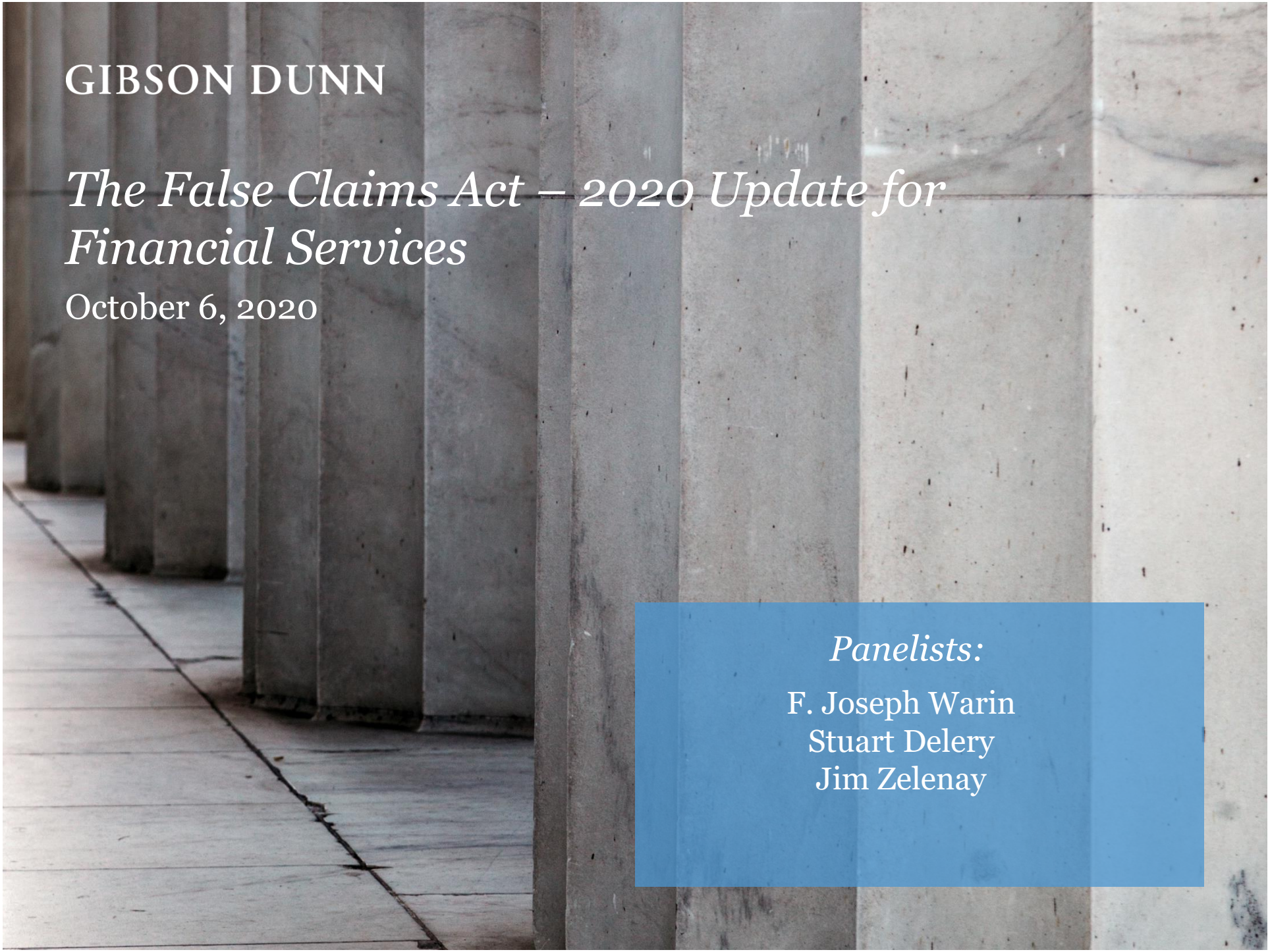

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The False Claims Act – 2020 Update for Financial Services

October 6, 2020

Panelists:

F. Joseph Warin
Stuart Delery
Jim Zelenay

Today's Panelists

F. Joseph Warin is a partner in the Washington, D.C. office, Chair of the office's Litigation Department, and Co-Chair of the firm's White Collar Defense and Investigations practice group. His practice focuses on complex civil litigation, white collar crime, and regulatory and securities enforcement—including FCA cases, FCPA investigations, special committee representations, compliance counseling and class action civil litigation.

Stuart Delery is a partner in the Washington, D.C. office. He represents corporations and individuals in high-stakes litigation and investigations that involve the federal government across the spectrum of regulatory litigation and enforcement. Previously, as the Acting Associate Attorney General of the United States (the third-ranking position at the Department of Justice) and as Assistant Attorney General for the Civil Division, he supervised the DOJ's enforcement efforts under the FCA.

Jim Zelenay is a partner in the Los Angeles office and a member of the firm's Litigation Department. He is experienced in federal and state FCA matters and whistleblower litigation, in which he has represented a breadth of industries and clients, including financial institutions. Mr. Zelenay is one of the primary authors of the firm's mid-year and year-end FCA updates and he has represented clients in FCA matters in all phases—investigation, litigation, trial, and appeals—in both federal and state courts.

MCLE Certificate Information

- Most participants should anticipate receiving their certificates of attendance via email approximately four weeks following the webcast
- Virginia Bar members should anticipate receiving their certificates of attendance six weeks after the webcast
- Please direct all questions regarding MCLE to CLE@gibsondunn.com

Agenda

- FCA Overview and Recent Jurisprudence
- FCA Enforcement Developments
- DOJ Policy Developments
- Recent Settlements and Enforcement
- FCA Compliance Best Practices
- Questions

FCA Overview and Recent Jurisprudence

The False Claims Act (FCA)

- The FCA, 31 U.S.C. §§ 3729–3733, is the federal government's ***primary weapon to redress fraud*** against government agencies and programs
- The FCA provides for recovery of ***civil penalties and treble damages*** from any person who knowingly submits or causes the submission of false or fraudulent claims to the United States for money or property
- Under the FCA, the Attorney General, through DOJ attorneys, investigates and pursues FCA cases
- DOJ devotes substantial resources to pursuing FCA cases—and to considering whether *qui tam* cases merit parallel criminal investigations

"It seems quite clear that the objective of Congress was broadly ***to protect the funds and property of the Government from fraudulent claims*** …."

Rainwater v. United States, 356 U.S. 590 (1958)

FCA – Key Provisions

31 U.S.C. § 3729(a)(1)	Statutory Prohibition	Summary
(A)	Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval	False/Fraudulent Claim
(B)	Knowingly makes or uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim	False Record/Statement
(C)	Conspires to violate a liability provision of the FCA	Conspiracy
(G)	Knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government	"Reverse" False Claim

FCA – Overview of Key FCA Theories

Factual Falsity

- False billing (e.g., goods or services not provided)
- Overbilling (e.g., upcoding)

Legal Falsity

- Express certification of compliance with legal requirements
- Submission of claim with representations rendered misleading as to goods/services provided

Promissory Fraud / Fraud in the Inducement

- Obtaining a contract through false statements or fraudulent conduct
- *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (claims by contractors who colluded on bids)

Reverse False Claims

- Improper avoidance of obligation to pay money to the government
- Retention of government overpayment

FCA – *Qui Tam* Provisions

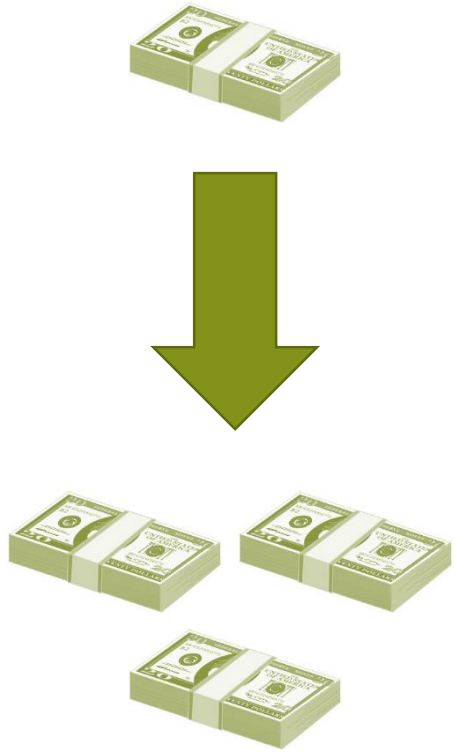
- ***Qui Tam Provisions***
  - Enable so-called "relators" to bring cases in the government's name and receive ***as much as 30%*** of recovery or judgment
  - Allow government to intervene
    - An increasing number of cases are pursued ***without government intervention*** (but often with government statement of interest)
  - DOJ has broad dismissal authority
    - We will cover ongoing developments in DOJ's use of this power
- ***FCA Whistleblower Protections (31 U.S.C. § 3730(h))***
  - Protect employees and others (e.g., contract workers)
  - Relief may include double back pay and interest on back pay; reinstatement (at same level); costs and attorneys' fees
  - Case law continues to develop, e.g., around meaning of anti-retaliation provision's causation language ("because of")

"In short, sir, I have based the [*qui tam* provision] upon the old-fashioned idea of holding out a temptation and '***setting a rogue to catch a rogue***,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice."

Statement of Senator Howard, Cong. Globe, 37th Cong. 955-56 (1863)

FCA – Damages and Penalties

- ***Simple Damages Calculation***
  - Treble damages are traditionally calculated by multiplying the government's loss by three (e.g., if government charged $100 for goods not received, damages would be $300)
- ***Complex, Contested Damages Calculation***
  - Calculations are more complicated (and less certain) when the government receives goods or services it considers deficient or when there is a "false certification" or "promissory fraud"
- ***Civil Per-Claim Penalty***
  - Previously $5,500 to $11,000
  - Increased by interim rule in 2016, with later adjustments for inflation; current range, per final rule issued in June 2020: ***$11,665 to $23,331 per violation***
  - Lower penalty range still in effect for violations occurring on or before November 2, 2015 ($5,500 to $11,000 per violation)



Universal Health Services, Inc. v. United States ex rel. Escobar

136 S. Ct. 1989 (2016)

- The Supreme Court's opinion reached a number of key conclusions that have formed the basis for significant follow-on FCA litigation:
  - The Court deemed the ***"implied false certification"*** theory of liability viable in certain circumstances, but declined to decide whether "all claims for payment implicitly represent that the billing party is legally entitled to payment"
  - The Court stated that the FCA's materiality and scienter requirements are ***"rigorous" and must be "strict[ly] enforce[d]"***
  - The Court set forth factors for consideration in analyzing what makes a particular regulatory or other requirement "material" to government payment decisions:
    - Whether the government has expressly identified compliance with the provision or regulation as ***a condition of payment***
    - Whether the government would have ***denied payment if it had known of the alleged noncompliance***
    - Whether the government in fact ***continued paying*** despite ***knowledge of the alleged noncompliance***
    - Whether the noncompliance is ***minor or insubstantial***

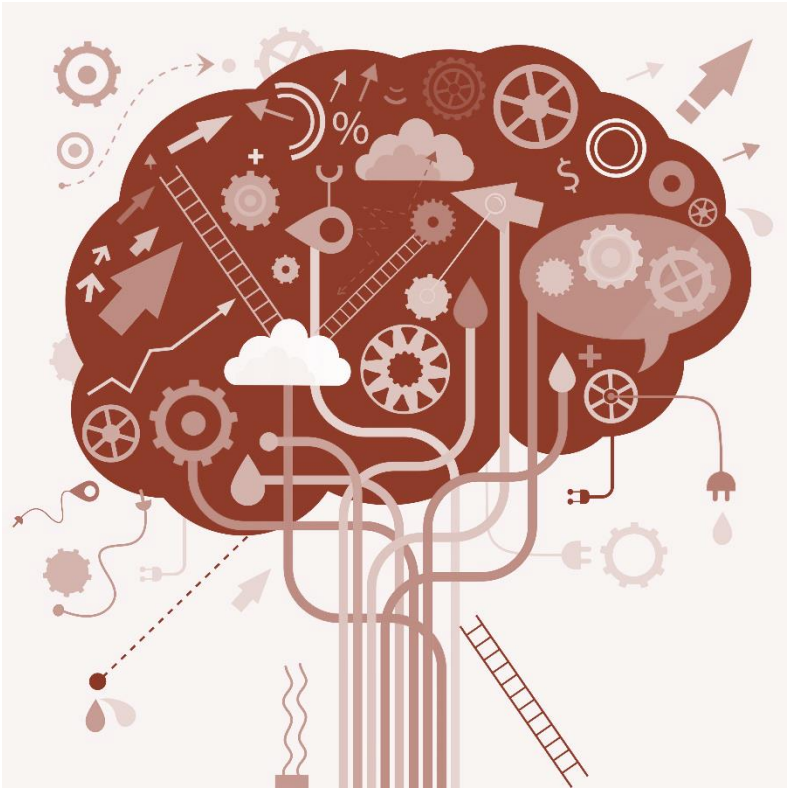
Post-*Escobar* Materiality – When Does Government Knowledge Defeat Materiality?

***United States ex rel. Janssen v. Lawrence Mem. Hosp.*, 949 F.3d 533 (10th Cir. 2020)**

- The case concerned alleged certifications to Medicare regarding patient arrival times, and the District Court granted summary judgment to defendants on materiality
- The Tenth Circuit affirmed, finding it significant that CMS's third-party investigative service had investigated relator's allegations after she raised them via CMS's hotline prior to filing suit—and that CMS did "nothing in response and continue[d] to pay [defendant's] Medicare claims"
- "Although CMS may not have independently verified [defendant's] noncompliance—and thus may not have obtained 'actual knowledge' of the alleged infractions—***its inaction in the face of detailed allegations from a former employee suggests immateriality"***

FCA – Scienter

- ***"Knowingly"*** requires scienter and is defined as:
  - Actual knowledge,
  - Deliberate ignorance, or
  - Reckless disregard
- Negligence is not actionable
- Specific intent to defraud is not required



Post-*Escobar* Scienter

***United States ex rel. Complin v. North Carolina Baptist Hosp.*, 818 Fed. App'x 179 (4th Cir. 2020)**

- The court rejected relator's argument that scienter could be "inferr[ed] from the alleged regulatory violation itself . . . because ***the FCA does not punish 'honest mistakes or incorrect claims submitted through negligence'"***
- The court emphasized the ***ambiguity of the regulation at issue*** in the case, including the open question of whether the rule "even . . . applies in the first place to the transactions in question"
- In the course of its analysis, the court cited favorably to FCA case law applying the *Safeco* rule that reckless disregard cannot exist where the alleged fraud "turns on a ***disputed interpretive*** question" and the defendant has not been ***"warned away"*** from its interpretation

Recent Jurisprudence – Definition of "Claim" under the FCA

United States v. Wells Fargo & Co., 943 F.3d 588 (2d Cir. 2019)

- This case related to representations allegedly made to the Fed's Federal Reserve Banks
- The District Court dismissed the case, holding that, for purposes of the FCA's definition of "claim," FRB personnel are not "officer[s], employee[s], or agent[s] of the United States," and the United States does not provide the money given to Fed borrowers
- The Second Circuit reversed, holding that the loan requests in question were claims
- "FRB personnel are not 'officer[s]' or 'employee[s] . . . of the United States,'" but they are "agents of the United States" and the "'money . . . requested' by Fed borrowers is 'provided' by the United States to advance a Government program or interest"
- The court explained that "the United States created the FRBs to act on its behalf in extending emergency credit to banks; the FRBs extend such credit; and the FRBs do so in compliance with the strictures enacted by Congress and the regulations promulgated by the Board, an independent agency within the executive branch"
- The court also held that the fact that the U.S. Treasury does not fund the FRBs was not dispositive of whether the government "provide[d]" the funds in question—what mattered was that "the United States is the source of the purchasing power conferred on the banks when they borrow from the Fed's emergency lending facilities"

FCA – Statute of Limitations

- The ***statute of limitations*** is:
  - 6 years from the date of the violation, ***or***
  - 3 years from when facts material to the violation are known or reasonably should have been known to the government, but not more than 10 years from the date of the violation,

whichever occurs last.

31 U.S.C. § 3731(b)

Recent Jurisprudence – Statute of Limitations

Cochise Consultancy, Inc. v. United States ex rel. Hunt, 139 S. Ct. 1507 (2019)

- Resolving a Circuit split, the Supreme Court held that an extended limitations period of up to ten years applies in all FCA cases, whether the government has intervened or not

- Following *Cochise*, ***relators can now employ the extended limitations period even in cases where the government has declined to intervene***

- The Court held that courts must look to the government official's knowledge (not the relator's) as the trigger for the additional three-year period

Recent Jurisprudence – Statute of Limitations

***Houpt v. Wells Fargo Bank, N.A.*, 800 Fed. App'x 533 (9th Cir. 2020)**

- Relator alleged FCA claims relating to payments of a loan guarantee by the Small Business Administration
- The District Court granted summary judgment for defendant, in part on the basis that relator's claims were outside the FCA's statute of limitations
- On appeal, the Ninth Circuit affirmed on statute of limitations grounds, holding that the six-year limitations period begins running when a claim for payment is submitted, and assuming without deciding that the SBA official—***not DOJ***—was the relevant official for purposes of the three-year tolling provision under the statute

FCA – Public Disclosure and First-to-File Bars

- ***Public Disclosure Bar.*** A relator's *qui tam* complaint cannot be ***"substantially the same"*** as allegations or transactions ***publicly disclosed in certain enumerated sources*** such as public hearings, government audits or reports, or the news media
  - ***"Original source" exception:*** A relator may proceed on publicly disclosed allegations if he/she is an "original source" of the allegations, meaning he/she ***either:***
    - ***voluntarily disclosed*** them to the government ***prior to the public disclosure;*** or
    - ***voluntarily disclosed*** them to the government ***before filing*** and has knowledge that is ***"independent of and materially adds to"*** the public disclosures
  - ***2010 Amendments:*** The public disclosure provisions were amended to the current language by PPACA in 2010; previously, the bar was jurisdictional and contained differences in the public disclosure and original source provisions
- ***First-to-File Bar.*** The FCA provides that, when a *qui tam* action is ***"pending," "no person*** other than the Government ***may intervene or bring a related action based on the [same] facts"***
- The first-to-file and public disclosure bars do not apply to DOJ

Recent Jurisprudence – Public Disclosure Bar

United States ex rel. Banigan v. PharMerica, Inc., 950 F.3d 134 (1st Cir. 2020)

- Applying the pre-2010 version of the public disclosure bar, the First Circuit held that, for purposes of the original source exception, a relator's "independent knowledge" need not be based on actual participation in or observation of the alleged conduct; rather, the relator need only have ***direct and independent knowledge "of the information on which the allegations are based"***

- The court held the fact that the relator learned about the alleged conduct from other people did not disqualify him as an original source

  - Relator was "a corporate insider" who learned of the underlying conduct during his employment, and via communications with the primary participants in the conduct and "documents . . . that he obtained through his own investigative efforts"

  - There was no "intervening agency, instrumentality, or influence" between the sources of relator's knowledge and the knowledge itself

Recent Jurisprudence – Public Disclosure Bar

United States ex rel. Holloway v. Heartland Hospice, Inc., 960 F.3d 836 (6th Cir. 2020)

- The Sixth Circuit held that a *qui tam* relator is the government's "agent" for purposes of the prong of the public disclosure bar requiring disclosure in a federal proceeding in which the government or its agent is a party

Recent Jurisprudence – First-to-File Bar

In re Plavix Marketing, Sales Practice & Prods. Liability Litig. (No. II), --- F.3d ----, 2020 WL 5200681 (3d Cir. Sept. 1, 2020)

- Deepening a Circuit split, the Third Circuit joined the First, Second, and D.C. Circuits in holding that ***the FCA's first-to-file bar is not jurisdictional, such that arguments under the first-to-file bar do not implicate the court's subject matter jurisdiction***, even if they are a cause for dismissal

- This distinction can affect how, and when, arguments under the first-to-file bar may be made, and also the standard of review a court applies

- The Fourth, Fifth, Ninth, and Tenth Circuits have held the bar is jurisdictional

Recent Jurisprudence – Anti-Retaliation Provision

Nesbitt v. Candler Cty., 945 F.3d 1355 (11th Cir. 2020)

- The Eleventh Circuit held that an employee suing under the FCA's retaliation provision must satisfy a "but-for" causation standard—that is, the employee must show that the claimed retaliation would not have occurred ***absent the employee's protected action***

- The court relied on the plain language of the FCA, holding that it had an "obligation to presume that 'because of' means 'because of' and not something else"

- As such, the court rejected the less stringent "motivating factor" standard applied by the Sixth, Seventh, and D.C. Circuits

Case to Watch – *Res Judicata* in *Qui Tam* Cases

State ex rel. Balderas v. Bristol-Myers Squibb Co., 436 P.3d 724 (N.M. Ct. App. 2018)

- The State of New Mexico filed this case—which is related to the *In re Plavix Marketing* litigation—separately in state court while the other litigation was pending
- The State of New Mexico had declined to intervene in the *In re Plavix Marketing* case, which was ultimately dismissed
- The state trial court denied defendants' motion to dismiss on claim preclusion grounds, and the New Mexico Court of Appeals affirmed, holding that the dismissal of the *Plavix* relator's claims with prejudice did not act as dismissal with prejudice as to the government
- A petition for writ of certiorari was filed before the U.S. Supreme Court in early September, and it remains pending

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FCA Enforcement Developments

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By the Numbers: 2019 Federal Fiscal Year

> $3 Billion

Civil Settlements and Judgments under the FCA

782

New FCA Cases Filed

81%

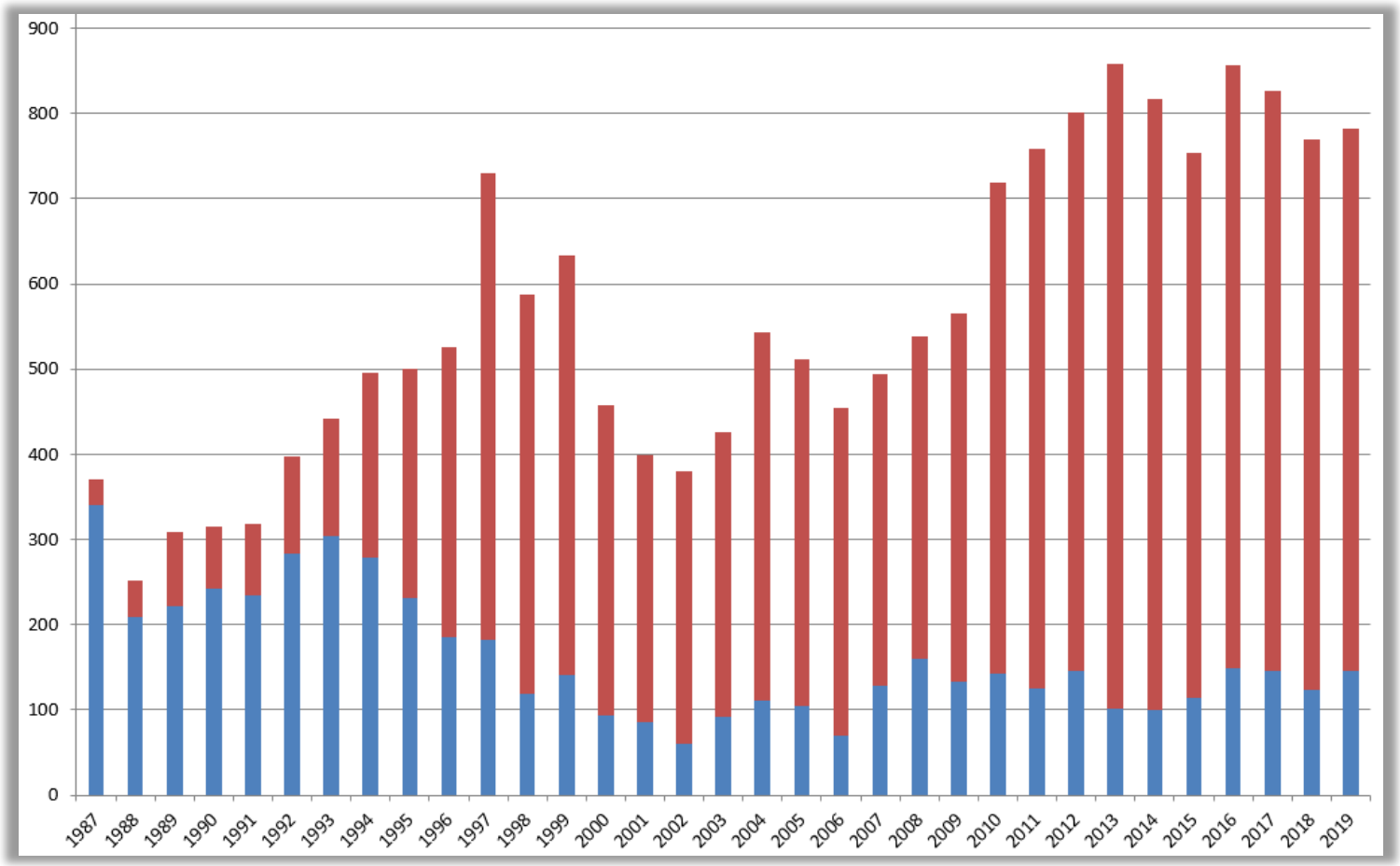
New FCA Cases Initiated by a Whistleblower

63%

Overall Federal Recovery from Cases in which the Government Intervened

Source: U.S. Dep't of Justice, "Fraud Statistics – Overview" (Jan. 9, 2020)

Number of New FCA Suits (FFY 1987-2019)



782 new cases in 2019 FFY:

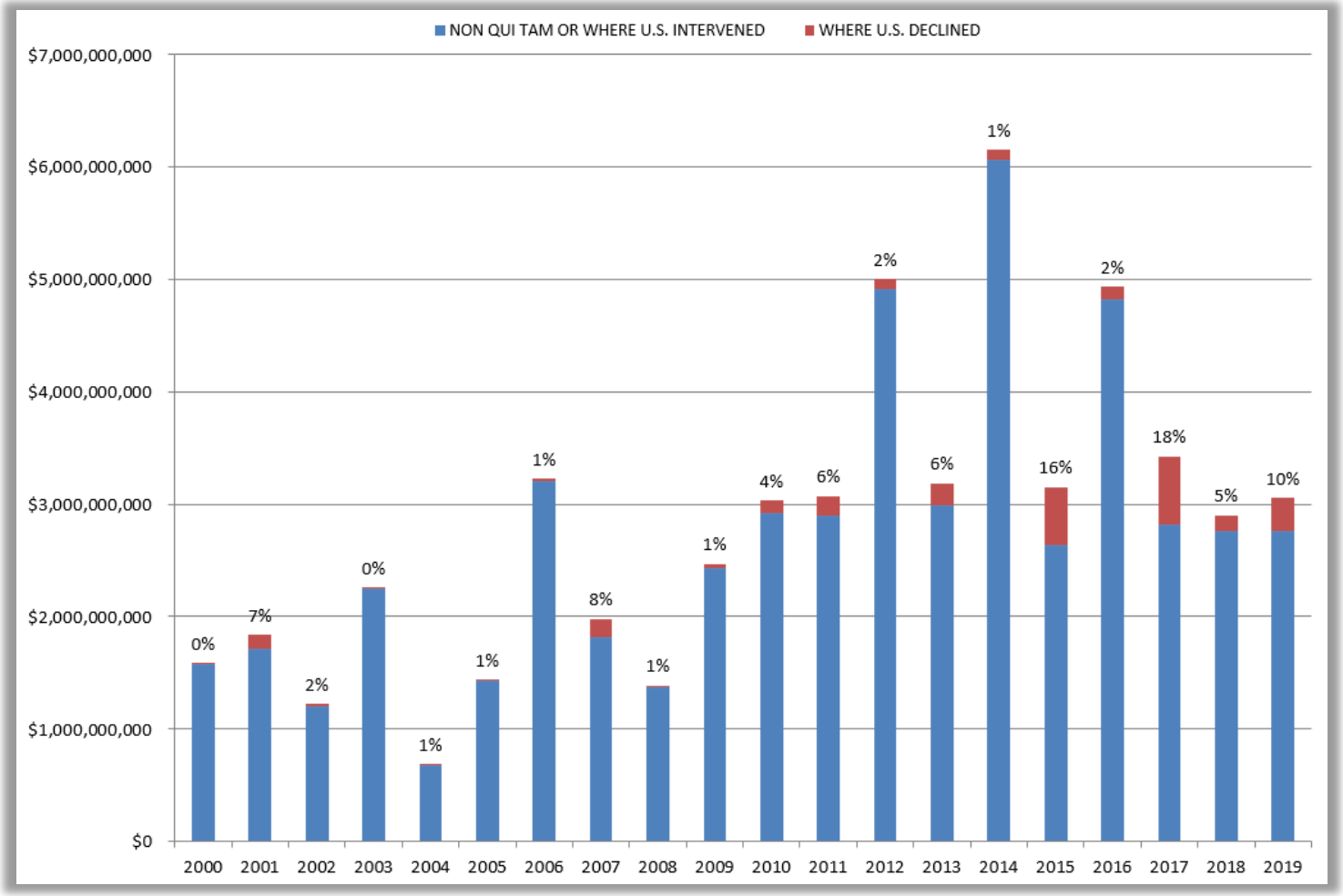
- 636 *qui tam* cases
- 146 non-*qui tam* cases

Source: DOJ, "Fraud Statistics – Overview"

Recoveries through Settlements & Judgments (FFY 2000–2019)

2019 FFY:

- >$3bn
- $293m declined
- $2.74bn intervened and non-*qui tam*



Source: DOJ, "Fraud Statistics – Overview"

The CARES Act

- The ***Coronavirus Aid, Relief, and Economic Security Act (CARES Act)***
  - Largest emergency stimulus package in history—$2.2 trillion in government funds to mitigate effects of COVID-19
  - Key programs:
    - Paycheck Protection Program (PPP)—Small Business Administration (SBA) loan program
    - Main Street Lending Program (Federal Reserve)
  - Created Pandemic Response Accountability Committee (PRAC) and Special Inspector General for Pandemic Recovery (SIGPR)
    - SIGPR empowered to conduct audits and investigations into CARES Act relief programs

DOJ Enforcement Priorities in the COVID-19 Era

- DOJ has made clear that it sees the FCA as a prime tool for addressing fraud in COVID-19 stimulus programs
- Then-Principal Deputy Assistant Attorney General Ethan Davis gave a speech in June that made DOJ's focus on the programs clear:
  - "Going forward, the Civil Division will make it a priority to use the False Claims Act to ***combat fraud*** in the Paycheck Protection Program"
  - "We will use the False Claims Act to hold accountable those who knowingly attempt to skirt th[e] requirements" of the ***Main Street Credit Facility***
  - "Our enforcement efforts may also include, in appropriate cases, ***private equity firms*** that sometimes invest in companies receiving CARES Act funds. . . . Where a private equity firm takes an active role in illegal conduct by the acquired company, it can expose itself to False Claims Act liability"
  - ***But:*** "You can rest assured that the Civil Division will not pursue companies that made ***immaterial or inadvertent technical mistakes*** in processing paperwork, or that ***simply and honestly misunderstood*** the rules, terms and conditions, or certification requirements"

Implications for *Qui Tam* Activity

- SBA now maintains a database of PPP loan-level data
  - Last updated in early August 2020
  - Public resource—anyone can download; no FOIA required
- When launched, the data covered 4.9 million PPP loans
- Examples of information included in the data:
  - Business names (except for loans below $150,000)
  - Business types
  - Addresses
  - Demographic data
  - Jobs supported by loans
  - Loan amounts
  - Lender names

- Lenders can expect this public data to serve as a starting point for *qui tam* relators and law firms looking for allegations of potential fraud

Potential Risk Areas for Lenders

- False certifications / false statements
  - Lender status and eligibility
  - Underwriting requirements
    - Lenders are permitted to rely on certain certifications by borrowers, but lenders still must obtain those certifications and certify that they have received them
  - Determinations of borrower eligibility for loan forgiveness
    - Lenders need not independently verify borrower-provided information, but should work with borrowers to fix errors or gaps identified
- Reverse false claims
  - Retention of processing fees from SBA
  - Retention of improperly forgiven loan amounts

DOJ Policy Developments

Government Players

DOJ

DOJ devotes substantial resources to pursuing FCA cases—and considering whether *qui tam* cases merit criminal investigation

Support Agencies

Parent agencies (e.g., HUD, SBA) participate in financial sector FCA investigations

Cooperation

Inspectors General

FCA – Government's Dismissal Authority

- The FCA empowers DOJ to ***dismiss*** *qui tam* actions (31 U.S.C. § 3730(c)(2)(A))
- ***Section 4-4.111 of the Justice Manual*** sets forth the factors DOJ considers when determining whether to exercise this authority; this provision codifies the principles set forth in the Granston Memo (Jan. 10, 2018)
- The factors DOJ attorneys should consider include:
  - "Curbing . . . *qui tams* [that] facially ***lack merit"***
  - Preventing ***"parasitic or opportunistic*** *qui tam* actions"
  - Preventing ***"interference with an agency's policies*** or administration of its programs"
  - "[P]rotect[ing] the Department's ***litigation prerogatives"*** by "[c]ontrolling litigation brought on behalf of the United States"
  - "Safeguarding ***classified information*** and national security interests"
  - "Preserving government resources," especially where ***costs outweigh expected gains***
  - "Addressing ***egregious procedural errors*** that could frustrate the government's efforts to conduct a proper investigation"

FCA – Government's Dismissal Authority (2020)

- In a January 2020 speech at the 2020 Advanced Forum on False Claims Act and *Qui Tam* Enforcement, ***DOJ's then-Deputy Associate Attorney General Stephen Cox*** explained DOJ's exercise of its dismissal authority"
  - DOJ's "exercise of this authority will remain judicious, but we will use this tool more consistently to preserve our resources for cases that are in the United States' interests and to rein in overreach in whistleblower litigation"
  - Cox noted that, between 1986 and the Granston Memo, DOJ dismissed about 45 cases, and has dismissed a similar number in the short period since the Granston Memo—and that "[c]ourts have granted our motions in all but one of the roughly thirty decisions that have been rendered during that two-year period"
  - Cox also elaborated on some of the considerations motivating the Granston Memo:
    - Cases that are "frivolous, abusive, or contrary to the interests of justice . . . . impose unnecessary costs not just on the government, but on the corporate and individual defendants, third parties facing discovery, and of course the judiciary. Plus, bad cases often result in bad law, which can inhibit our ability to enforce the False Claims Act in good and righteous cases. And from a resource perspective, when the department's resources and our client agencies' resources are consumed by unnecessary litigation, we have less time to fulfill our priorities."

FCA – Government's Dismissal Authority (2020) (cont.)

- In a June 2020 speech to the U.S. Chamber of Commerce's Institute for Legal Reform, the ***Civil Division's then-Principal Deputy Assistant Attorney General, Ethan Davis***, provided more details on the types of cases DOJ will focus on in exercising its dismissal authority in the COVID-19 era:
  - "[W]e will consider moving to dismiss *qui tams* that are based on technical mistakes with paperwork or honest misunderstandings of the rules"
  - "We may also take a look at *qui tams* that try to hold companies liable for doing what the government said was okay to do"
  - Cases based on "noncompliance with [agency] guidance documents," which "cannot by itself form the basis of an FCA case" per the Brand Memo
- DOJ's efforts have prompted increased attention from Congress
  - In July 2020, Senator Chuck Grassley (R-Iowa) stated in a Senate floor speech that he is drafting legislation that would require DOJ to justify its dismissal decisions and give relators an opportunity to take a position on dismissal before courts rule

FCA – Dismissal Authority – Judicial Interpretations

- ***Sequoia*** test: government may dismiss if: (1) it identifies a valid government purpose; and (2) a rational relation exists between the dismissal and accomplishment of that purpose; unless (3) dismissal is fraudulent, arbitrary and capricious, or illegal. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998)

- ***Swift*** test: government has "an unfettered right to dismiss" FCA actions under 3730(c)(2)(A), and so dismissals are "unreviewable" with a possible exception for dismissals constituting "fraud on the court." *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003)

FCA – Dismissal Authority – Judicial Interpretations (cont.)

- ***United States v. UCB, Inc.***, 970 F.3d 835 (7th Cir. 2020): The Seventh Circuit called the choice between the *Sequoia Orange* and *Swift* standards "a false one, based on a misunderstanding of the government's rights and obligations under the False Claims Act"
  - The court held that DOJ's exercise of its dismissal authority should be evaluated under the Federal Rule of Civil Procedure 41 standard concerning voluntary dismissals
  - In the Seventh Circuit, the voluntary dismissal right conferred by that rule is "absolute" provided the notice of dismissal is served before the opposing party moves for summary judgment
  - The court did also hold, however, that the government must intervene before it can move for dismissal—and so the "good cause" standard in the FCA still governs in the event that DOJ decides to dismiss a case after initially declining to intervene
  - The court characterized its holding as lying "much nearer to *Swift* than *Sequoia Orange*"

FCA – Dismissal Authority – Judicial Interpretations (cont.)

- ***United States v. Academy Mortgage Corp.***, 968 F.3d 996 (9th Cir. 2020): The Ninth Circuit considered the District Court's denial of the government's motion to dismiss the case under Section 3730(c)(2)(A)
  - The case involved allegations regarding FHA-insured loans
  - The District Court's decision in June 2018 held that the government's cost-benefit justification for dismissal was insufficient to satisfy the *Sequoia Orange* standard; the government claimed that discovery would be burdensome, but according to the court, the government's limited investigation meant its justification was based on an incomplete understanding of the potential recovery in the case
  - The government appealed under the collateral order doctrine rather than seeking to have the issue certified for interlocutory review
  - The Ninth Circuit held that the collateral order doctrine does not apply to denials of motions to dismiss under Section 3730(c)(2)(A), "at least in cases where the Government has not exercised its right to intervene"
  - The court thus dismissed the appeal for lack of jurisdiction

FCA – Dismissal Authority – Judicial Interpretations (cont.)

- Outcomes in Circuits that have not yet adopted a standard of review remain mixed, but also highlight the ultimate similarities in the standards

Court	Circuit	Approach
D.R.I.	First	Declined to choose, but found *Sequoia Orange* satisfied
S.D.N.Y.*	Second	Declined to choose, but found *Sequoia Orange* satisfied
S.D.N.Y.*	Second	*Sequoia Orange*
E.D. Pa.	Third	Declined to choose, finding both standards satisfied
E.D. Pa.	Third	Declined to choose, but applied *Sequoia Orange* and found it satisfied
E.D. Va.	Fourth	*Swift* (but found *Sequoia Orange* satisfied)
S.D. Miss.	Fifth	*Swift*
N.D. Ala.	Eleventh	Predicted Circuit Court would apply *Swift*, but found both standards satisfied
S.D. Ala.	Eleventh	Applied *Sequoia Orange* "in abundance of caution" and found it satisfied

**Case involved a financial institution*

Recent Settlements and Enforcement

The FCA Implicates a Wide Range of Financial Services

- **False Certification Regarding Servicing & Origination of FHA-Insured Loans**
- **False Statements Regarding Servicing of "Reverse" Mortgage Loans**
- **False Statements to Obtain Ex-Im Bank Loan Guarantees**
- **False Representations Regarding Financial Health to Borrow Money**
- **False Certification to Obtain Reimbursement**
- **False Promises to Obtain Federal Grant Dollars**
- **Any other interactions with federal or state governments**

DOJ-HUD Memorandum of Understanding

- HUD Secretary Ben Carson promised in May 2018 to "seek[] to limit the use of the False Claims Act as a tool of last resort"
- In October 2019, DOJ and HUD signed a Memorandum of Understanding setting forth guidance on the appropriate use of the FCA to enforce violations of FHA regulatory requirements
  - Secretary Carson's public remarks regarding the MOU called the FCA a "monster" that drove banks away following the financial crisis but now "has been slayed"
- Key takeaways from the MOU:
  - Referral to DOJ for pursuit of FCA claims when two conditions are met—the violations reach a certain level of seriousness (based on volume or value of loans), and there are aggravating factors
  - In investigating, litigating, and settling FCA cases, DOJ will solicit HUD's views, including on whether the alleged violations are material to the agency
  - HUD will recommend dismissal of *qui tam* suits under defined circumstances (e.g., lack of materiality)

Recent Enforcement Activity

- Amount of settlements much smaller than similar cases a few years ago
- Some FCA resolutions over the last year:

Settlement	Date	Amount	Subject Matter
CRA/LA	Feb. 6, 2020	$3.1 million	HUD accessibility requirements for affordable housing
Finance of America Reverse	Mar. 31, 2020	$2.47 million	HUD requirements for High Equity Conversion Mortgage (HECM) loans
Guaranteed Rate	Apr. 29, 2020	$15 million	FHA-insured and VA-guaranteed mortgage requirements

- On September 25, 2020, DOJ filed suit against Nutter Home Loans, making claims regarding certifications related to FHA-insured HECM loans

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FCA Compliance Best Practices

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Minimizing Exposure

- Set a compliance-focused "tone from the top"
- Adopt and implement reasonable compliance policies and controls
  - Standards and procedures, internal audits, external audits, compliance hotline
  - A strong internal compliance program may not prevent a rogue employee from committing fraud, but it may help to defeat scienter
- Train employees on compliance policies and reporting options
- Monitor and audit
- Investigate and remediate
  - Develop standards and procedures to prevent, detect, and respond to improper conduct

Risk Assessment

- Monitor government interactions
- Understand compliance requirements
- Account for internal quality control measures
- Evaluate business partners
- Have a strong HR system in place—most whistleblowers are aggrieved/disgruntled former employees
- Document the government's knowledge, awareness, and ratification of contractual and programmatic deviations
- Take care in responding to billing inquiries, as incorrect explanations may be used as evidence of fraud
- Documentation and transparency are key

Investigation Responsiveness

- Critical to know of FCA complaints as soon as possible
- Foster an environment in which employees and other interested parties report concerns internally
- Separate the message from the messenger, take allegations seriously and follow up
- *Qui tam* warning signs:
  - HR issues;
  - Exit interview statements;
  - Unexpected audits;
  - Requests for billing explanations;
  - Increased web activity; and
  - Former employees contacted

- Proactively engage with and present your case to DOJ and USAO
- The most critical juncture is the government's intervention decision

Upcoming Gibson Dunn Webcasts

- **October 13 | False Claims Act Updates for the Government Contracting Sector** | 12:00 – 1:30 pm EDT

  If you are interested in attending, please click here.
- **October 16 | Trends in Government Investigations into Foreign Influence in the Private Sector: A discussion of FARA and related provisions** | 12:00 – 1:00 pm EDT

  If you are interested in attending, please click here.
- **October 22 | False Claims Act Updates for Drug and Device Manufacturers** | 12:00 – 1:30 pm EDT

  If you are interested in attending, please click here.
- **October 27 | In-house Guidance for Managing Non-U.S. Antitrust Investigations** | 12:00 – 1:30 pm EDT

  If you are interested in attending, please click here.
- **November 4 | False Claims Act Updates for Health Care Providers** | 12:00 – 1:30 pm EST

  If you are interested in attending, please click here.
- **November 9 | Spoofing: What it is, where it's going** | 12:00 – 1:00 pm EST

  If you are interested in attending, please click here.
- **November 16 | Corporate Compliance and Sentencing Guidelines** | 12:00 – 2:00 pm EST

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*** Continued on next page**

Upcoming Gibson Dunn Webcasts

- **November 18 | SEC Enforcement Focus on COVID-19 Issues and Recent Accounting Cases** | 12:00 – 1:15 pm EST

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- **December 2 | What's next? The Legislative and Policy Landscape After the 2020 Election** | 12:00 – 1:00 pm EST

  If you are interested in attending, please click here.
- **December 3 | FCPA 2020 Case Round-Up** | 12:00 – 1:30 pm EST

  If you are interested in attending, please click here.
- **December 8 | Congressional Investigations and Oversight Post-Election** |12:00 – 1:00 pm EST

  If you are interested in attending, please click here.
- **December 10 | International Anti-Money Laundering and Sanctions Enforcement** | 12:00 – 1:30 pm EST

  If you are interested in attending, please click here.

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