

**Davis Polk**

# **False Claims Act webinar: Enforcement trends and updates**

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# Introduction

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# Introduction



**Neil H. MacBride**  
Partner

Neil is chair of our White Collar Defense & Investigations practice. He is one of the nation's leading litigators and has successfully defended dozens of companies, boards and individuals in high-stakes crisis management matters. He focuses on government enforcement actions, complex civil litigation and regulatory matters, trials, and congressional and internal investigations.

Neil returned to Davis Polk in January 2025, after serving as General Counsel of the Treasury Department under Secretary Janet Yellen, where he led the 2,200 lawyer Treasury Legal Division. He was previously a Davis Polk partner from 2014 to 2022, after earlier serving as the United States Attorney for the Eastern District of Virginia, Associate Deputy Attorney General and Chief Counsel on the Senate Judiciary Committee.

Neil has been recognized as a premier litigator by publications including the National Law Journal, Chambers USA, Benchmark Litigation and Global Investigations Review. A client quoted by Chambers said Neil is "an extraordinarily gifted lawyer blessed with impeccable judgment and unwavering integrity," who has "earned the trust and confidence of the judiciary."



**Martine M. Beamon**  
Partner

Martine is co-head of our White Collar Defense & Investigations practice. A former federal prosecutor, she represents individuals, boards and companies in their most critical situations. She is ranked in Band 1 by Chambers, where clients say she is "an excellent partner who takes the time to truly understand our business" and offers advice that "is risk-based, practical and action-focused." Other clients call her a "phenomenal lawyer" whose "strategic abilities ... are off the charts."

Martine represents clients in grand jury, regulatory and internal investigations involving allegations of securities fraud, sexual misconduct, tax fraud, foreign corrupt practices, money laundering, pharmaceutical and medical device marketing and anti-kickback law violations. She advises companies and boards on governance and compliance.

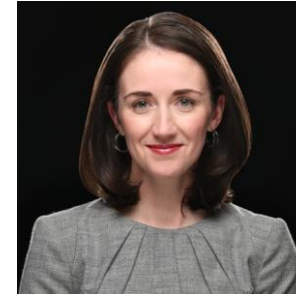
She is a member of the board of Prisoners' Legal Services of New York.



**Uzo Asonye**  
Partner

Uzo is a seasoned trial lawyer who, before joining the firm, spent more than a decade prosecuting complex financial crimes and public corruption. He advises companies and individuals in government, grand jury and internal investigations, and represents clients in criminal and civil trials. He has deep experience in matters involving insider trading, market manipulation, money laundering/AML, public corruption and financial fraud, as well as significant cross-border work.

Uzo was previously Acting Chief of the Financial Crimes and Public Corruption Unit in the U.S. Attorney's Office for the Eastern District of Virginia. In government, he led major fraud and public corruption cases, and tried numerous multi-defendant, complex cases to guilty verdicts before juries.



**Fiona R. Moran**  
Partner

Fiona's practice focuses on highly sensitive government investigations and enforcement actions. She also represents clients in connection with confidential internal investigations and advises companies on corporate governance and compliance matters, including the design of strategies, policies and procedures to mitigate risk.

Her matters have involved allegations of securities fraud, insider trading, foreign corrupt practices, money laundering, antitrust and other financial crimes. Her clients have included major financial institutions, regulated entities, cryptocurrency developers, public companies, senior executives and former government officials. Fiona actively advises a number of entities in the digital asset space in connection with various government investigations.

Fiona is recognized by Chambers FinTech in crypto-asset disputes and by Benchmark Litigation as a District of Columbia Future Star. The National Law Journal named Fiona one of its "D.C. Rising Stars" for 2021.

# FCA overview and recent enforcement

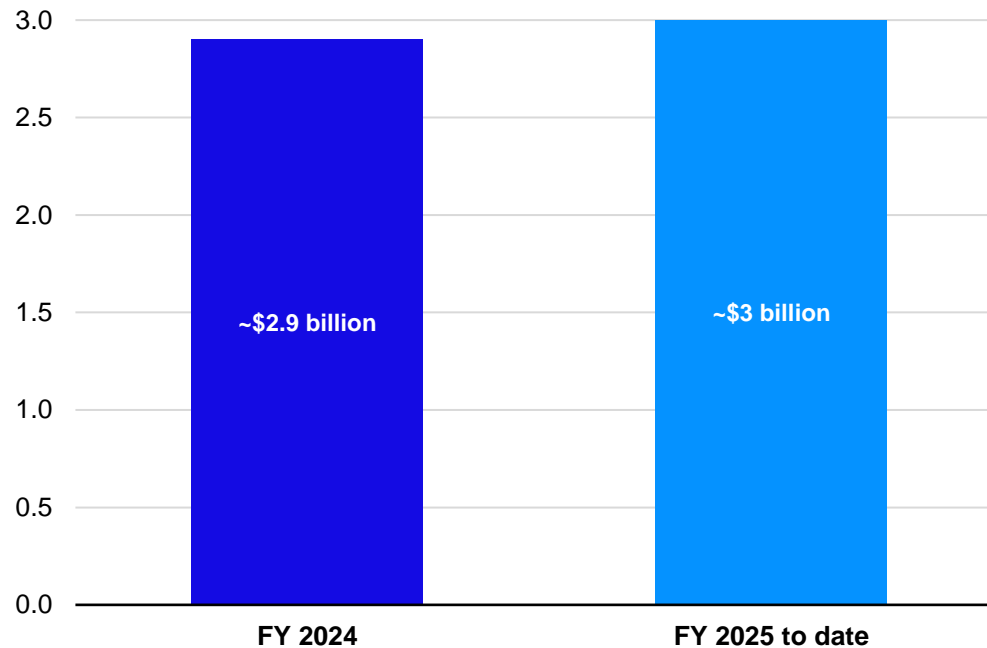
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# FCA overview and recent enforcement

## False Claims Act

- The federal government’s primary tool for combatting fraud against public programs
- Imposes liability for knowingly submitting or causing submission of false or fraudulent claims for government funds
- Civil actions filed by:
  - (1) DOJ
  - (2) Whistleblowers (i.e., relators) via “*qui tam*” lawsuits on the government’s behalf
    - Relators may share in any recovered awards

- FCA enforcement has led to billions in settlements annually
  - So far for FY 2025: ~\$3 billion in settlements
  - FY 2024: ~\$2.9 billion in settlements



# Enforcement trends from recent administrations

	Trump I administration (FY 2017 – FY 2020)	Biden administration (FY 2021 – FY 2024)
<b>FCA cases</b>	3,362	4,393
<b>Total spent</b>	~\$11.75 billion	~\$13.62 billion
<b><i>Qui tams</i></b>	~2,600	~3,000
<b><i>Non qui tam</i></b>	~700	~1,500

# Trump II administration priorities – healthcare

- Consistent focus on healthcare providers, pharmaceutical companies, and pharmacies that contributed to and exacerbated the opioid crisis
  - *See, e.g., United States ex rel. Novak et al. v. Walgreens*, 1:18-cv-05452, (N.D. Illinois, 2025)
    - The DOJ alleged that Walgreens and its subsidiaries dispensed unlawful prescriptions and submitted false claims for reimbursements, resulting in a settlement in April 2025
- Relaunch of the DOJ-HHS False Claims Act Working Group
- 6 priority enforcement areas:
  - Medicare Advantage
  - Drug, device or biologics pricing
  - Barriers to patient access to care, including violations of network adequacy requirements
  - Kickbacks related to drugs, medical devices, durable medical equipment, and other products
  - Materially defective medical devices that impact patient safety
  - Manipulation of Electronic Health Records systems to, as they describe it “drive inappropriate utilization of Medicare covered products and services”

# Trump II administration priorities – government contracts

## Recent FCA enforcement has been based on alleged failures to meet contractual or cybersecurity requirements (or misrepresentations about compliance)

- DOJ’s Civil Cyber-Fraud Initiative remains active
  - Pursuing government contractors and grant recipients who knowingly provide deficient cybersecurity products or services
  - Seven cybersecurity-related settlements worth approximately \$51 million in 2025
- Continued enforcement related to Paycheck Protection Program (“PPP”) fraud cases involving misrepresentations in obtaining COVID-era PPP loans
  - Will likely continue to see PPP-related *qui tam* cases in the year to come given the applicable statute of limitations, which is the longer of (1) six years from when the fraud is committed, or (2) three years after the United States knows or should know about the material facts, but not more than 10 years after the violation
- New enforcement of employment verification practices
  - For example, this past September, the DOJ alleged that a New Jersey-based contractor improperly employed unauthorized aliens on military ships and entered into a \$4 million settlement

# Trump II administration priorities – emerging technologies

- Under the current administration, there is an expansion on the use of data analytics and artificial intelligence for case development relating to FCA enforcement
  - In February 2025, former Deputy Assistant AG Michael Granston highlighted an “increasing reliance” on data analytics to identify fraud, particularly in healthcare
- The DOJ has already begun to use these tools in FCA-related healthcare investigations, looking to identify doctors at highest risk of making fraudulent claims as well as relationships between providers that may be indicative of illegal payments
- Companies should expect closer DOJ scrutiny of disclosures given its own utilization of emerging technologies to identify false claims

# DEI-related enforcement

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# DEI-related enforcement

- On January 21, 2025, the administration issued Executive Order, No. 14173 (the “Order”), “Ending Illegal Discrimination and Restoring Merit-Based Opportunity.”
  - Stated purpose is to enforce civil rights laws “by ending illegal preferences and discrimination”
  - Requires “all agencies to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements [and] enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.”
- Section 3 of the Order: Materiality requirement
  - Directs agency heads to include in every contract or award:
    - (1) a term requiring compliance with “all applicable Federal **anti-discrimination laws**...material to the government’s payment decision”
    - (2) a term requiring the contractor to “certify that it does not operate any programs promoting **DEI** that violate any applicable Federal **anti-discrimination laws**”
      - Notwithstanding, FCA liability still turns on whether the alleged misrepresentation went to “the essence of the bargain.” *Kousisis v. United States*, 145 S. Ct 1382, 1404 (2025) (Thomas, J., concurring).

# DEI-related enforcement (cont.)

- Section 4 of the Order: Directs the AG to collaborate with agency heads to identify sectors of concern and potential offenders and to issue guidance, which has since included:
  - **June 11, 2025 DOJ memo:** “Civil Division Enforcement Priorities”
    - Highlights that the Civil Rights Fraud Initiative will partner with the Civil Rights Division, whistleblowers and agencies to “aggressively investigate” FCA violations against recipients of federal funds that knowingly contravene civil rights laws
  - **July 29, 2025 DOJ memo:** “Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination”
    - Clarifies how federal antidiscrimination laws apply to programs or initiatives that could involve discriminatory practices, including those framed as DEI programs
- Pursuant to Section 4 of the Order, the DOJ also established the **Civil Rights Fraud Initiative**, which, among other things, will specifically use the FCA to combat discrimination in the form of antisemitism and DEI policies
  - Notably, in its announcement regarding the Initiative, DOJ noted that it “strongly encourages” *qui tam* actions from individuals who have knowledge of DEI-related misconduct

# Trade and tariffs

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# Trade and tariffs

- The FCA is continuing to be used to prosecute customs/tariff evasions schemes in line with the current administration's trade policies
  - The theory of liability being applied here is a “reverse” false claim—e.g., making a knowingly false statement to avoid an obligation to pay the government for something owed, such as a customs duty or tariff
- This type of enforcement activity is tied directly to the current administration's “America First” trade policy, using the FCA as a key tool to protect U.S. industries and revenue concerning three types of fraud:
  1. Misclassification of goods
  2. Undervaluation
  3. Country-of-origin misrepresentation
- Notably, *qui tam* actions are becoming increasingly relevant in this space in light of DOJ's recently launched **Trade Fraud Task Force**, which has indicated it will rely on whistleblower intelligence to identify importers and other parties attempting to defraud the United States

# Trade and tariffs (cont.)

Recent case law developments:

- *United States ex rel. Lee v. Barco Uniforms Inc., et al.*, No.2:16-CV-1805 (E.D. Cal. 2025)
  - DOJ's complaint against Barco Uniforms, alleging FCA violations connected to underpaid customs duties, marks the government's first intervention in an FCA customs case under the second Trump administration
  
- *Island Industries, Inc. v. Sigma Corporation*, 151 F.4th 1003 (9th Cir. 2025)
  - Island Industries alleged that its competitor, Sigma Corporation, submitted false statements on customs forms to avoid antidumping duties
  - The Ninth Circuit held that there was no jurisdictional bar for FCA *qui tam* cases
  - This may lead to an increase in *qui tam* actions, including those brought by competitors

# Trump II anticipated enforcement trends

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# Anticipated enforcement trends

## — Increased FCA activity can be expected

- Administrative policies and statements encouraging of *qui tam* relators and FCA cases
- Several significant *qui tam* FCA settlements from the last six months
- Dovetails with the administration's focus on reducing government spending via the Department of Government Efficiency ("DOGE")
- Underscored by former Deputy Assistant AG's statements regarding the administration's focus on "aggressively" enforcing the FCA

## — However, there are potential limitations on FCA enforcement

- AG Bondi's February 5th, 2025 memo, "Reinstating the Prohibition on Improper Guidance Documents," which rescinded AG Garland's prior memo
- *Loper Bright v. Raimondo*, 603 U.S. 369 (2024): diminished *Chevron* deference to federal agencies and expanded the power of the courts to reject agencies' statutory interpretations

# Implications for future and existing investigations

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# Implications for future and existing investigations

- Forward-looking compliance considerations:
  - Companies should review DEI policies and conduct related risk assessments with the assistance of counsel to ensure privilege
  - Trade-specific compliance may warrant review of imported goods and products that are subject to tariffs for purposes of verifying accuracy of customs declarations and other relevant documentation
- For companies facing ongoing investigation:
  - The particular facts and stage of investigation will inform appropriate steps to assess and mitigate risks regarding FCA enforcement
  - The scope of existing investigations could widen to include other emerging enforcement priorities

# Legal updates regarding FCA statutory scheme

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# Legal updates regarding FCA statutory scheme

Open questions and high thresholds remain in establishing FCA liability

- Broadening of the scienter element

- *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 757 (2023)

- Scienter can be established if a defendant was:

- (1) “aware of a substantial risk” that their claims were false and intentionally avoided learning if the claim was false or
- (2) “aware of such a substantial and unjustifiable risk but submitted the claim anyway”

- Departure from the “objective reasonableness” standard

- Materiality requirement presents a hurdle for the government

- *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016)

- Established a rigorous standard for assessing the materiality of false statements, holding that materiality must be demonstrated in practice
- Labeling a provision as a “condition of payment” is not dispositive for the materiality inquiry

# Legal updates regarding FCA statutory scheme (cont.)

Important developments in the legal landscape:

- (1) Level of federal funding required for an FCA claim
  - *Wisconsin Bell, Inc. v. United States ex rel. Heath*, 604 U.S. 140 (2025) held that FCA liability may attach to funds provided and administered by private entities acting as government agents
    - May implicate companies that participate in federal programs with *de minimis* funding
    - Broad definition of “claim” may support a broader definition of materiality
- (2) The constitutional status of the FCA’s whistleblower provision
  - Although the vast majority of courts have rejected that *qui tam* actions run afoul of Article II, some have expressed skepticism about its constitutionality, which could lead to Supreme Court review
- (3) Circuit split regarding the federal Anti-Kickback Statute in the healthcare space
  - Lenient causal-link (3rd Cir.) v. stringent “but-for” standard (1st, 6th, and 8th Cir.)

# Legal updates regarding FCA statutory scheme (cont.)

Developments in how federal agencies handle fraud enforcement:

- **Administrative False Claims Act:** amended in 2024 to allow federal agencies to investigate and pursue fraud claims (up to \$1 million per claim), without significant DOJ involvement
  - Could act as a force multiplier for DOJ's enforcement efforts
  - Broadens potential liability, as it permits recovery for false statements without any funding relationship
  - No *qui tam* provision, but unlikely to decrease overall whistleblower activity given FCA's mechanisms remain
- In practice, contractors should prepare for greater individual agency scrutiny