crowell moring

CLIENT ALERT

Taking It to the Bank: FCA Case Dismissed Because Federal Reserve Banks Are Not the U.S. Government

May.16.2018

On remand from the U.S. Supreme Court and Second Circuit to reconsider its earlier dismissal of a long-running civil False Claims Act (FCA) lawsuit based upon implied and express certification theories undermined by the 2016 *Escobar* decision, the U.S. District Court for the Eastern District of New York concluded in *United States ex rel. Bishop v. Wells Fargo & Co.* that the lawsuit should be dismissed because no claims had been submitted to, or reimbursed by, the government. Relators claimed the defendants violated the FCA by engaging in "extensive accounting and control fraud" that allegedly distorted the financial condition of defendants in such a way as to make them eligible to borrow short-term funds from the Federal Reserve Banks' (FRBs) Discount Window at the lower interest rate and to borrow longer-term funds from the FRBs' Term Auction Facility, which they would not have been entitled to borrow without the alleged fraudulent distortions. The court concluded - as a matter of first impression – that FRBs do not act as the government or its agents under the FCA and that the government does not "provide funds to or reimburse FRBs for the conduct relevant here."

Specifically, the court identified and considered a number of factors for determining whether a federally-established entity qualifies as the government for purposes of the FCA, and concluded FRBs were not because: (a) the statutory history and the language of the Federal Reserve Act placed FRBs outside of the government; (b) "each FRB is a private corporation, owned by private stockholders made up of national banks," and "FRBs do not receive government appropriations to operate;" (c) FRB leadership is independent of the government and FRB employees are not government employees; and (d) FRBs function and operate independently from the Board of Governors of the Federal Reserve System and the government.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Stephen J. McBrady
Partner – Washington, D.C.
Phone: +1 202.624.2547
Email: smcbrady@crowell.com

Alan W. H. Gourley
Partner – Washington, D.C.
Phone: +1 202.624.2561
Email: agourley@crowell.com

Brian Tully McLaughlin
Partner – Washington, D.C.
Phone: +1 202.624.2628
Email: bmclaughlin@crowell.com

Gail D. Zirkelbach

Partner – Los Angeles
Phone: +1 213.443.5549
Email: gzirkelbach@crowell.com

Charlotte Gillingham
Counsel – Washington, D.C.
Phone: +1 202.624.2948
Email: cgillingham@crowell.com