclosure challenges, where a relator could demonstrate "direct and independent" knowledge of publicly disclosed information. The ACA amendments, however,

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broadened this. They expanded the original source exception by removing the requirement that the original source have "direct and independent" knowledge of the allegations and allowing qui tam allegations to survive under the "original source" doctrine where mere "independent" knowledge that "materially adds" to the publicly disclosed allegations is established.

Also notable is that the ACA amendments also broadened exposures under the FCA by amending the Anti-Kickback Statute to provide that Medicare or Medicaid claims that include items or services that result in kickback violations are false claims under the FCA and that the retention of an overpayment under these federal healthcare programs gives rise to FCA liability.

As with the FERA amendments, the ACA's amendments to the FCA also only apply prospectively to actions occurring after the date of enactment. In the case of the ACA, March 23, 2010.

Dodd-Frank—In close temporal proximity to the FERA and the ACA, in 2010, Congress, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, amended the FCA's "whistleblower" retaliation provision. The Dodd-Frank amendment to this provision protected both lawful acts in furtherance of a qui tam suit as well as efforts to stop a violation of the FCA and also added a statute of limitations of three years for retaliation actions. Thus, the acts of employees, contractors and agents, as well as acts of anyone "associated" with them, are covered.

Holder Memo (Civil, Criminal Administrative)—The FCA exists on a spectrum of remedies available to the Government. Government contractors may face everything from administrative actions (contract claims or cure notices) to civil FCA suits to criminal prosecution. Even after an FCA settlement or judgment, contractors may face scrutiny from inspectors general or suspension and debarment officials. All seem to agree that the system is best served by a coordination of these otherwise disparate, sometimes conflicting Government agents.

On Jan. 30, 2012, then-Attorney General Eric Holder issued a policy statement to "update and further strengthen" the Department of Justice's coordination of criminal, civil, regulatory, and administrative remedies. U.S. Dep't of Justice, *Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings* (Jan. 30, 2012), available at *www.justice.gov/jm/organization-and-functions-manual-27-parallel-proceedings* (Holder memo). The Holder memorandum required further that every U.S. Attorney's Office and litigating DOJ department have its own policies and procedures on this score. On receipt of qui tam cases, in particular, DOJ litigators were instructed to share the referral with appropriate administrative, regulatory and criminal counterparts.

As far as investigations, the Holder memo directed DOJ, where possible, to avail itself of non-grand-jury resources—such as administrative subpoenas and CIDs under 31 USCA § 3733—to maximize internal sharing of information obtained. When necessary, and subject to certain safeguards, information procured via grand jury can be shared by prosecutors with civil and administrative counterparts. Nevertheless, this is clearly DOJ's last resort in parallel proceedings. The upshot is that contractors should never assume, upon receipt of a CID or administrative subpoena, that they are "in the clear" when it comes to criminal liability. There may always be prosecutors waiting in the wings.

Finally, as far as remedies, the Holder memo directed DOJ attorneys and agents to consider the impacts of certain remedies on others. For example, tailoring a plea deal so that the charge or covered conduct could more easily be used to shortcut a civil case, e.g., by collateral estoppel, res judicata. See 31 USCA § 3731(e)) ("Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.").

Yates Memo—Individuals on the Hook—On Sept. 9, 2015, then-Deputy Attorney General Sally Yates issued a memo on "Individual Accountability for Corporate Wrongdoing." U.S. Dep't of Justice, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), available at *www.justice.gov/archives/dag/file/769036/download* (Yates memo). The product of a select working group assembled within DOJ, the Yates memo identified six key steps to enable prosecutors and civil litigators "to most effectively pursue the individuals responsible for corporate wrongs."

The first was a rigid cooperation credit policy that required corporations to provide the Department

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with "*all* relevant facts" relating to the individuals "involved in" the misconduct in order to be eligible for any cooperation credit, in both criminal and civil cases. Second, prosecutors and litigators were told to focus on individuals from the get-go. Third, prosecutors were admonished to coordinate and communicate at all times. Fourth, it became DOJ's expressed policy—absent "extraordinary circumstances or approved departmental policy"—*not* to release culpable individuals when settling with a corporation. Fifth, DOJ attorneys were told not to resolve matters with corporations *until* they had a plan for resolution with individuals, too. Sixth, and particularly relevant for FCA purposes, civil attorneys specifically were directed to consider bringing suit against individuals—and not to abandon such suits merely because the individual might not be able to satisfy the judgment.

Pumping the Brake: *Escobar*—"Materiality" by Any Other Name (A Judicial "Backstop")—The issuance of the decision in this case was a watershed moment in FCA jurisprudence. It breathed new life into a largely dormant element of FCA liability: materiality. It has already caused DOJ to seek dismissal of certain qui tam lawsuits and has prompted judges to toss out jury verdicts of hundreds of millions of dollars. The case deserves close inspection and careful analysis.

The relators in *Escobar* were the parents of a Medicaid patient who died while undergoing treatment at a Massachusetts mental health clinic in 2009. The relators alleged that the treating staff members were not properly licensed or supervised under Massachusetts law. The theory of liability was that, by submitting invoices to Medicaid for services performed by unlicensed or unsupervised clinicians, the clinic and its parent corporation, Universal Health Services, had effectively *falsified* those claims. Because the invoices did not themselves certify that the services were performed in compliance with state regulations, the relators in *Escobar* relied on the "implied certification" theory.

The Government declined to intervene, and the district court ultimately dismissed the case. Applying a split of authority in implied certification precedent, the court reasoned that the relators had only alleged noncompliance with conditions of *participation* in Massachusetts Medicaid, rather than conditions of *payment*. The First Circuit reversed, holding that conditions of payment "may be found in sources such as statutes, regulations, and contracts, [but] need not be 'expressly designated.' " *U.S. ex rel. Escobar v Universal Health Servs., Inc.*, 780 F.3d 504, 512 (1st Cir. 2015). The requisite analysis is "a fact-intensive and context-specific inquiry, involving a close reading of the foundational documents, or statutes and regulations, at issue." Id. at 512–13. The court of appeals concluded that the supervision regulations at issue did, indeed, impose conditions of payment, and therefore were "dispositive evidence of materiality." Id. at 514.

The Supreme Court granted certiorari on the following question: whether the implied certification theory was viable at all and, if so, whether it applies only where a contractor violated an *expressly designated* condition of payment.

The Court easily answered the first question: "the implied false certification theory can, at least in some circumstances, provide a basis for liability." *Escobar*, 136 S. Ct. at 1999. Specifically, a defendant may find itself liable where it "makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements," so long as those omissions "render the defendant's representations misleading with respect to the goods or services provided." Id. at 1999. That left the obvious question: which omissions might render the representations misleading?

The answer is that *material* omissions will render the defendant liable. Because the FCA is *not* an "all-purpose fraud statute" meant to "punish[] garden-variety breaches of contract," FCA plaintiffs—whether qui tam relators or the Government itself—must plead and prove "the likely or actual behavior of the recipient of the alleged misrepresentation." Id. at 2003. Whether a given provision in a contract or regulation is a condition of payment, is still "relevant," but "not automatically dispositive." Id. at 2002. Plaintiffs may also prove materiality by showing "that the defendant kn[ew] that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." Id. at 2003.

The Difference an Election Makes: Shifting Priorities—While it has not said so expressly, the Trump Administration may enforce the FCA less rigorously than previous administrations. We submit this based on the aggregate of the following policies and initiatives.

Granston Memo—The Importance of Dismissal—On Jan. 10, 2018, Michael Granston, Direc-

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tor of the Commercial Litigation Branch, Fraud Section, issued a memo that established a framework for DOJ attorneys to evaluate whether to seek voluntary dismissal of actions under 31 USCA § 3730(c)(2)(A). The memo included the following factors, which are not mutually exclusive or exhaustive:

- Curbing meritless or duplicative qui tam suits where the complaint is facially lacking in merit;
- Preventing parasitic or opportunistic qui tam actions that duplicate a pre-existing Government investigation;
- Preventing interference with agency policies and programs;
- Protecting DOJ's litigation prerogatives;
- Safeguarding classified information and national security interests;
- Preserving Government resources;
- Addressing egregious procedural errors.

Although purportedly meant to codify preexisting policy on moving to dismiss qui tam suits, few doubt that the memo has led DOJ to dismiss more cases than it has previously. Many believe it was the first shot by the Trump Administration in a salvo against qui tam relators generally.

One encapsulation of this phenomenon is the saga surrounding the National Healthcare Analysis Group, an institutional relator that brought cases around the country. We summarized these cases and DOJ's motions to dismiss in a previous Feature Comment for this publication. Lynch, Rhoad and Liu, Feature Comment, "When The King No Longer Wants You Suing In His Name: The NHAG Saga And Its Implications For DOJ's Ability To Dismiss Qui Tam Suits," 61 GC ¶ 129. The upshot is that different courts have applied different standards with mixed results. Absent legislative amendment, resolution at the Supreme Court seems inevitable.

The Brand Memo—This memo did not come out of the blue. On Nov. 16, 2017, then-Attorney General Jeff Sessions issued a memo prohibiting DOJ from issuing guidance documents that "create rights or obligations binding on persons or entities outside the Executive Branch." The policy was meant to prevent DOJ from evading the required notice-and-comment rulemaking process and to prohibit DOJ from using guidance documents to coerce regulated parties into taking or refraining from taking action beyond what is required by statute or regulation. In guidance documents that set out voluntary standards, the memo required a statement that noncompliance with the guidance would not, in itself, result in enforcement action.

This policy was furthered when, on Jan. 25, 2018, then-Associate Attorney General Rachel Brand issued a memo that further developed DOJ's policy of curtailing enforcement of nonbinding guidance. The Brand memo stated that DOJ may not use its enforcement authority to convert agency guidance documents into binding rules for Affirmative Civil Enforcement (ACE) cases. DOJ may not use noncompliance with guidance documents as a basis for proving violation of applicable law in ACE cases. DOJ may continue to use agency guidance documents for proper purposes, such as presenting evidence that a party read a guidance document to help prove that the party had knowledge of a legal requirement.

On Feb. 28, 2018, Deputy Associate Attorney General Stephen Cox explained the Brand memo's application to FCA cases: (1) if a regulated party received an agency alert that explained the requirements of a regulation and there was evidence that the party received, reviewed, and understood the alert, then refused to abide by the regulation, the guidance document could be relevant to proving scienter or reckless disregard; (2) if a guidance document expanded upon the regulatory requirements, then noncompliance with the nonregulatory requirements will not be used to show that the party violated the regulation; and (3) if an agency wants to make its own interpretation binding on the public, it should do so through the rulemaking process.

No Piling On—On May 9, 2018, then-Deputy Attorney General Rod Rosenstein addressed the New York City Bar White Collar Crime Institute. The subject, later codified in a new section of the Justice Manual, was "Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct." Justice Manual § 1-12.100. It has been known colloquially as the "anti-piling on" policy.

The policy is brief and straightforward. First, prosecutors must be mindful of their ethical obligation not to use the threat of criminal sanction to extract (or attempt to extract) additional civil or administrative monetary payments. Second, DOJ attorneys must strive for an "equitable result" after considering the various criminal, civil or administrative sanctions imposed, "to avoid the unnecessary imposition of duplicative fines, penalties, and/or

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forfeiture." Id. Similarly, DOJ should consider sanctions imposed by state, local or foreign enforcement authorities. The policy gives a non-exclusive list of factors to be considered in pursuit of "the interests of justice," with an exception for "appropriate circumstances." Still, defendants generally took heart that DOJ would not be piling on in the future.

Individual Liability Revisited—On Nov. 29, 2018, then-Deputy Attorney General Rod Rosenstein announced four changes to the Yates memo. Rod Rosenstein, *Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2018), available at *www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0* (11/29/2018 Rosenstein Remarks). Those remarks are now codified in several Justice Manual sections. See Justice Manual §§ 1-12.00 (Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings); 4-3.100 (Pursuit of Claims Against Individuals); 9-28.210, 9-28.300, and 9-28.700 (Principles of Federal Prosecution of Business Organizations).

First, the Yates memo now only applies to criminal cases: "[A]bsent extraordinary circumstances, a corporate resolution should not protect individuals from criminal liability" because "the deterrent impact on the individual people responsible for wrongdoing is sometimes attenuated in corporate [only] prosecutions." 11/29/2018 Rosenstein Remarks. The Yates memo had previously provided that "[a]bsent extraordinary circumstances, no corporate resolution will provide protection from criminal *or civil* liability for any individuals." Yates memo at 5 (emphasis added).

Second, although a company seeking cooperation credit in a criminal case "must identify every individual who was substantially involved," DOJ now believes that "investigations should not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted." 11/29/2018 Rosenstein Remarks.

Third, Rosenstein addressed the fundamental difference between criminal prosecution and civil enforcement: "The primary goal of affirmative civil enforcement cases is to recover money, and we have a responsibility to use the resources entrusted to us efficiently." Id. In civil enforcement actions, the "binary choice" between credit or no credit is being eliminated. Id. While a company must always identify "senior officials," and will only get *maximum* credit if it identifies "every individual person who was substantially involved in or responsible for the misconduct," DOJ civil attorneys "now have discretion to offer *some* credit even if the company does not qualify for maximum credit." Id.

Fourth, contrary to the Yates memo's admonition, DOJ civil attorneys "once again are permitted to consider an individual's ability to pay in deciding whether to pursue a civil judgment." Id. The Yates memo had read: "Pursuit of civil actions against culpable individuals should not be governed solely by those individuals' ability to pay." In other words, while the Yates memo had encouraged civil attorneys to go after even judgment-proof defendants, because "pursuing individual actions in civil corporate matters will result in significant long-term deterrence," it is not clear that the current administration shares that view.

FCA-Specific Cooperation Credit—Finally, and most recently, DOJ has offered FCA-specific guidance on cooperation credit. This was the culmination of several steps toward that end. On June 14, 2018, Acting Associate Attorney General Jesse Panuccio announced three policy initiatives to reform FCA enforcement, including cooperation credit. DOJ reaffirmed its discretion in structuring settlements and that discounts can be offered, depending on the nature of the cooperation—which could come in the form of voluntary disclosure, sharing information gleaned from an internal investigation, or making witnesses available.

DOJ hinted that yet more FCA-specific guidelines were in the works in January 2019, when Deputy Associate Attorney General Stephen Cox concluded his remarks at the 2019 Advanced Forum on False Claims and Qui Tam Enforcement by telling the attendees that "[t]he Department has significant discretion under the False Claims Act to resolve cases in a way that provides a material discount based on cooperation while still making the government whole. Stay tuned on this front." A month later, Michael Granston, Director of the Civil Fraud Section, told another audience that DOJ was "in the process of considering whether to issue further guidance on cooperation credit that is specific to the False Claims Act."

On May 8, 2019, definitive DOJ guidance appeared. Assistant Attorney General Jody Hunt

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announced the policy, saying, "The Department of Justice has taken important steps to incentivize companies to voluntarily disclose misconduct and cooperate with our investigations; enforcement of the False Claims Act is no exception." The policy was codified in Justice Manual § 4-4.112 ("Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters"). Under the policy, cooperation credit can be earned through (1) voluntary self-disclosure of misconduct, (2) taking other steps to cooperate with FCA investigations, *or* (3) taking adequate and effective remedial measures.

To receive credit for voluntary disclosures, entities or individuals must "make proactive, timely, and voluntary self-disclosure to the Department about misconduct." Justice Manual § 4-4.112. Importantly, however, a disclosure will not be deemed to be voluntary—and thus will not qualify for cooperation credit—if disclosure of the information was required under mandatory reporting requirements, such as the Federal Acquisition Regulation's mandatory disclosure obligations.

Additional credit can be earned by taking "other steps" to cooperate with the Government's investigation. Id. The policy provides a non-exclusive list of such steps:

- Identifying individuals substantially involved in or responsible for the misconduct;
- Disclosing relevant facts and identifying opportunities for the Government to obtain evidence relevant to the Government's investigation that is not in the possession of the entity or individual or not otherwise known to the Government;
- Preserving, collecting, and disclosing relevant documents and information relating to their provenance beyond existing business practices or legal requirements;
- Identifying individuals who are aware of relevant information or conduct, including an entity's operations, policies, and procedures;
- Making available for meetings, interviews, examinations or depositions an entity's officers and employees who possess relevant information;
- Disclosing facts relevant to the Government's investigation gathered during the entity's independent investigation (not to include information subject to attorney-client privilege or work product protection), including attribution of facts to specific sources rather than a general narrative of facts, and providing timely updates on the organization's internal investigation into the Government's concerns, including rolling disclosures of relevant information;
- Providing facts relevant to potential misconduct by third-party entities and third-party individuals;
- Providing information in native format, and facilitating review and evaluation of that information if it requires special or proprietary technologies so that the information can be evaluated;
- Admitting liability or accepting responsibility for the wrongdoing or relevant conduct; and
- Assisting in the determination or recovery of the losses caused by the organization's misconduct.

Id.

Lastly, some cooperation credit may be earned if appropriate remedial actions have been taken, including:

- Demonstrating a thorough analysis of the cause of the underlying conduct and, where appropriate, remediation to address the root cause;
- Implementing or improving an effective compliance program designed to ensure the misconduct or a similar problem does not occur again;
- Appropriately disciplining or replacing those identified by the entity as responsible for the misconduct either through direct participation or failure in oversight, as well as those with supervisory authority over the area where the misconduct occurred; and
- Any additional steps demonstrating recognition of the seriousness of the entity's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

Id.

"Maximum credit" is available to those who timely self-disclose and identify all individuals substantially involved in or responsible for the misconduct, provide "full cooperation" with the Government's investigation, and take remedial steps designed to

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prevent and detect similar wrongdoing in the future. Partial credit is available to those who "meaningfully assisted" the Government's investigation through cooperation in any of the three categories described above.

But what is "maximum credit"? The policy does not say how credit is measured. It is unclear, therefore, how valuable it is to cooperate. While the policy provides that cooperation credit will "most often" entail reduced penalties or a reduced damages multiplier, it also provides that DOJ will not settle for less than full compensation for the losses suffered by the Government, which includes damages, interest, costs of investigation and the relator's share. Given that the relator's share is 15–30 percent of the total recovery, DOJ presumably would insist on at least 115 percent of single damages, plus interest and investigation costs. Although not codified in any formal policy, in our experience DOJ typically seeks, as a starting point for negotiations, double damages and reduced penalties in settlements, with parties typically settling for less. With this in mind, it is not entirely apparent what dollar value will flow from "full cooperation credit."

"Today" to "Tomorrow"—With our second and penultimate installment, "Today," under our belt, we will pivot to what lies ahead for the FCA in our next and final installment of this series, "Tomorrow." From its humble beginnings as a wartime antifraud statute, the FCA has taken prominence as among the most potent weapons in the Government's arsenal to combat fraud in a variety of contexts and in various industries, including not only defense contracting and healthcare, but also the financial services, education (lending, research grants, etc.), and natural resources industries. How broad and how far the enforcement tentacles of the FCA will reach remains to be seen but can be forecast based on imperatives articulated by the Government and relators' bar. How courts will grapple with growing circuit splits and fault lines in the wake of such cases as *Escobar* and their progeny will shape this brave new world. These are among the issues to be addressed by "Tomorrow." Again, stay tuned ….

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