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FEATURE COMMENT: The Top FCA Developments Of 2018

2018 included several large False Claims Act settlements and significant court rulings, but the headline of the year may well be the cases that did *not* proceed to full litigation, that is, the rising number of cases that were disposed of as part of the Department of Justice's apparent interest in breathing new life into its rarely used dismissal authority. Beyond the renewed focus on DOJ's dismissal power, the second year of FCA enforcement under the Trump administration was marked by several notable policy announcements including reforms to the policy on corporate cooperation credit and limits on the use of agency guidance documents. And more than two and half years after the U.S. Supreme Court articulated a materiality standard in its landmark *Escobar* decision, the lower courts continue to grapple with its application. This Feature Comment highlights these and other top FCA developments, and looks ahead to what is in store for Government contractors in 2019.

Recovery Statistics and Notable Settlements—On Dec. 21, 2018, DOJ announced that the Government had recovered $2.88 billion in settlements and judgments in fiscal year 2018. Notably, this is the second year in a row that total recoveries fell from the previous year and the lowest mark for recoveries in a decade. Of the $2.88 billion in total FCA recoveries, almost three-quarters came from qui tam cases ($2.1 billion), with relators receiving over $300 million in awards. While recoveries were down, the filing of new cases remained steady, with 767 actions filed, including 645 new qui tam matters and 122 affirmative civil enforcement actions filed directly by DOJ.

Consistent with recent years, health-care-related settlements and judgments ($2.5 billion) constituted the majority of the recoveries. Headlining the list of health care recoveries was the $625 million settlement paid by pharmaceutical distributor AmerisourceBergen Corp. and a $270 million settlement by Medicare Advantage provider DaVita Medical Holdings LLC. Hidden among the recovery statistics is a welcome figure for defense contractors—only four percent of all FY 2018 recoveries ($107 million) involved Department of Defense funds. This is a 50-percent decrease from FY 2017 when the Government reported $220 million in defense-related recoveries.

Although recovery amounts are down in the defense industry, the Government did obtain sizable recoveries in several long-running cases. Japanese textile manufacturer Toyobo Co. Ltd. paid $66 million to resolve claims that the company sold defective Zylon fiber used in bullet proof vests purchased by law enforcement agencies. In another notable settlement, marine services contractor Inchcape Shipping Services Holdings Ltd. paid $20 million to resolve allegations that it overbilled the U.S. Navy under contracts to service Navy vessels at various ports throughout the world. The Government alleged that Inchcape knowingly submitted invoices that overstated the quantity of services provided and billed at rates in excess of applicable contract rates.

This past year also saw the resolution of one of the country's most high-profile FCA cases. Reinforcing the Government's continued emphasis on individual accountability for corporate wrongdoing, cyclist Lance Armstrong paid $5 million to resolve allegations that the use of performance-enhancing drugs by his team in the Tour de France resulted in the submission of millions of dollars in false claims to the team's sponsor, the U.S. Postal Service.

What do these statistics tell us? For one, the FCA remains a fountain of opportunity for both DOJ and would-be relators to seek massive recoveries, as the hundreds of new cases filed yearly and the settlement numbers demonstrate. On the

other hand, while there is always some ebb and flow to recoveries, one can infer that the development of the FCA case law, particularly surrounding the issue of materiality, has raised the bar for plaintiffs—both relators and DOJ alike—in litigation while providing defendants with a defense that did not previously exist on such a broad scale, and it's a defense that is having a real impact in many cases.

Renewed Use of the Government's Dismissal Authority—One of the most closely watched trends of 2018 was the Government's exercise of its dismissal authority under 31 USCA § 3730(C)(2)(A), which allows the Government to dismiss a qui tam action notwithstanding the objections of a relator so long as the relator has been notified by the Government of the filing of the motion and the court has provided the relator with an opportunity for a hearing on the motion.

Historically, the Government has rarely exercised this authority. But in January 2018, several media outlets reported on the content of a memorandum sent by the director of the civil fraud section, Michael Granston, to attorneys in DOJ's civil fraud section and all assistant U.S. attorneys handling FCA cases. The so-called "Granston memo" encouraged DOJ lawyers to seek dismissal of non-intervened qui tam cases that "lack substantial merit" and discussed several non-exhaustive factors that should guide the dismissal decision, including whether the qui tam case threatens to interfere with agency policies and programs, the case could lead to unfavorable precedent, dismissal would prevent an unwarranted windfall to the relator, or dismissal is necessary to protect classified information or matters of national security. The principles from the Granston memo have since been added to § 4-4.111 of DOJ's Justice Manual which sets forth internal guidance for DOJ attorneys.

While the Granston memo acknowledged that DOJ has only used its dismissal authority sparingly in the past, it recognized that DOJ has a responsibility to act as a gatekeeper, and the Government's actions over the past year indeed suggest that the Granston memo has teeth. A survey of docket filings shows that there have been almost 20 motions to dismiss filed under § 3730(C)(2)(A) since the release of the memo—a considerable uptick from the past when this authority was used in less than one percent of all cases. The high-water mark came in December 2018 when DOJ moved to dismiss 10 kickback-related FCA complaints against 38 major pharmaceuticals companies and commercial-outsourcing vendors. According to the Government's filings, the relators in all 10 cases were shell companies affiliated with an LLC formed solely to file qui tam actions, thus reinforcing the Granston memo's warning against windfalls for parasitic relators.

While the Government's decision to move for dismissal typically sounds the death knell of the litigation, this past year has also shown that DOJ's filing of a motion under § 3730(C)(2)(A) may not always mean a guaranteed "get out of jail free" card for a defendant. The D.C. Circuit has held that the DOJ's right to dismiss is essentially "unfettered," but the Ninth and Tenth Circuits have required that DOJ (1) identify a valid purpose for dismissal and (2) show a "rational relation" between the dismissal and accomplishing that purpose. Compare *Swift v. U.S.*, 318 F.3d 250, 252–53 (D.C. Cir. 2003); 45 GC ¶ 93, with *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998); *U.S. ex rel. Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925 (10th Cir. 2005). Although the rational relation standard has typically been viewed as a low hurdle, it was recently applied to reject a Government motion to dismiss. In *U.S. v. Acad. Mortg. Corp.*, the relator amended his pleadings after DOJ investigated the initial complaint, and the Government then moved to dismiss, citing the costs of the litigation. 2018 WL 3208157 (N.D. Cal. June 29, 2018). But the district court denied DOJ's motion, finding that it could not invoke the litigation costs as a valid purpose for dismissal without meaningfully assessing the potential proceeds from the suit as amended. The Government has since appealed to the Ninth Circuit, and the case is expected to be fully briefed by the end of March 2019. That case may prove instructive as to the metes and bounds of DOJ's dismissal authority, including whether there should be any in the first place.

The Granston memo has found itself front and center not just in court filings but before Congress, as it was a topic of questioning at the confirmation hearing of Attorney General nominee William Barr just last week, on Jan. 15, 2019. Sen. Charles Grassley (R-Iowa), a longtime champion of the FCA and an author of the seminal 1986 amendments, described the Granston memo as containing "a long list of reasons that the Department can use to dismiss False Claims Act cases," and referring to some of the reasons as "pretty darn vague." When asked under what circumstances DOJ should be moving to dismiss cases, Barr said he was not familiar with the memo but would review it and work with Grassley on the issue if confirmed.

All told, the Government's decision to dust-off its dismissal authority is a welcome development for contractors. A year ago, few defendants would have considered asking the Government to move to dismiss—rather, persuading DOJ to decline to intervene was commensurate to winning the brass ring. But the current trend suggests that requests for § 3730(C)(2)(A) motions may be a new tool in the defendant's toolbox in certain situations, including cases where the Government will bear significant discovery costs, such as responding to *Touhy* requests and making officials available to testify.

Other FCA Policy Reforms—On Nov. 29, 2018, Deputy Attorney General Rod Rosenstein announced much-awaited changes to the DOJ policy on individual accountability in corporate investigations. For over a year, DOJ had been reviewing the memorandum on "Individual Accountability for Corporate Wrongdoing" authored by then-Deputy Attorney General Sally Yates in September 2015 (the "Yates memo"). Within the FCA context, the Yates memo required companies to provide DOJ with all relevant facts about the individuals involved in corporate misconduct to be eligible to receive cooperation credit. Moreover, according to the principles in the Yates memo, monetary recovery and deterrence were considered equally important aims for civil prosecutions.

In the years since the Yates memo was issued, there was a growing sense that strict adherence to its principles was delaying resolution of civil FCA cases because investigations would drag on as corporations attempted to identify all participants involved in the wrongdoing regardless of their seniority within the company. Fearing individual exposure, employees would retain outside counsel, which only further contributed to the delay.

Announcing changes to the Justice Manual's policy regarding individual accountability, Rosenstein emphasized that pursuing individuals responsible for wrongdoing will continue to be a top priority, including in the FCA context. That said, Rosenstein acknowledged that the Yates memo had created inefficiencies and hindered resolutions in the civil context, which meant the policy was not always strictly enforced. In an effort to make the policy more practical, Rosenstein stated that a company must identify all wrongdoing by senior officials, including members of senior management or the board of directors, to be eligible for cooperation credit in a civil case. Moreover, recognizing that the primary goal of civil enforcement cases is to recover money, the revised policy gives civil prosecutors greater discretion to weigh an individual's ability to pay when deciding whether to pursue a judgment.

On balance, these reforms are positive developments for contractors facing FCA investigations because the new policy provides prosecutors with greater flexibility in negotiating resolutions. In practice, these changes should allow companies to focus their investigation on the key employees responsible for the misconduct and still be eligible to receive cooperation credit. Of course, there are open questions about what this will look like in practice, and contractors would benefit from DOJ providing more insight into how it will calculate cooperation credit under the new policy—i.e. what is the financial significance of receiving "maximum" or "minimum" cooperation credit. On the criminal side, the process for quantifying cooperation is set forth in the U.S. Sentencing Guidelines and the fraud section guidance, but there is no civil analogue. DOJ leadership has explained that civil prosecutors have tremendous enforcement discretion with respect to discounting settlements based on cooperation and has identified the type of cooperation that it considers significant, such as sharing the results of an internal investigation and making witnesses available pursuant to Civil Investigative Demands. Going forward, DOJ would further incentivize companies to cooperate if companies could better quantify what they will get in return.

In another notable policy development, Associate Attorney General Rachel Brand issued a memorandum (Brand memo) that prohibits DOJ litigators from using noncompliance with guidance documents as a basis for proving violations of the underlying law or regulation in FCA actions. The Brand memo appears to be part of a larger DOJ effort to communicate to federal agencies its position that using sub-regulatory guidance to expand statutory and regulatory requirements is inconsistent with promoting the rule of law, fair notice and due process.

While the Brand memo permits DOJ litigators to continue using agency guidance for "proper purposes," such as to establish that a party had the requisite knowledge of a legal mandate because the party was familiar with a guidance document that explained it, this new policy has been heralded as a distinct limitation on the use of agency guidance in FCA enforcement.

Implied Certification Evolves—Two years after the Supreme Court's decision in *Universal Health*

Servs., Inc. v. U.S. ex rel. Escobar, 136 S. Ct. 1989 (2016); 58 GC ¶ 219, the landmark ruling continues to have a profound impact on the way FCA cases are handled at every stage—from pre-filing investigations through trial and appeal. In *Escobar*, the Court recognized the viability of the implied-certification theory of liability, "at least" where (1) the claim makes specific representations about the goods or services provided and (2) the defendant's failure to disclose noncompliance with material statutory, regulatory or contractual requirements makes those representations misleading half-truths. In applying *Escobar*, lower courts have split on whether that two-part test was necessary—or merely sufficient—for establishing FCA liability. Compare, e.g., *U.S. v. Sanford-Brown, Ltd.*, 840 F.3d 445, 447 (7th Cir. 2016) (implied-certification claim must satisfy both conditions described in *Escobar*); 58 GC ¶ 388 with, e.g., *U.S. ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174, 178 n.3 (4th Cir. 2017) (*Escobar* did not restrict implied-certification liability to cases where the two listed conditions are met).

In 2018, the Ninth Circuit weighed in on this issue in *U.S. ex rel. Rose, et al. v. Stephens Inst.,* which involved allegations that the defendant school violated the incentive-compensation ban in its program-participation agreement with the Department of Education by paying bonuses to recruiters. 901 F.3d 1124 (9th Cir. 2018); 60 GC ¶ 288. Prior to *Escobar*, the Ninth Circuit had recognized the implied-certification theory of FCA liability in *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993 (9th Cir. 2010). *Ebeid* permitted implied-certification claims without requiring that a claim for payment contain a "specific representation" made misleading by the failure to disclose a violation. The *Rose* panel found that two prior Ninth Circuit decisions applying *Escobar* had fatally undermined *Ebeid*. First, in *U.S. ex rel. Kelly v. Serco, Inc.*, the panel applied the two-part test from *Escobar* in holding that the plaintiff's implied-false-certification claim failed. 846 F.3d 325, 332 (9th Cir. 2017). Second, in *U.S. ex rel. Campie v. Gilead Scis., Inc.*, the panel held that both of *Escobar's* conditions were mandatory in implied-certification claims. 862 F.3d 890, 901–03 (9th Cir. 2017); 59 GC ¶ 236. Accordingly, the *Rose* panel concluded it was bound by *Serco* and *Campie* to hold that *Escobar's* two-part test was mandatory, "unless and until our court, en banc, interprets *Escobar* differently."

Materiality Remains Front and Center—In recognizing the implied-certification theory of liability, *Escobar* emphasized that liability could only rest on "material" misrepresentations. Rather than setting out a bright line rule for which requirements are material, the opinion focused on how violations would affect payment in the real world and laid out several specific factors that could contribute to a finding of materiality. Because the *Escobar* materiality analysis is fact-specific, the lower courts have been busy grappling with questions of whether compliance with a particular requirement was material to payment.

One such example emerged from the Ninth Circuit in *U.S. ex rel. Campie v. Gilead Sciences* where the relators alleged that the defendant drug manufacturer violated the FCA by concealing the use of contaminated drug ingredients from the Food and Drug Administration (FDA). In a motion to dismiss, Gilead argued that any misconduct was immaterial because the Government continued to pay for Gilead's products even after learning of the alleged noncompliance. On appeal, the Ninth Circuit ultimately rejected Gilead's argument, finding that there was ambiguity in the record about what the FDA knew and when. In response, Gilead filed a petition for certiorari asking the Supreme Court to clarify the materiality standard articulated in *Escobar*. 2017 WL 6812110 (U.S.).

There was widespread speculation as to whether the justices might revisit questions left unanswered by *Escobar* when the Court requested the views of the solicitor general as to whether it should grant cert in *Campie*. This speculation was put to rest in December, however, when the solicitor general responded by asking the Court to deny certiorari and agreeing with the Ninth Circuit's interpretation of *Escobar*. Standing alone, this development would have been a significant victory for the relators, but in an unexpected twist, the solicitor general told the Court that, if the case were remanded to the trial court, the Government would move to dismiss it under § 3730(C)(2)(A) to avoid burdensome litigation costs and interference with Government operations. On January 7, the Supreme Court followed the solicitor general's advice and denied certiorari. Cert. denied, *Gilead Scis., Inc. v. U.S. ex rel. Campie*, 2019 WL 113075 (U.S. Jan. 7, 2019) (mem.). While relators appear to have won the battle because their victory at the Ninth Circuit remains intact, the Government's intention to move to dismiss suggests relators may nonetheless lose the war.

In the same vein, the Court declined another opportunity to revisit the issue of materiality by denying certiorari in *U.S. ex rel. Harman v. Trinity Indus.*, in which the Fifth Circuit overturned a $663 million jury verdict

against a guard rail manufacturer after determining that the guard rail defects could not have been material because the Department of Transportation was aware of the defects and yet continued to pay for the rails. 872 F.3d 645 (5th Cir. 2017). At least for the time being, the Court does not appear poised to revisit materiality, giving more time for the development of the case law and circuit splits in 2019 and perhaps beyond.

Supreme Court to Address Statute of Limitations Split—While not likely to have nearly the impact of the *Escobar* decision, the Supreme Court is poised to hear an FCA case this term in *Cochise Consultancy Inc. et al. v. U.S. ex rel. Hunt*, where it will address the question of whether a relator can invoke the statute's tolling provision to lengthen the limitations period to as much as 10 years. Under the statute, cases must be brought either within six years of the alleged FCA violation or three years after material facts "are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances," up to a maximum of 10 years after the violation occurred. Section 3731(b)(2) of title 31, U.S. Code is used in cases where the Government intervenes to cover conduct that the Government did not learn about within the six-year limitation period. Where the Government does not intervene and the relator pursues the case on their own, the Fourth and Tenth Circuits have held that the tolling provision does not apply, because it would be triggered based on the knowledge of a non-party (the Government). The Ninth Circuit has taken a different approach, holding that the tolling provision does apply in non-intervened cases, and that it is triggered based on when the relator, not the Government, knew or should have known about the facts material to the fraud.

In *Hunt*, the relator brought suit more than six years after the alleged conduct but within three years of his disclosure to authorities. After the Government declined to intervene, the district court dismissed the case as time-barred, holding that relator could not take advantage of § 3731(b)(2) in light of the Government's declination. But the Eleventh Circuit reversed, finding that nothing in § 3731(b)(2) says that its limitations period is unavailable to relators when the Government declines to intervene. Moreover, the court concluded that the period begins to run when the pertinent Government official—not the relator—first learns of the fraud. 887 F.3d 1081 (11th Cir. 2018); 60 GC ¶ 129. This created a three-way split among the circuits, prompting the Supreme Court to grant certiorari. The statute of limitation question before the Court may appear to be a dry procedural issue, but it is nonetheless important given that it can prove outcome-determinative depending on where a suit is filed.

Trade and Domestic Preferences in the Age of "America First"—With the administration's focus on leveling the playing field for domestic products, it should come as no surprise that the trade and sourcing arena experienced its share of FCA activity in 2018. The past year saw the resolution of several cases based on allegations that contractors failed to comply with the Government's domestic preference and country of origin requirements under the Buy American Act and Trade Agreements Act (TAA). On balance, it was a mixed bag for the relators who brought these cases. There were some recoveries, such as when manufacturer Smith & Nephew paid $8 million to settle allegations that the company violated the TAA by selling orthopedic devices to the Department of Veterans Affairs that were manufactured in Malaysia. But there were also clear victories for contractors, including when a district court ruled that the mere presence of the TAA Federal Acquisition Regulation clause did not establish that compliance with it was per se material to the Government's payment decision. *U.S. ex rel. Folliard v. Comstor Corp*., 308 F. Supp. 3d 56 (D.D.C. 2018). And the Seventh Circuit unanimously affirmed the dismissal of a complaint by a General Services Administration vendor that his competitors had sold non-TAA compliant products through the GSA Advantage website. *U.S. ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834 (7th Cir. 2018). In affirming the dismissal, the Seventh Circuit held that the relator had failed to meet the heightened pleading requirements of Fed. R. Civ. P. 9(b) and noted that the allegations would have likely failed to meet the materiality standard articulated in *Escobar*.

Relatedly, there were several instances in 2018 where the FCA was used to redress the avoidance of tariffs and antidumping duties. In one case, a home furnishings company, Bassett Mirror Co., paid $10.5 million to resolve allegations that it knowingly made false statements on customs declarations to avoid paying antidumping duties on wooden bedroom furniture imported from China. Similarly, textile importer American Dawn Inc., paid over $2.3 million to settle allegations that it misclassified goods imported into the country in order to pay lower tariff rates.

These settlements are part of a broader trend in which companies have increasingly become targets of FCA suits alleging violations of the "reverse" FCA provision of the statute, which imposes liability on any person who "knowingly conceals or knowingly and improperly

avoids or decreases an obligation to pay or transmit money or property to the Government." 31 USCA § 3729(a)(1)(G). The potential FCA exposure faced by importers has only increased since the Third Circuit ruled in 2016 that a failure to mark country of origin could be actionable under a reverse FCA theory of liability if a company knowingly imported unmarked products in an effort to evade custom duties. *U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co*. 839 F.3d 242 (3d Cir. 2016). This favorable legal precedent for plaintiffs combined with increased duties as a result of numerous unfair trade proceedings has created fertile ground for FCA suits against importers in the coming years.

Continued Focus on Small Business Fraud—2018 saw more FCA enforcement activity on the small business front, with recoveries against both large and small businesses. In *U.S. ex rel. Savage v. Washington Closure Hanford LLC*, a large contractor, Washington Closure Hanford (WCH), agreed to pay $3.2 million to settle allegations that it used pass-through businesses to meet its targets for small business subcontracting during its performance of a Department of Energy contract. In the complaint-in-intervention, DOJ alleged that WCH awarded subcontracts to Sage Tec, a woman-owned small business, despite knowing that Sage Tec lacked relevant experience, employed only one person, had little or no equipment, and was far too small of an operation to perform even 15 percent of the work. Under the Government's theory of liability, WCH knew that Sage Tec was just a pass-through company and that the work would actually be performed by another large contractor. Despite this knowledge, WCH allegedly represented to the Government that WCH was entitled to WOSB credit and was implementing its subcontracting plan in good faith.

In another case involving allegations of small business fraud, communications company TrellisWare Technologies Inc. paid over $12 million to settle allegations that it was ineligible for multiple Small Business Innovation Research (SBIR) contracts that it had entered into with several branches of the military. TrellisWare self-certified that it met the small business size requirements for eligibility to receive funding from the SBIR program, which funds small businesses to engage in federal research and development efforts. The Government alleged that TrellisWare was not eligible for these SBIR awards because TrellisWare was actually a majority-owned subsidiary of a large company at the time it was awarded and performed the SBIR contracts.

Cases like those brought against WCH and TrellisWare are attractive for both prosecutors and qui tam relators in light of the Small Business Act's presumption-of-loss rule, which allows the plaintiff to seek the full value of the contract or grant if the defendant received the award by misrepresenting its small business size or status. Notably, these cases involving small business fraud tend to ensnare both small businesses and large businesses that are affiliated with the purportedly small entities. Combined with the FCA's statutory trebling, the presumption-of-loss rule creates a powerful incentive for plaintiffs and should put contractors on notice of more small business enforcement activity to come. Contractors both large and small would do well to tread carefully when small business requirements are at play, whether in the award of the contract or subcontract, and regard- less of how and by whom it will be performed.

Expansive Theories of Liability Pulling in New Classes of Defendants into the FCA's Crosshairs —The past year also included several examples of plaintiffs pursuing novel theories of liability in an effort to reach new classes of defendants with deeper pockets. For instance, in *U.S. ex rel. Medrano v. Diabetic Care RX LLC*, the Government intervened in a case against a pharmacy compounding company as well as the private equity firm that owned a controlling interest in the company. The Government alleges that the compounding company paid kickbacks to marketing companies to recruit beneficiaries to obtain prescriptions for unnecessary treatments. Notably, the Government's complaint-in-intervention also highlights the private equity firm's role in appointing the company's directors and officers as well as their overall insight into the company's practice of using marketing companies to generate referrals. No. 90-345 (S.D. Fla. Dec. 14, 2015).

In *U.S. ex rel. Scollick v. Narula*, a former employee of a construction company filed a qui tam suit alleging that several contractors set up shell construction companies to obtain status as Historically Underutilized Business Zone, 8(a), and service-disabled veteran-owned small businesses to win set-aside Government contracts. The suit named not just the construction companies and their principals, but also the sureties that wrote the bonds on the theory that the sureties wrote the bonds after obtaining information through the underwriting process that suggested that the construction companies were not eligible for set-aside awards. In August, the court denied a motion to dismiss, setting up a closely watched

test case for potential FCA exposure for sureties of Government contractors. No. 14-CV-01339-RCL, Dkt. No. 244 (D.D.C. Aug. 21, 2018).

The Year Ahead for the FCA—If 2018 will be remembered for its notable FCA policy and enforcement reforms, 2019 may well be defined by what these changes look like in practice. In the coming months, contractors will likely gain more insight into whether the uptick in § 3730(C)(2)(A) dismissals was an aberration or the new normal. And defendants will learn whether DOJ's pronouncement about cooperation credit is mere lip service or a policy change that will have a quantifiable impact on the way FCA investigations are handled and cases are settled.

The coming year will also be marked by new leadership of the DOJ. Thirty years ago, Attorney General nominee Barr authored an Office Legal Counsel memorandum arguing that the qui tam provisions of the FCA were likely unconstitutional. At his Jan. 15, 2019, confirmation hearing, Barr took a more moderate stance, noting that the constitutionality of the qui tam provisions had since been upheld by the Supreme Court. He pledged to "diligently enforce" the FCA, and Barr's confirmation could foretell another interesting year for contractors.

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