



2022 CLE Weeks

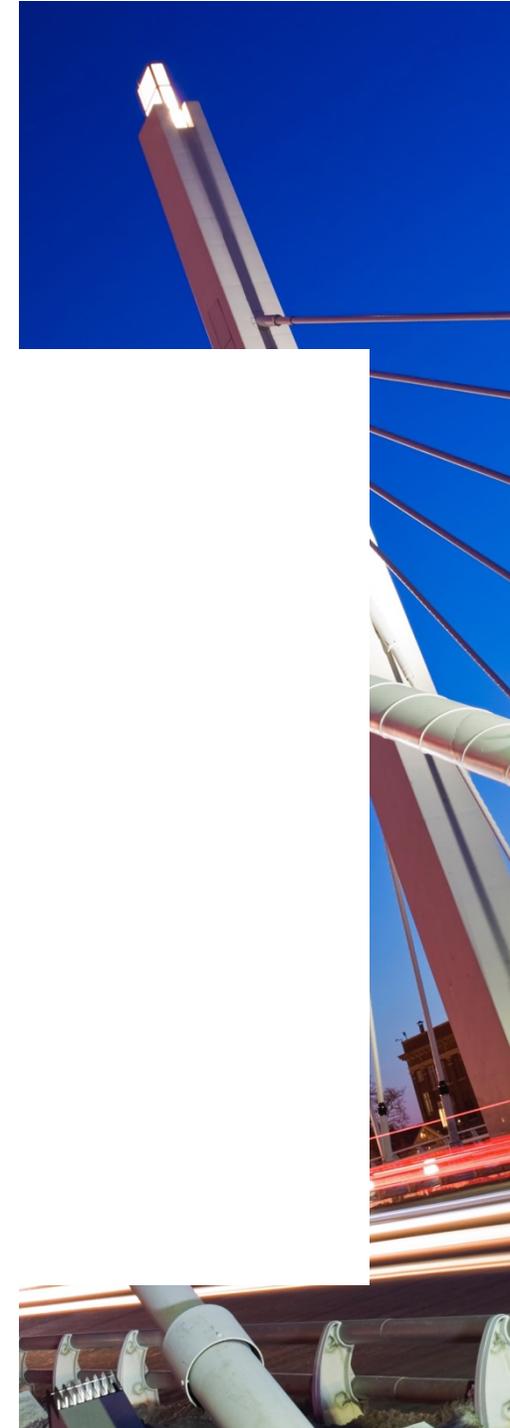
Contracting With the Government? What You Should Know About Today's False Claims Act Enforcement Regime

December 9, 2022



Agenda

- Big Picture
- *Qui Tam* Provisions
- Trends
- Foley Resources

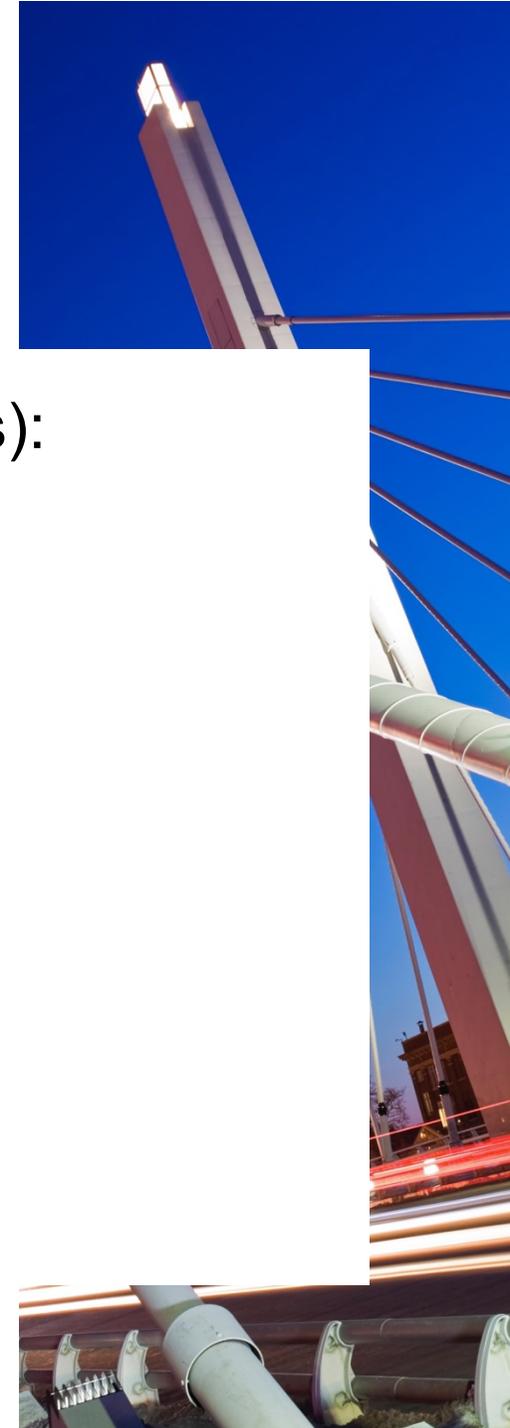




Big Picture

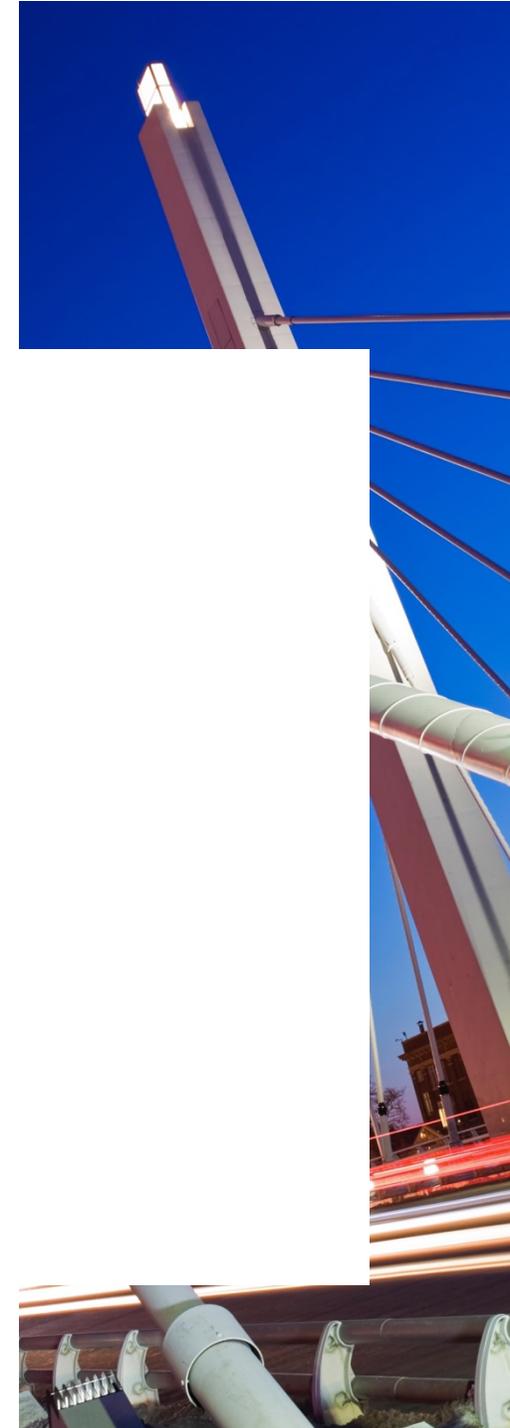
The False Claims Act (FCA)

- Fraud-based statute imposing civil liability for (among other things):
 - Submitting false claims to the government for payment, or
 - Submitting false statements that are used in a subsequent claim
- Applies to any government contractor
- Can apply to any matter involving federal funds
 - Directly or indirectly
- Many states (and cities) have corollary FCA statutes



FCA Basic Statistics

- Priority Area for DOJ
 - DOJ recovered in FCA settlements and judgments:
 - > \$5.6 billion in FFY 2021 (\$1.6 billion from *qui tam* cases)
 - > \$2.2 billion in FFY 2020 (\$1.7 billion from *qui tam* cases)
- 80-90% of recoveries are in the health care industry
- Around 600 new *qui tam* matters are docketed every year
 - Approximately 75% of newly docketed FCA cases are *qui tam* cases



Collateral Consequences

- Corporate Integrity Agreements are somewhat common
- Risk of suspension or debarment from federal programs
 - Can be devastating, e.g. Medicare & Medicaid exclusion
- Individuals can be liable as well
- DOJ policy requires all new FCA matters to be sent to the Criminal Division for review for a potential parallel criminal proceeding

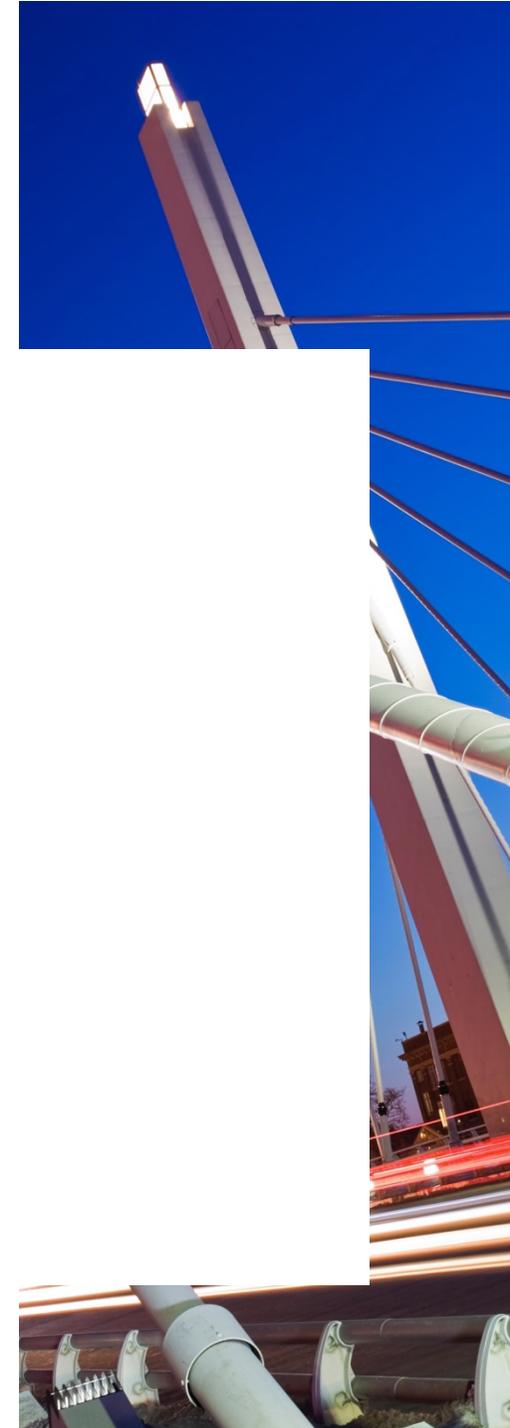




FCA Basics

FCA Elements

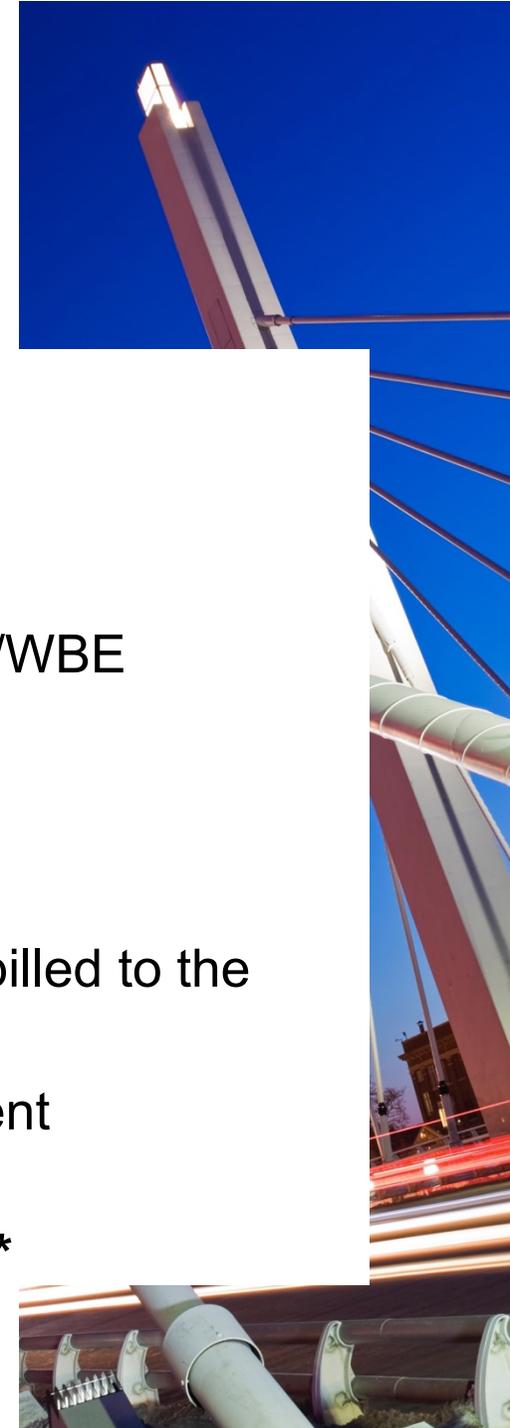
- Claim submitted to government
- False or fraudulent (falsity element)
- Knowingly false or fraudulent (scienter element)
 - Actual knowledge;
 - Deliberate ignorance; or
 - Reckless disregard
- Material to government's decision to pay
 - Government not likely to have paid if it had known



Example Circumstances Creating FCA Exposure

- Contractor submits claims to the government for:
 - Medically unnecessary or defective goods or services
 - Artificially inflated prices for goods or services
 - Claims “tainted” by an underlying violation of the law (e.g., failure to follow M/WBE contracting provisions, alleged Anti-Kickback Statute violation)
- Contractor:
 - Causes another entity to bill the government for the above
 - Fails to follow proper coding, billing, or documentation procedures for items billed to the government
 - Uses grant money or other government funding inconsistently with government requirements

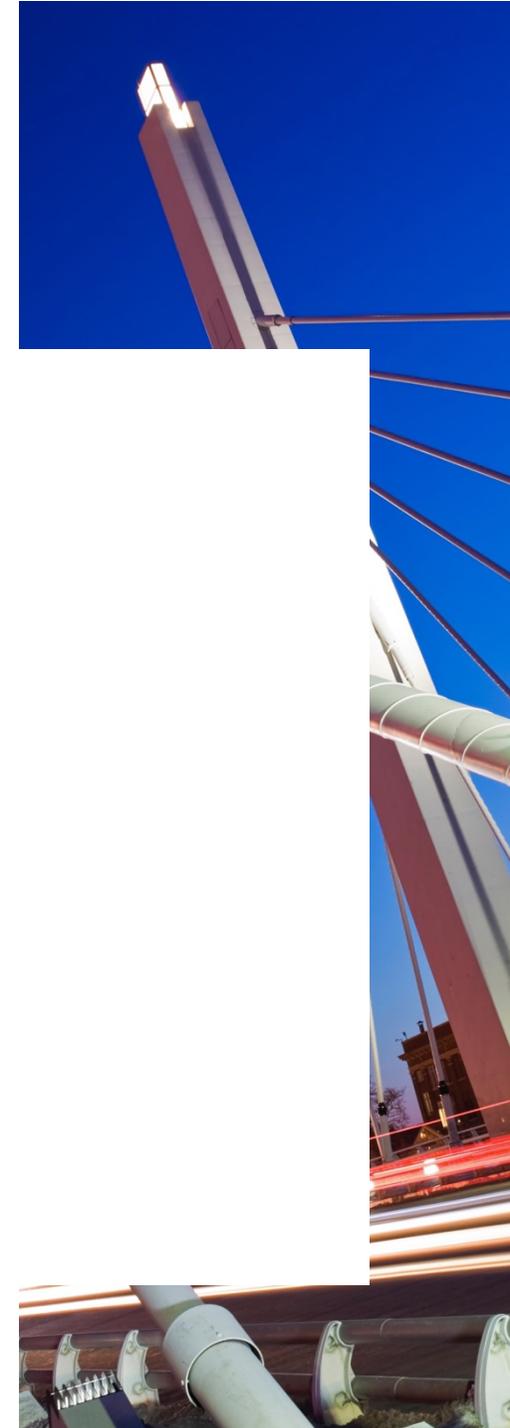
These circumstances create exposure, not necessarily liability



FCA Element: Claim/Presentation

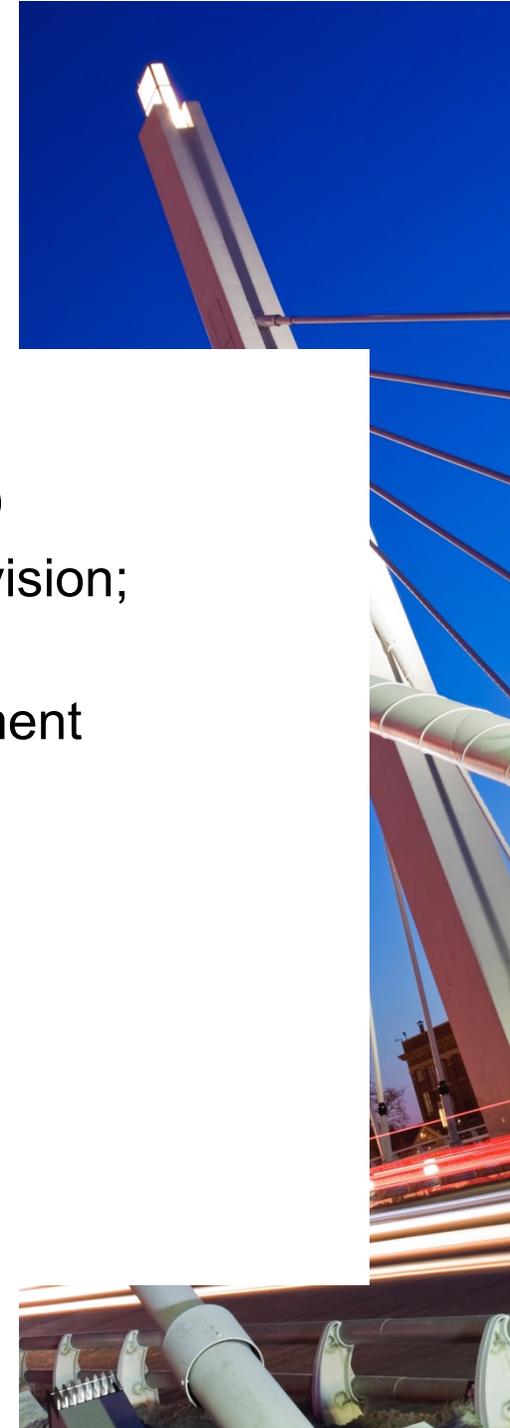
“Claim” means a request for money or property:

- Made to an officer, employee, or agent of the government; or,
- Made to a contractor, grantee, or other recipient
 - If the money or property is to be spent or used
 - *on behalf of the government, or*
 - *to advance a government program or interest,*
 - And if the government –
 - *provides any portion of the money or property, or*
 - *will reimburse for any portion of the money*



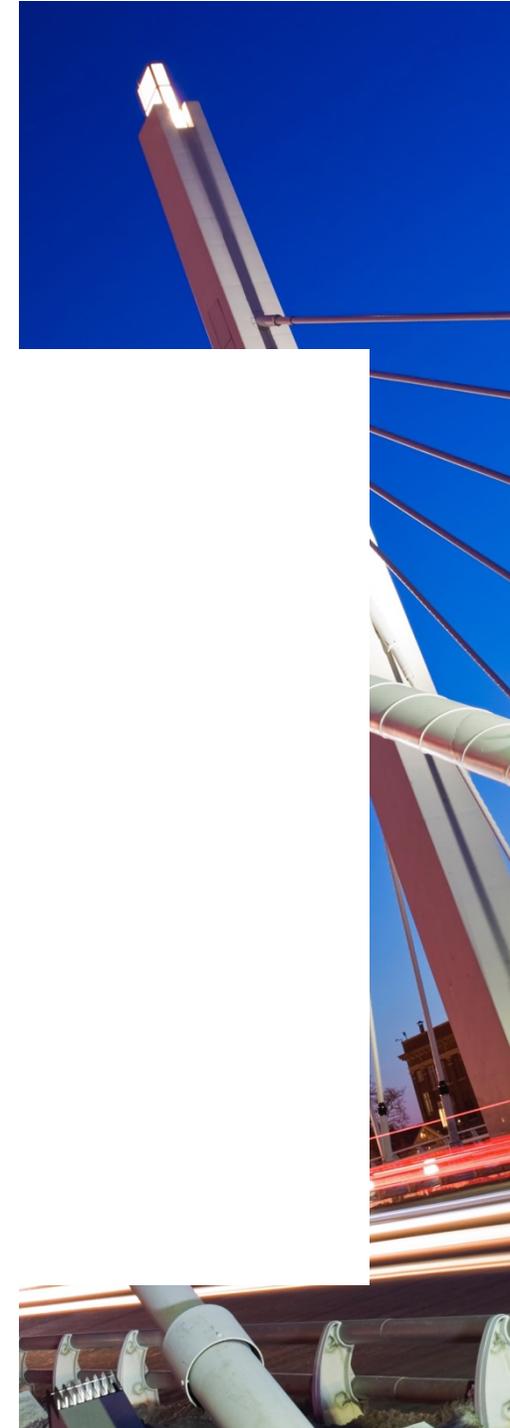
FCA Element: Presentment/Causation

- The defendant must have:
 - Submitted a false claim, or caused it to be submitted (presentment provision)
 - Made a false record or statement, or caused it to be made (make or use provision; reverse FCA provision)
 - Concealed, avoided, or decreased obligation to pay money owed to government (reverse FCA provision)
 - Participated in a conspiracy (conspiracy provision)



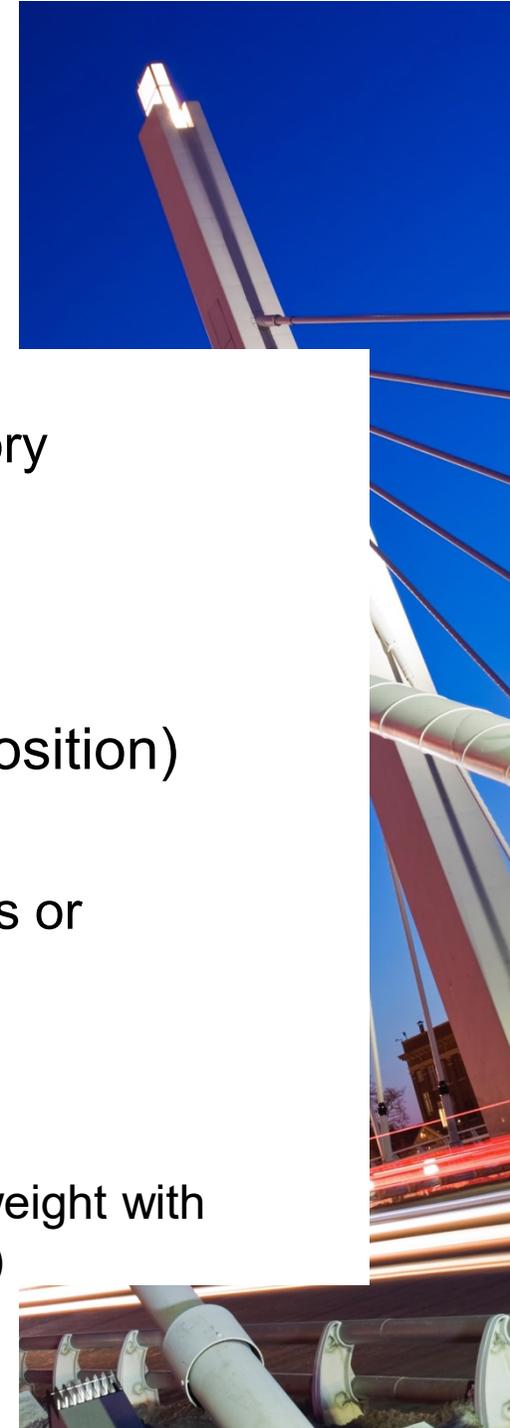
FCA Element: False or Fraudulent

- FCA cases are about fraud; should not be based solely on:
 - Negligence
 - Breach of contract
 - Mere regulatory non-compliance
 - Dispute about interpretation of requirements



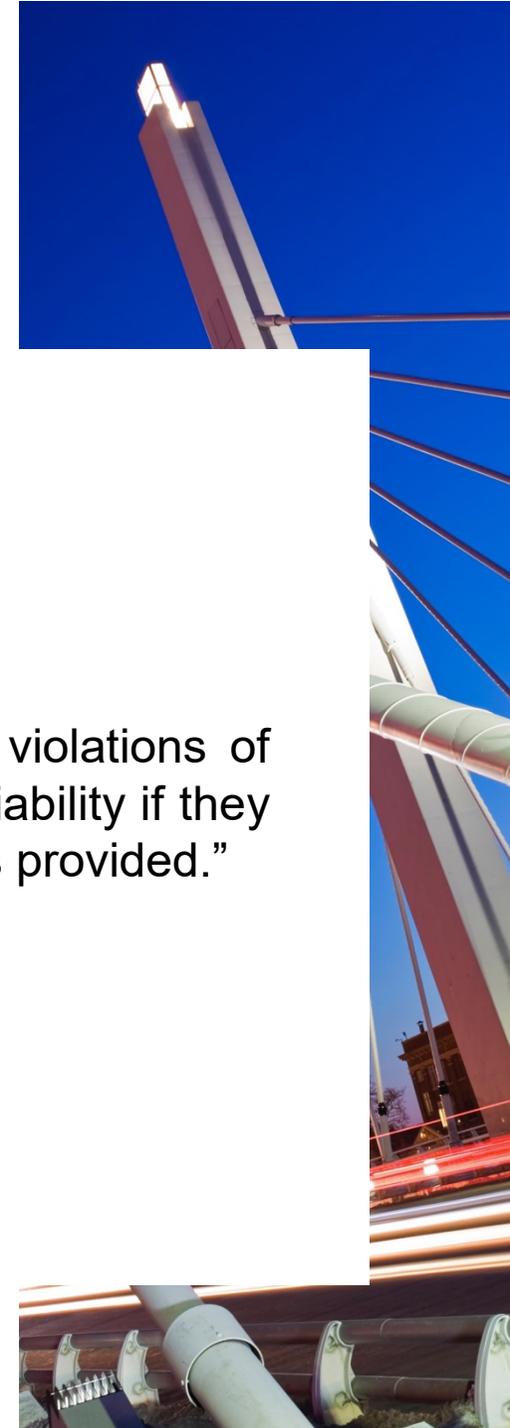
FCA Element: False or Fraudulent

- Sub-regulatory Guidance – evolving area
 - Agency manuals, bulletins, fraud alerts, rule preambles, FAQs, agency advisory opinions, etc.
 - Medicare national and local coverage determinations, etc.
 - Guidance for COVID-19 programs such as the Paycheck Protection Program
- 2021 Attorney General Garland Memo (reversed prior administration’s position)
 - Guidance documents alone may not form the basis for an enforcement action
 - Prosecutors are “free to cite or rely on” guidance documents relevant to claims or defenses
 - Guidance may be used to:
 - Demonstrate scienter
 - “A guidance document may be entitled to deference or otherwise carry persuasive weight with respect to the meaning of the applicable legal requirements.” (i.e., may go to falsity)



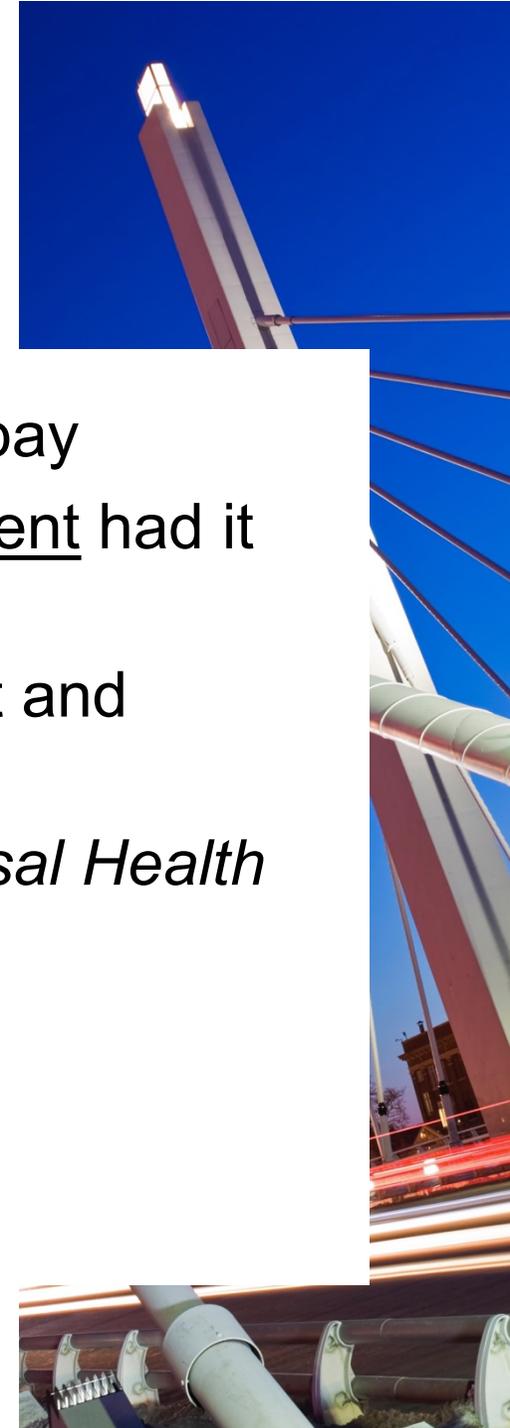
FCA Element: Falsity

- Factual falsity
- Legal falsity
 - Express certification
 - Implied certification
- “When . . . a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant’s representations misleading with respect to the goods or services provided.”
 - SCOTUS in *Escobar* (2016)
- Objective falsity vs. subjective falsity



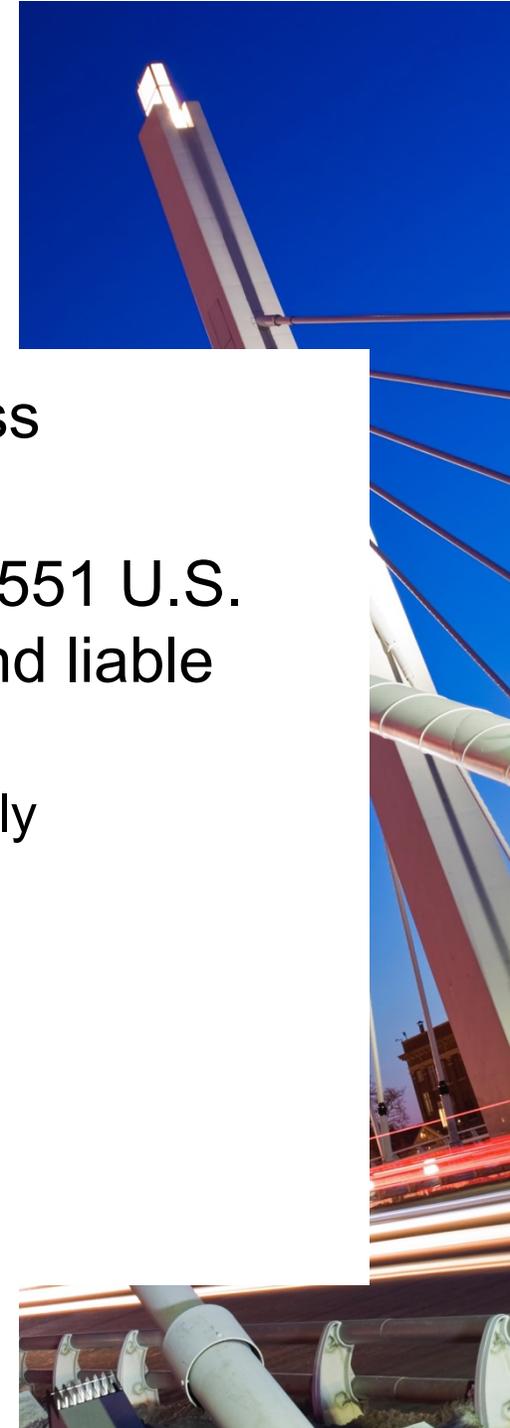
FCA Element: Materiality

- Materiality looks to “actual” or “likely” impact on govt. decision to pay
- Claim not material unless government likely to have denied payment had it known of underlying conduct
- Strong evidence no materiality = government knew about conduct and paid anyway
- Important SCOTUS case: *United States ex rel. Escobar v. Universal Health Servs.*, 136 S. Ct. 1989 (2016)



FCA Element: Scierter

- FCA scierter = actual knowledge, deliberate ignorance, or reckless disregard as to truth or falsity of claim
- Some courts have applied scierter standard from *Safeco v. Burr*, 551 U.S. 47 (2007) (FCRA) to the FCA wherein a defendant cannot be found liable under the FCA if:
 1. Its reading of applicable statutory or regulatory requirements was objectively reasonable; and
 2. No authoritative guidance warned it away from that interpretation



Reverse FCA Provision

- Liability for concealing, avoiding, or decreasing an obligation to pay money to the government and related false records or statements
- An overpayment retained after the deadline for reporting and returning overpayments (60 day rule) is considered an “obligation” under the FCA
 - Material false statements or records related to concealing or avoiding that obligation may be pursued as violations of the FCA
- Can’t simply be inverse of presentment or make or use claim





Qui Tam Provisions

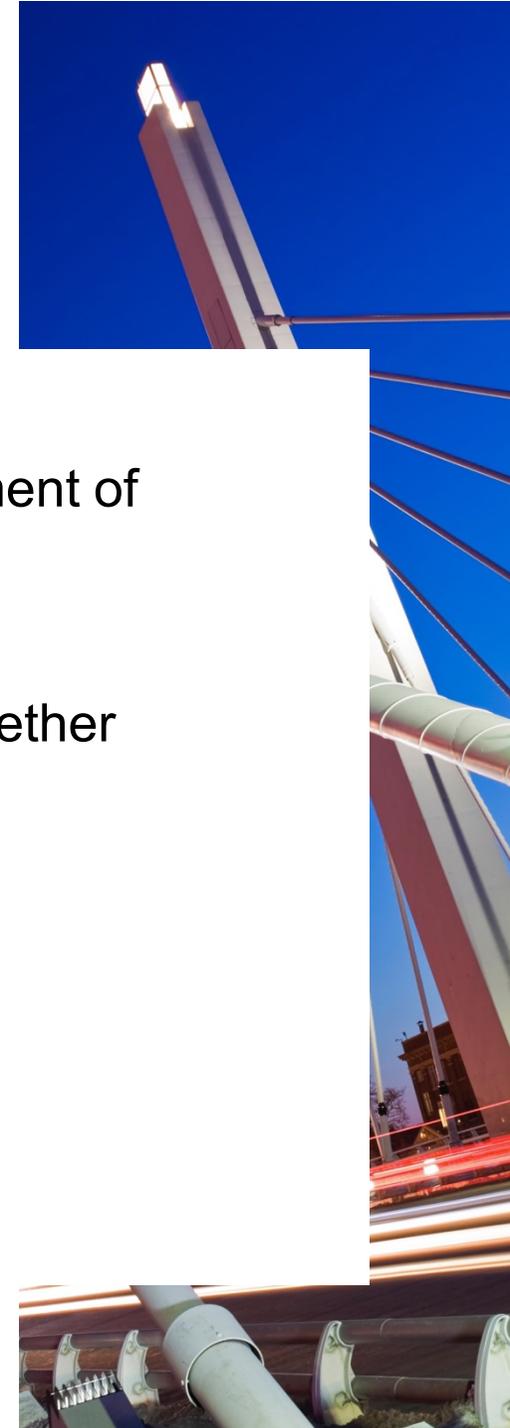
Qui Tam Provisions

- FCA cases may be filed by the government on its own or by relators on behalf of the government
 - Persons who file FCA cases are called “relators”
 - When relators file cases, those cases are referred to as “*qui tam*” actions
- *Qui tam* is an abbreviation of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning “he who sues in this matter for the king as well as for himself.”
- Relators can be anyone
 - Common to see compliance officers, billing personnel and other knowledgeable persons as relators, as well as disgruntled former employees
 - Professionals and competitors also can be relators and file FCA suits



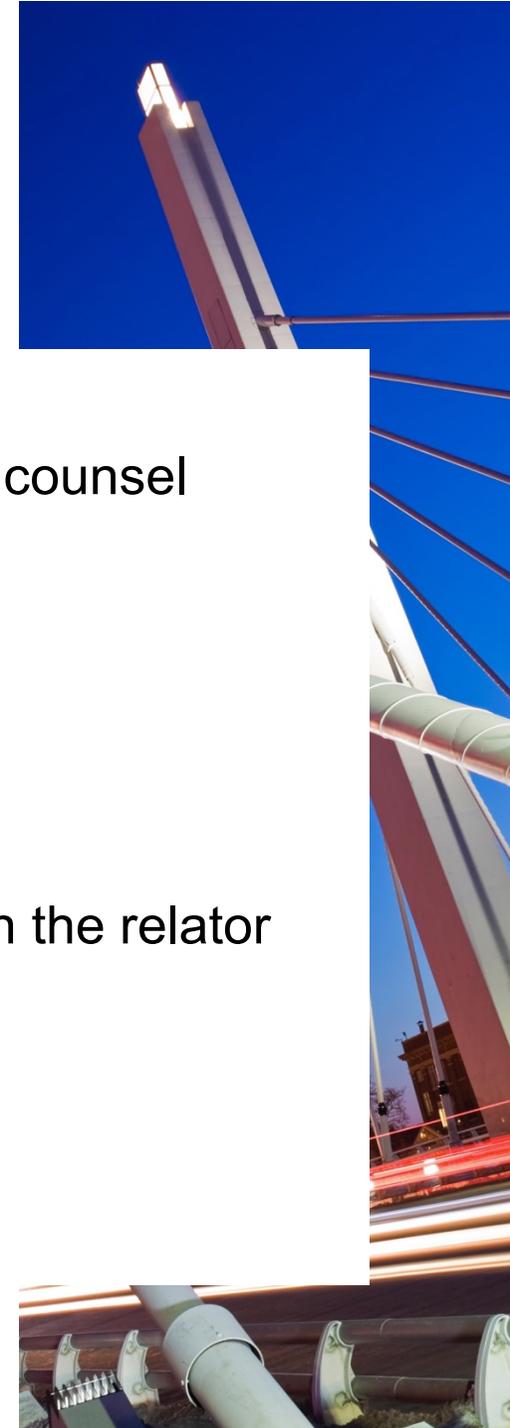
Qui Tam Provisions (cont'd)

- Filing of lawsuit
 - Relator files under seal and simultaneously provides government with statement of material evidence
- Government investigation
 - Government has 60 days to investigate the relator's allegations to decide whether to "intervene"
 - Time period is usually extended, sometimes for years, under seal
 - Some courts put deadlines on the amount of time they are willing to extend



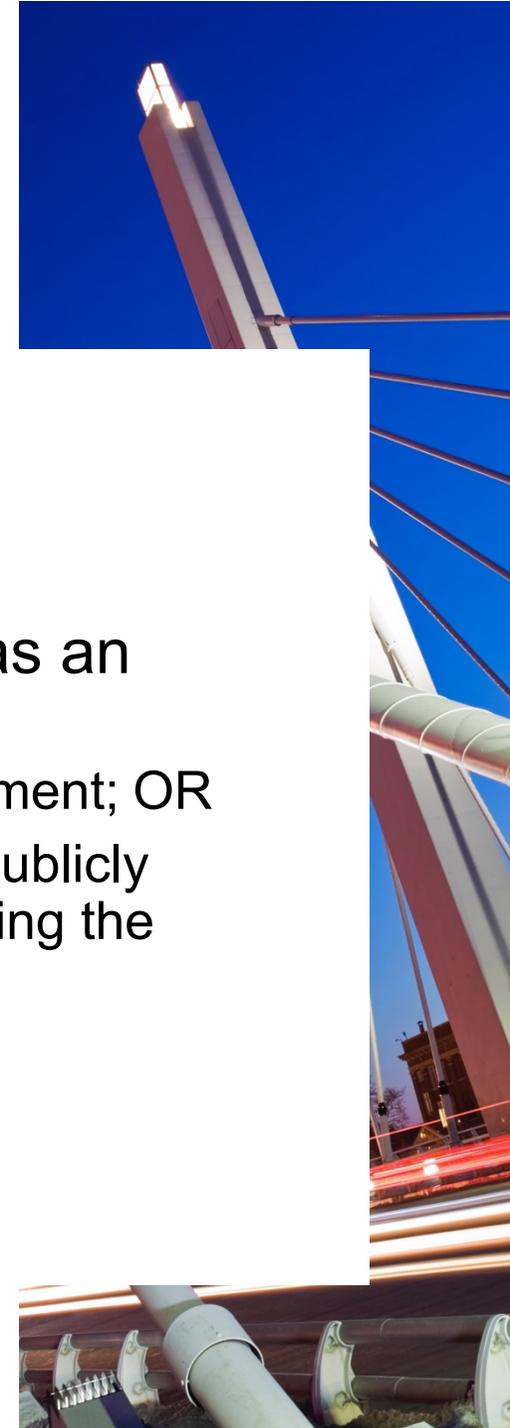
Qui Tam Provisions (cont'd)

- Government can “intervene” in the case in whole or in part
 - Government lawyers take over all or a portion of the FCA case from relator’s counsel
 - Government lawyers litigate the case, except retaliation claim, if any
- Government can “decline intervention”
 - Relator litigates case and bears burden and expense
 - Government can decline early in case but intervene later
 - Government can move to dismiss the case (Granston 2018 Memo)
 - Relator’s counsel may have “exit” clause in their engagement agreement with the relator
- Government can:
 - Dismiss, settle, or stay case over relator’s objections
 - Limit relator’s participation in the case
 - File statements of interest



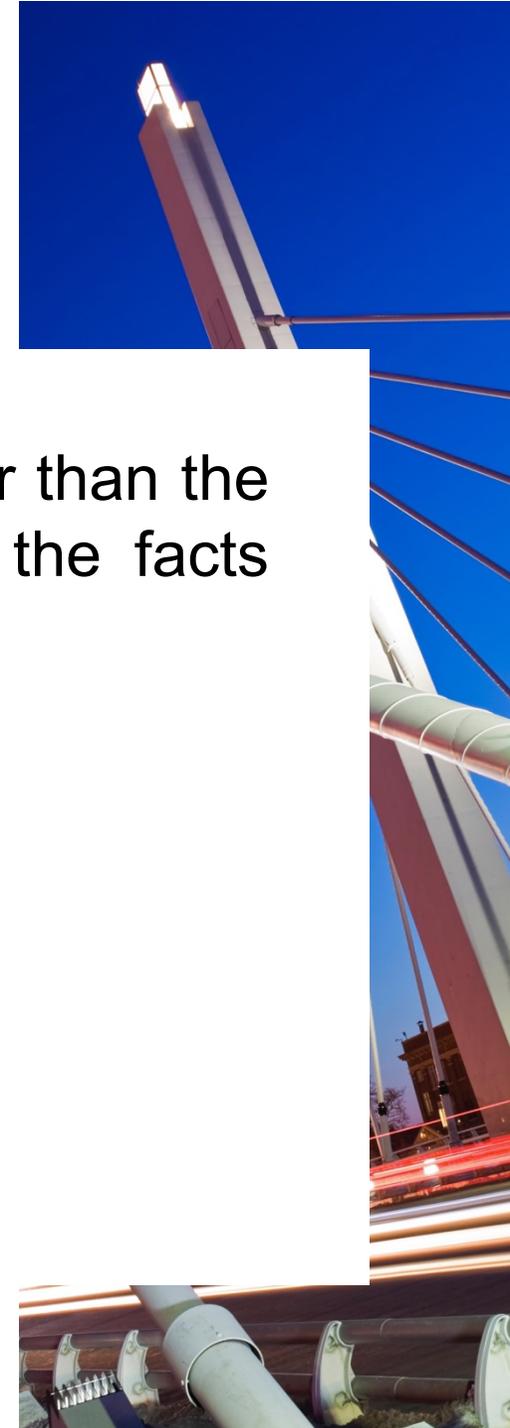
The Public Disclosure Bar Defense

- A relator must have unique information
- Allegations cannot be based on publicly disclosed information
 - “Public disclosure” can include news reports and government audits
- Even if publicly disclosed, relator can continue with case if she was an “original source”:
 - Prior to the public disclosure, she voluntarily disclosed the info to the government; OR
 - She has knowledge that is independent of and materially adds to what was publicly disclosed, and she voluntarily disclosed the info to the government prior to filing the action



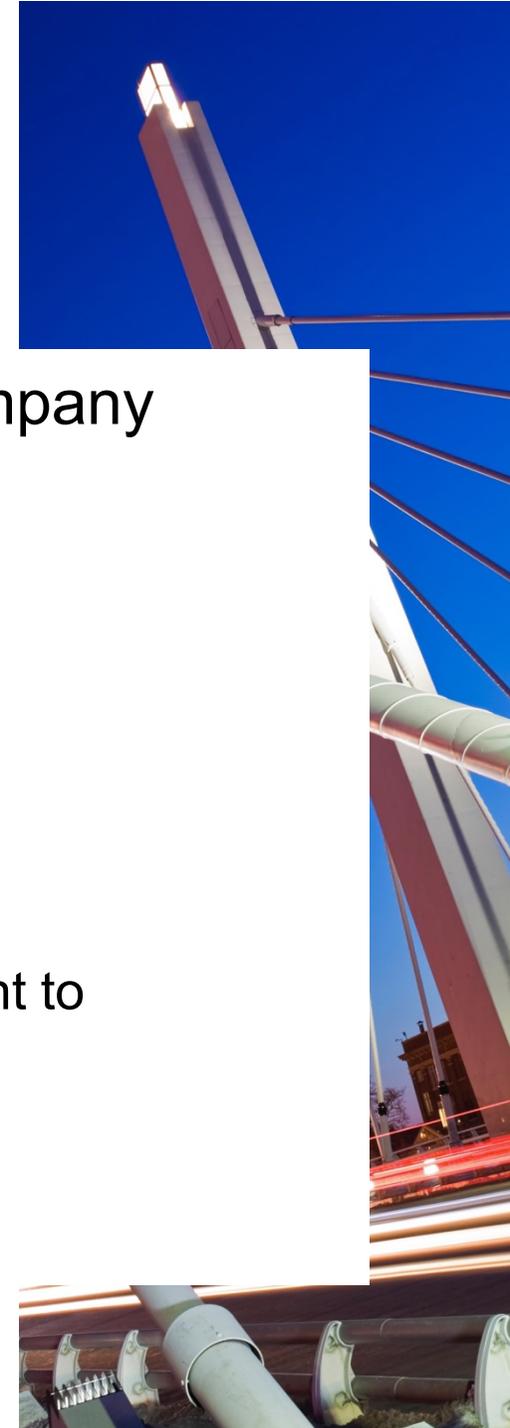
First to File Bar

“When a person brings an [FCA] action . . . , no other person other than the Government may intervene or bring a related action based on the facts underlying the pending action.” 31 U.S.C. § 3730(b)(5).



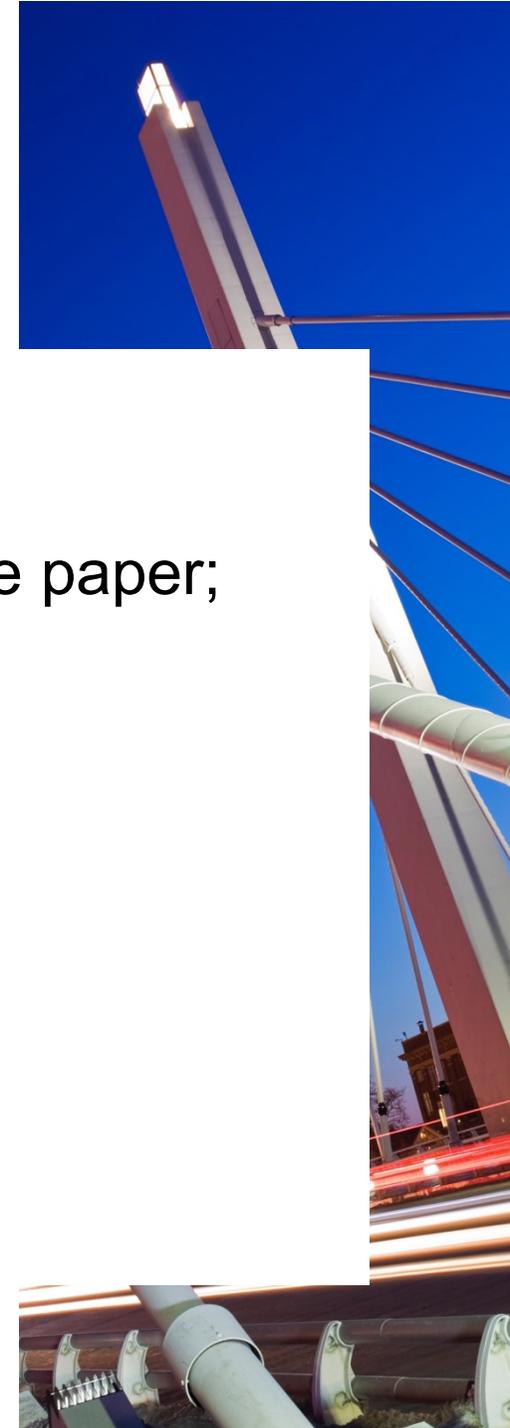
DOJ Investigates While Under Seal

- During the seal period while the government investigates, the company may have no knowledge of the lawsuit
- Company may be clued into the existence of a suit
 - Government may issue:
 - Civil Investigative Demands (CIDs)
 - Agency subpoenas (or criminal side issues a grand jury subpoena)
 - Search warrants in a parallel criminal investigation
 - Formal or informal interviews
 - Sometimes the government will ask the Court to partially unseal the complaint to show the defendant
- Arrival of the CID is a pivotal moment – Company should retain experienced FCA counsel immediately



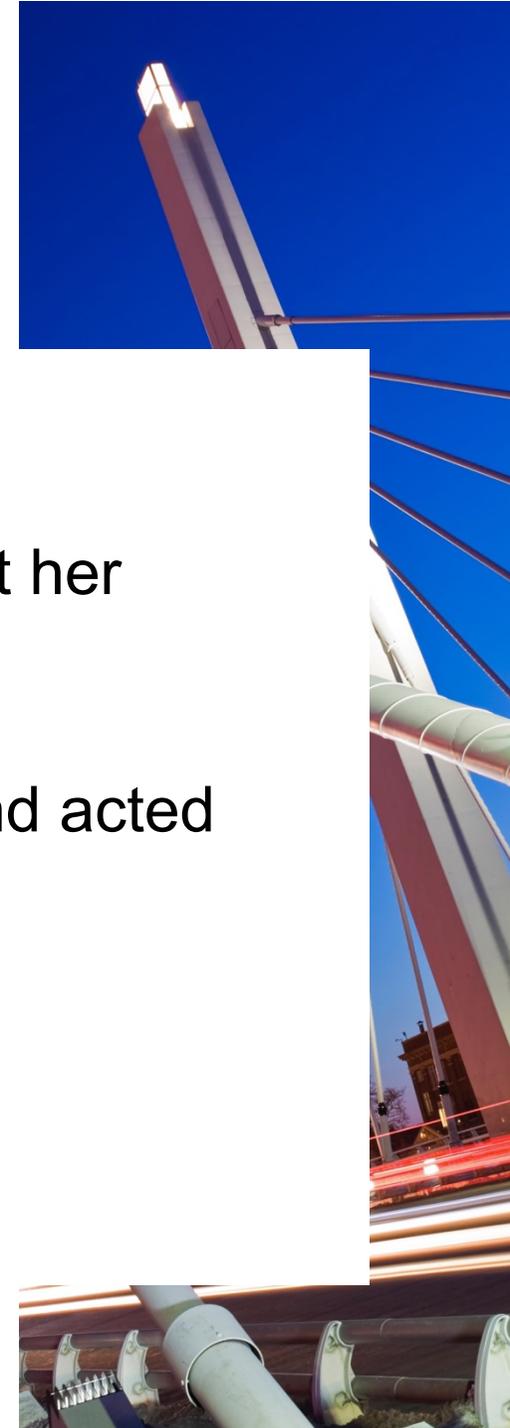
Interacting With The Government

- Cooperation
- The government values prompt resolution
- Consider making a presentation to the government; writing a white paper; offering witnesses informally
- Sometimes government will present to you (“reverse proffer”)



Interacting With a Known/Suspected Relator

- Do not retaliate!
- Be wary of privilege waiver
- Curiosity killed the cat: DOJ does not care who the relator is, what her story is, whether she was a model employee
- Studies show employees whose complaints are acknowledged and acted on are less likely to file FCA lawsuits

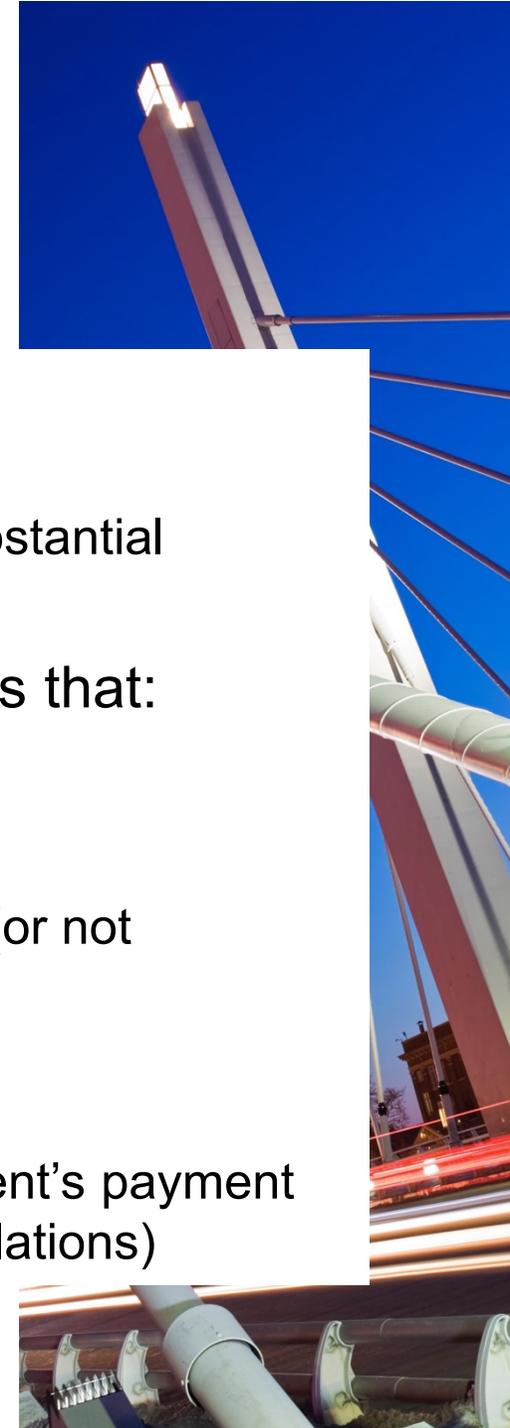




Trends

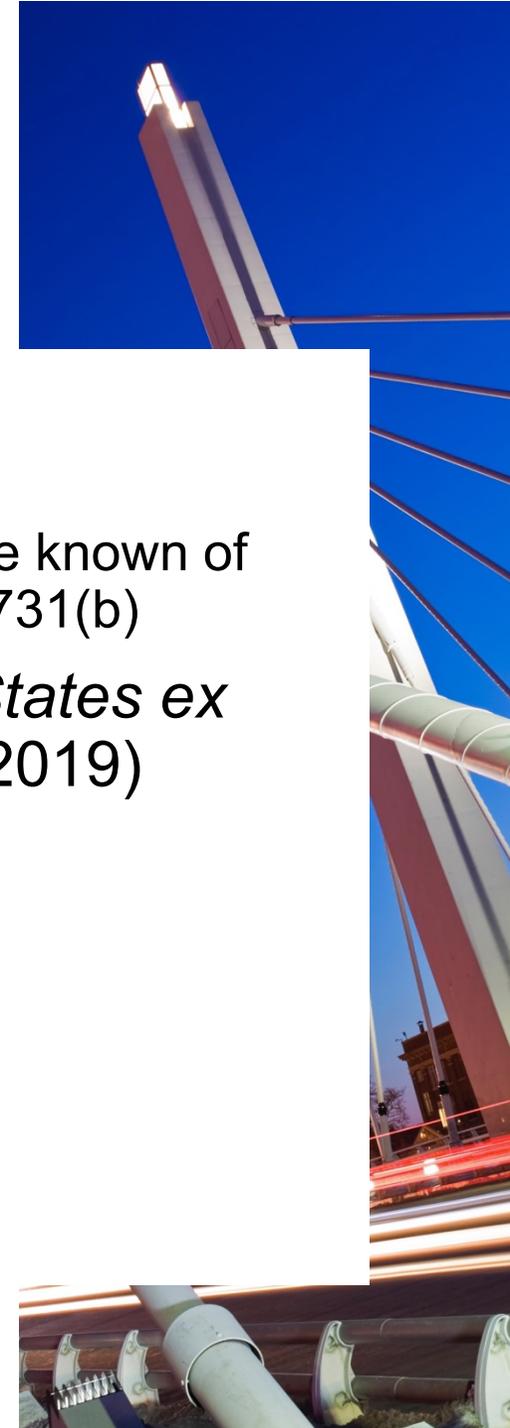
Litigation Trends

- There is a lot of FCA case law
 - Often the analysis varies by jurisdiction
 - Need to pay attention to which version of the FCA applies – there have been substantial amendments
- Motion to dismiss phase is often a major fight, often including arguments that:
 - Fraud not pled with requisite particularity under Rule 9(b)
 - Especially false claim and submission of false claim
 - Alleged conduct was not fraudulent, not material to government decision to pay (or not sufficient allegations of such), or barred by the statute of limitations
- Discovery
 - Substantially one-sided, except now can seek to obtain information on government's payment decision in light of *Escobar* (may need to comply with each agency's *Touhy* regulations)



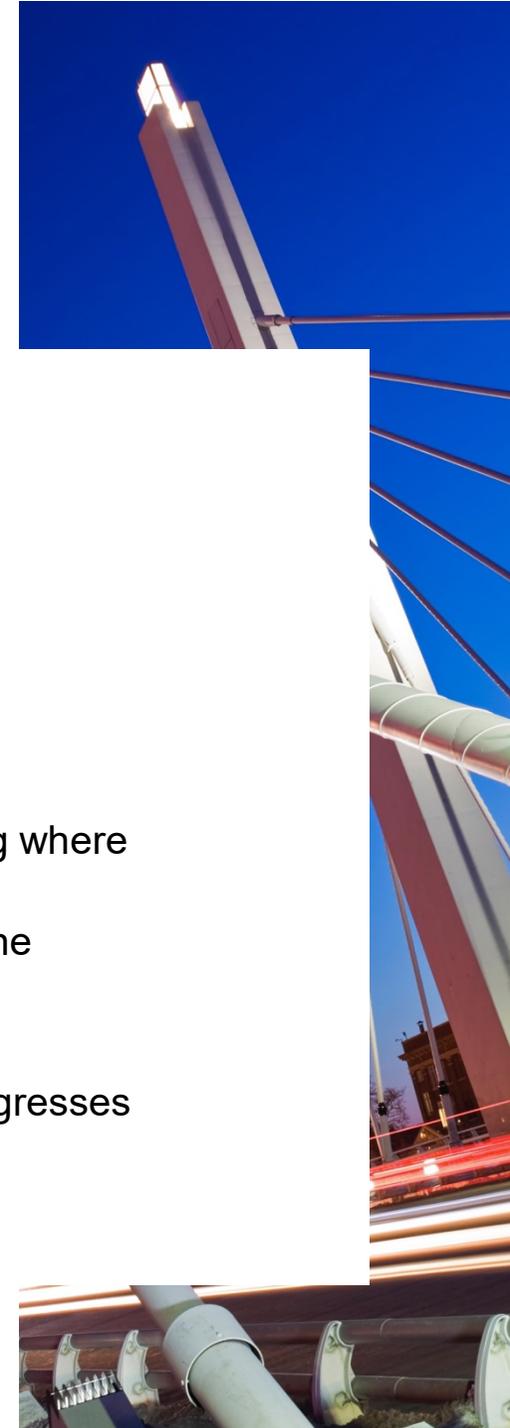
Statute of Limitations

- Action must be brought within:
 - 6 years after the date on which the alleged violation occurred, or
 - 3 years of the date by which the responsible U.S. official knew or should have known of the violation, whichever occurs last (subject to a 10-year cap). 31 U.S.C § 3731(b)
- A relator could have up to 10 years to file an FCA claim. *United States ex rel. Hunt v. Cochise Consultancy*, 587 U.S. ____, 139 S.Ct. 1507 (2019)
- Keep this in mind for discovery.



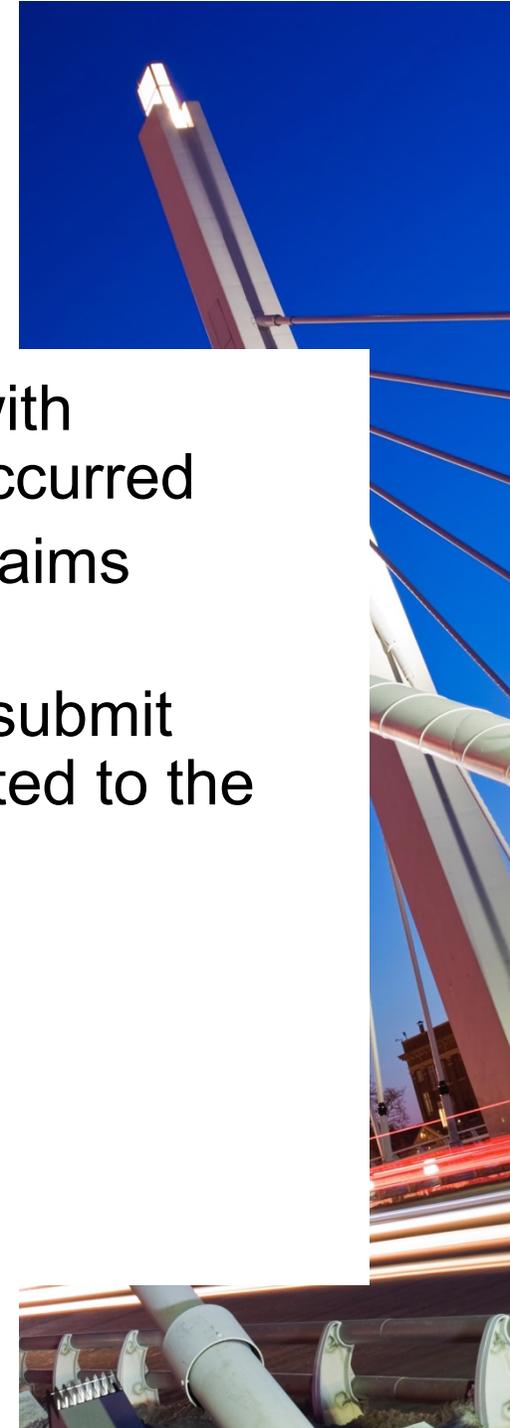
FCA Dismissal Authority

- *United States ex rel. Polansky v. Executive Health Resources, Inc.* (3d Cir)
 - Whether gov't has authority to dismiss an FCA suit after declining to proceed with the action; and
 - What standard applies if the government has that authority
 - Cert granted; SCT briefs filed (Oct. 17)
- Filed in 2012; declined in 2019
 - Significant burden on gov't resources, privilege, credibility of relator
- Circuit Split:
 - 3d and 7th Circuits – Gov't MTD should be granted, absent prejudice to Defendant, following a hearing where Relator may argue against dismissal
 - DC Circuit – gov't has virtually unfettered discretion to dismiss an FCA action brought in the name of the United States
 - 9th and 10th Circuits – gov't may dismiss an FCA action as long as there is a rational basis
 - 1st Circuit – gov't MTD should be granted unless the Relator establishes the decision to dismiss transgresses Constitutional limitations, or the gov't is perpetrating a fraud on the Court
- Oral argument 12/6/22



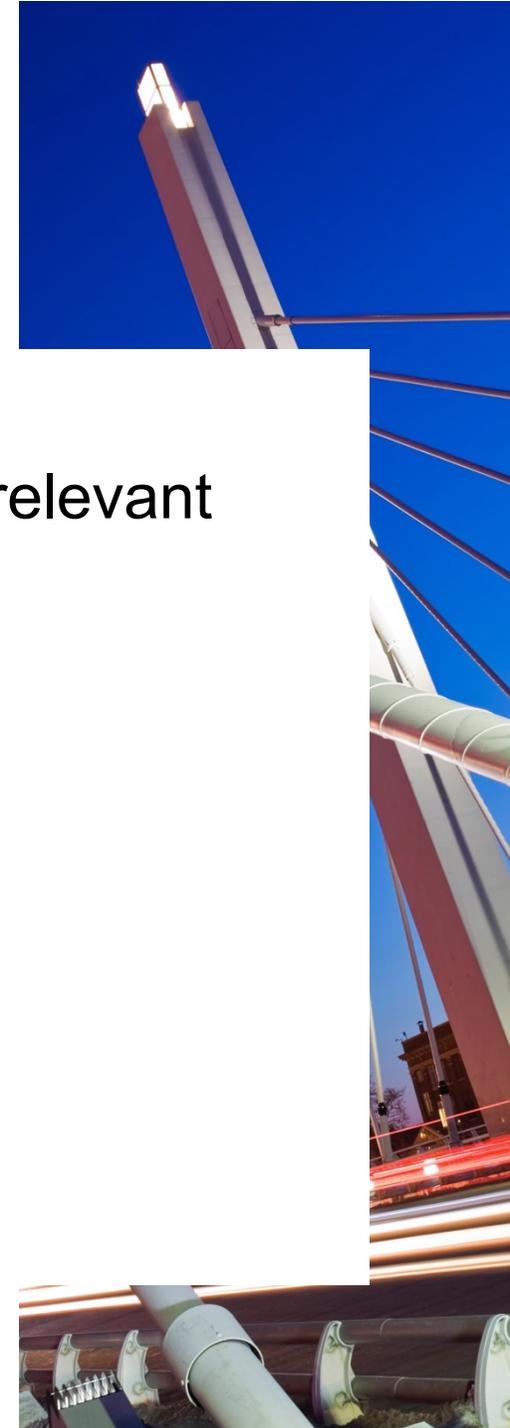
FRCP 9(b)

- FCA is an anti-fraud statute, so Relators/Gov't must plead fraud with particularity – i.e., who, what, where, why, when fraud allegedly occurred
- Some circuits require the FCA complaint to allege specific false claims were presented to the gov't for payment.
- The other circuits allow the FCA complaint to allege a scheme to submit false claims along with “reliable indicia” those claims were submitted to the government.
 - SG argued there is no circuit split; Relator's counsel disagreed
- SCT denied cert in 3 cases presented (Oct. 17)



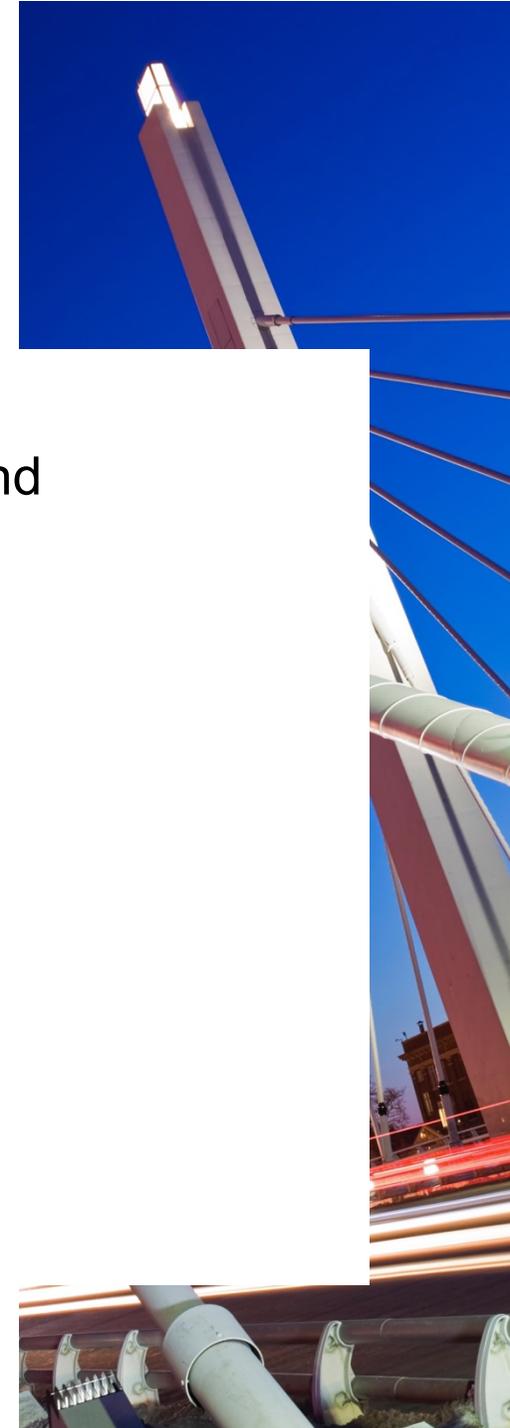
Reasonable Interpretation

- *United States ex rel. Schutte v. SuperValu* (7th Cir. 2021)
- Question is whether an objectively reasonable interpretation of a relevant statute or regulation precludes scienter under the FCA
- Related questions:
 - What if interpretation was reasonable, but incorrect?
 - Does the relied-upon guidance need to be authoritative?
 - (And what does that mean?)
- Six circuits have followed suit; cert petitions pending



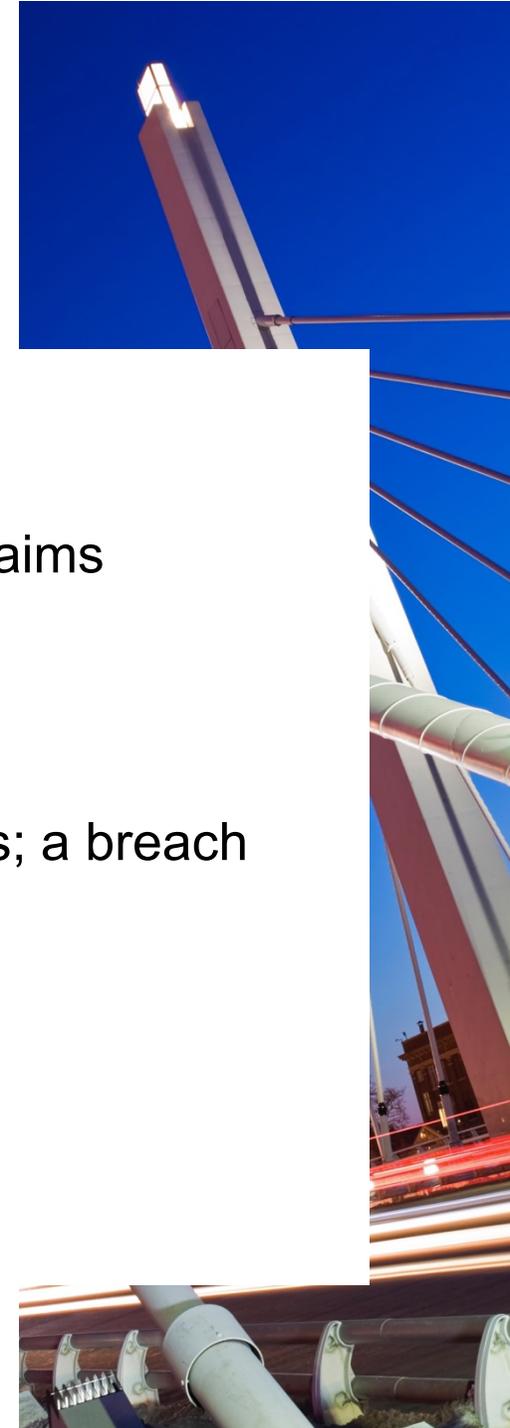
Substantive Trends – Some New and Some Familiar

- Medicare Advantage Program – growing in importance
 - Unsupported diagnosis codes that make patients look sicker than they are and
 - Inflated payments (e.g., RAF score components)
 - Charts altered after the fact to increase reimbursements
- Kickbacks – continuing to be a growth area
 - Labs that paid kickbacks to referral sources
 - Excessive entertainment expenses spent on referral sources
 - Improper referral arrangements



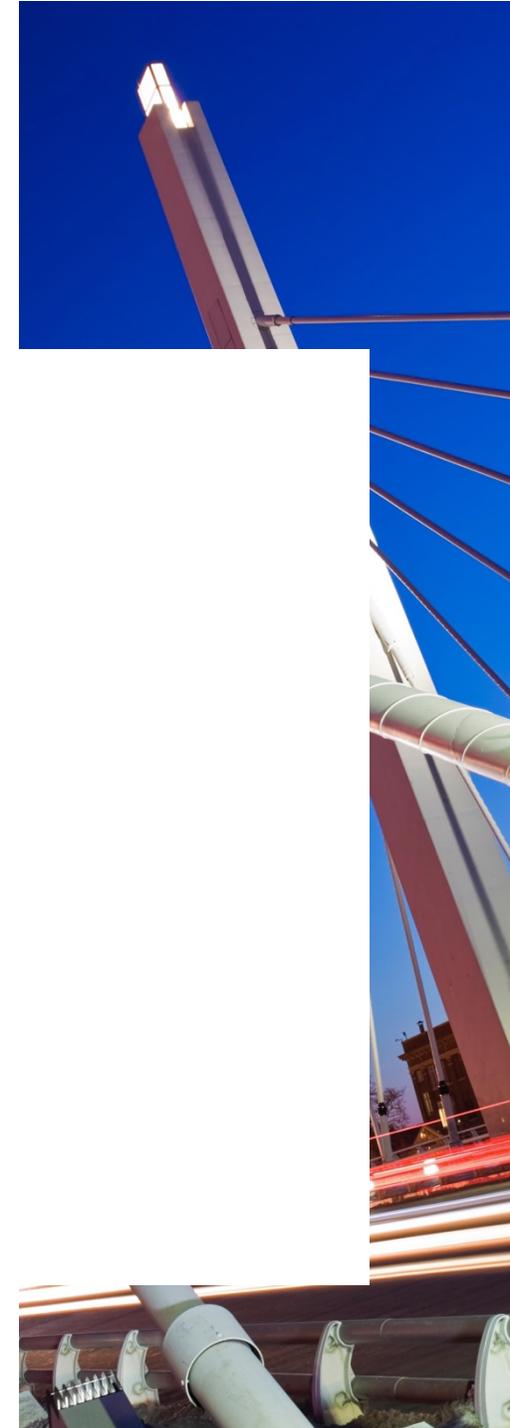
Trends – Some New and Some Familiar

- COVID-Related Fraud – transitory
 - CIDs about PPP loans have been going out from a DOJ Task Force
 - False certification of eligibility, misspending of relief funds, double-dipping, claims arising from contracts related to pandemic
 - Provider Relief Funds – first Indictment 2/21 – closed company
- Cybersecurity – new area for the future?
 - Government contractors must have cybersecurity in place to satisfy the FARs; a breach can lead to a violation of the FCA (FAR 52.204-21)
 - Grantees may have contractual obligations
 - Expect DOJ’s Civil Cyber-Fraud Task Force to issue CIDs



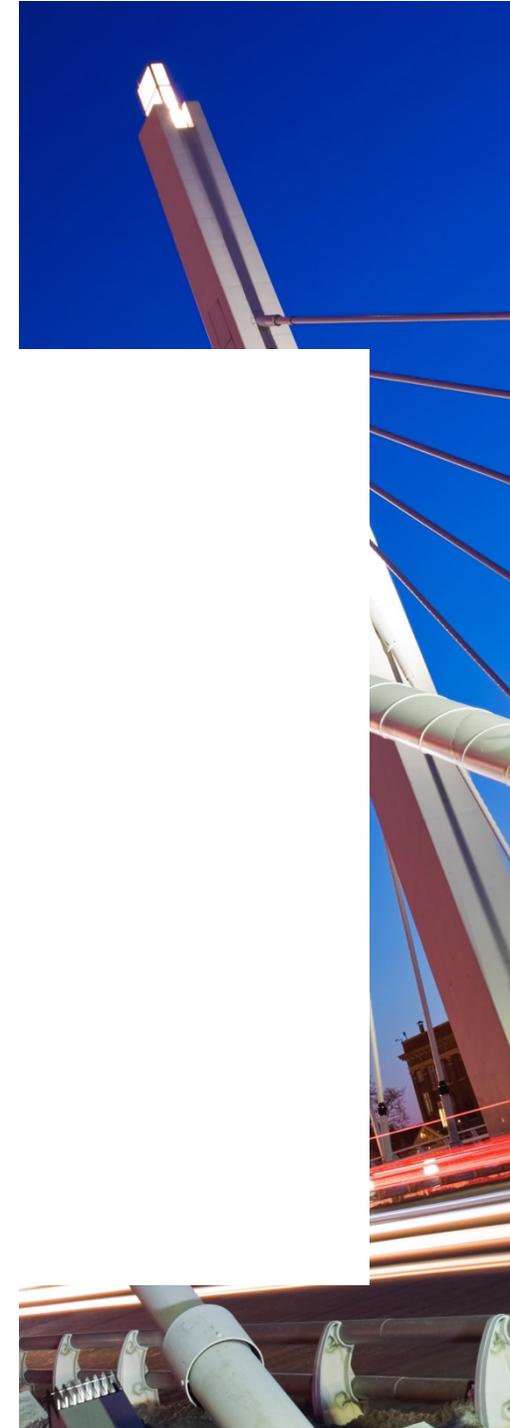
Cyberattacks and Information Security

- Ransomware attacks reflect blurring between crime and state-sponsored attacks
- DOJ (including FBI, together with DHS) invites companies to report intrusions as partners and victims
- But also expect increased mandatory reporting requirements:
 - Cyber incident reporting for Critical Infrastructure Act of 2022
 - SEC rulemaking



Cyberattacks and Information Security

- DOJ Civil Cyber-Fraud Task Force to use the False Claims Act
- Risk areas:
 - DoD Contracts
 - Requirement to complete NIST SP 800-171 assessment
 - CMMC 2.0 rulemaking
 - IT and OT contractors to the government
 - Healthcare providers/suppliers who submit claims
- Q: How do your Info Security and Data Privacy teams interface with Compliance and Legal?



Cyberattacks and Information Security

- *AeroJet Rocketdyne Holdings, Inc.*
 - Contractor who supplied propulsion and power systems to DoD
 - Compliance with the DFARS cybersecurity provision was expressly required by contract
 - AeroJet disclosed on multiple occasions to DoD that it was not compliant but did not disclose the extent of non-compliance
 - \$9M settlement under False Claims Act (July 2022)

Department of Justice

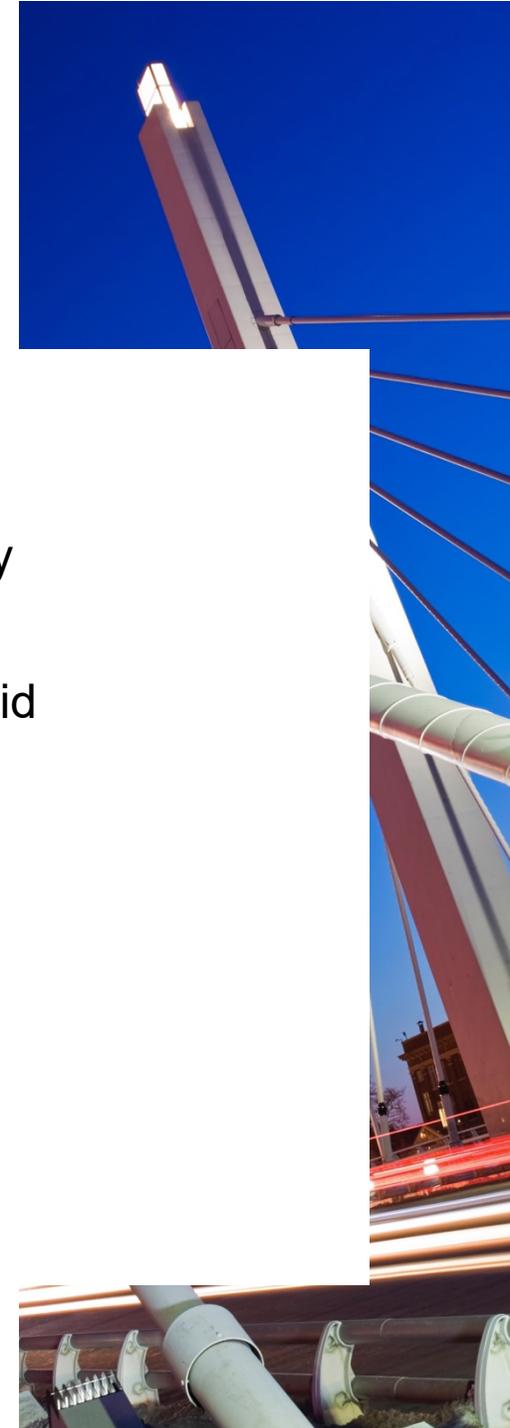
Office of Public Affairs

FOR IMMEDIATE RELEASE

Friday, July 8, 2022

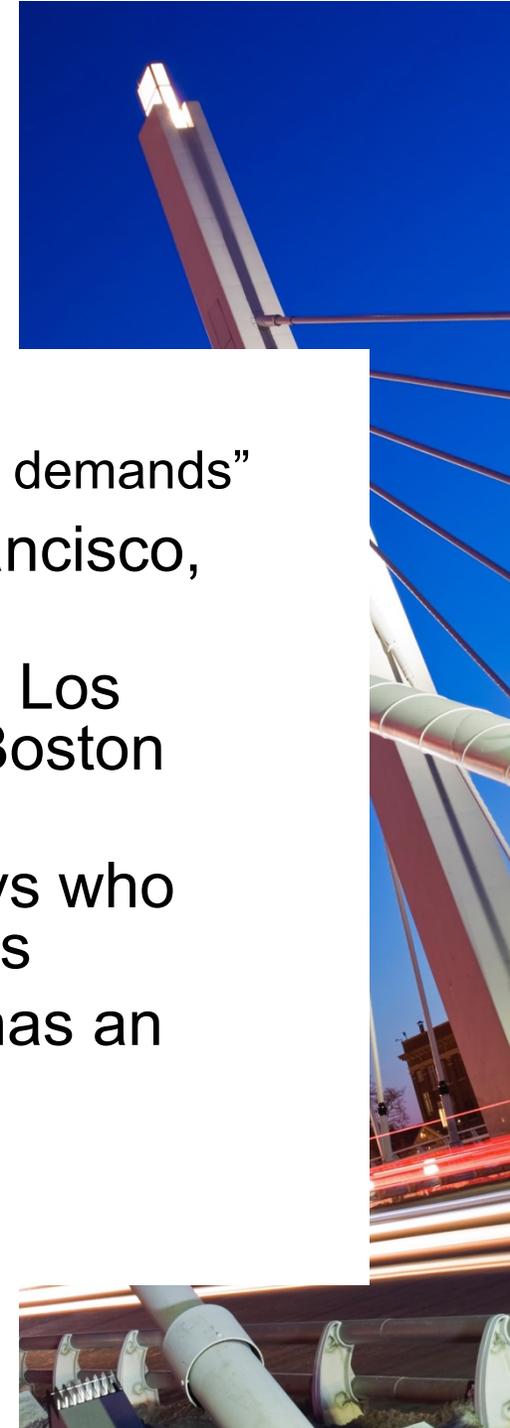
Aerojet Rocketdyne Agrees to Pay \$9 Million to Resolve False Claims Act Allegations of Cybersecurity Violations in Federal Government Contracts

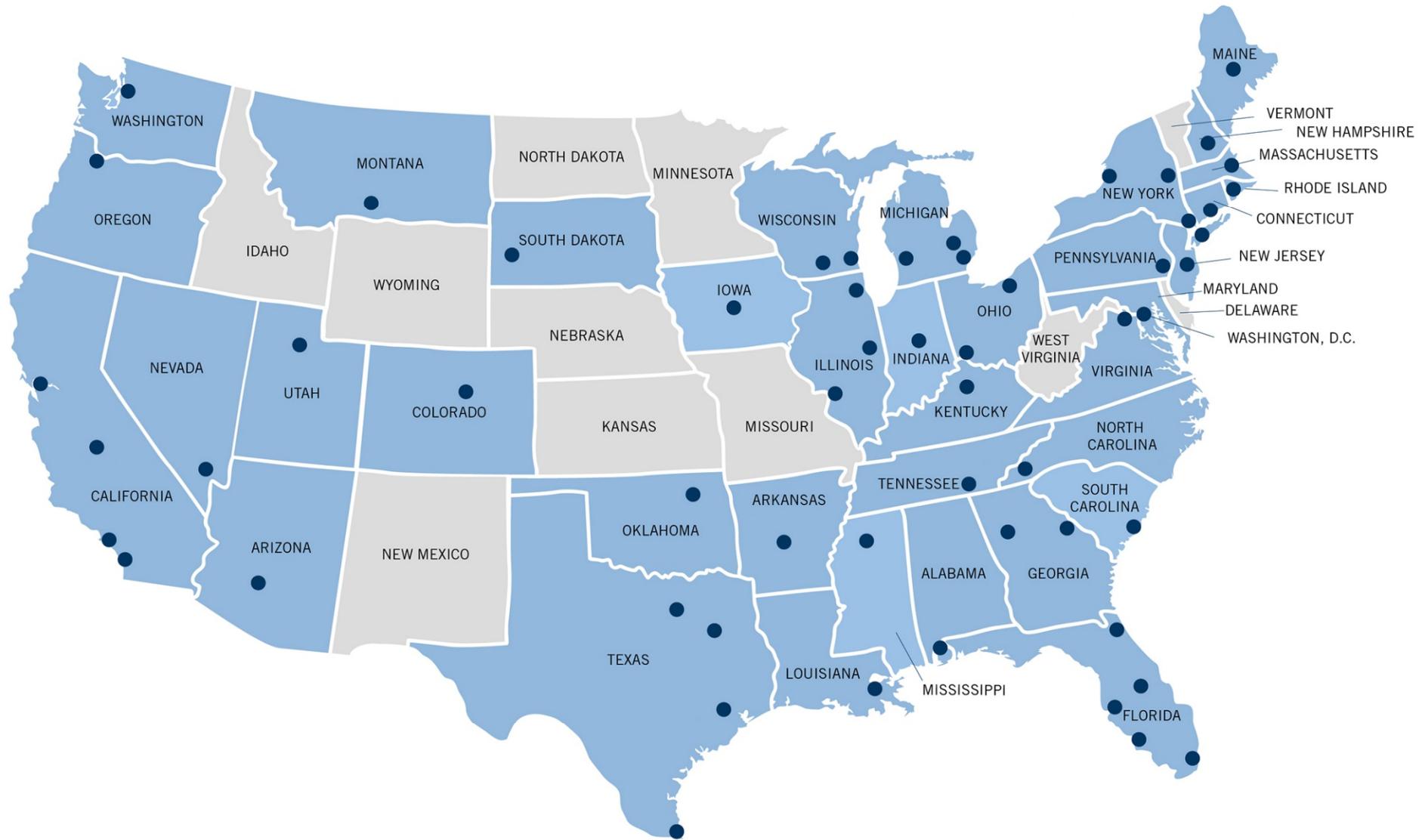
Aerojet Rocketdyne Inc., headquartered in El Segundo, California, has agreed to pay \$9 million to resolve allegations that it violated the False Claims Act by misrepresenting its compliance with cybersecurity requirements in certain federal government contracts, the Justice Department announced today. Aerojet provides propulsion and power systems for launch vehicles, missiles and satellites and other space vehicles to the Department of Defense, NASA and other federal agencies.



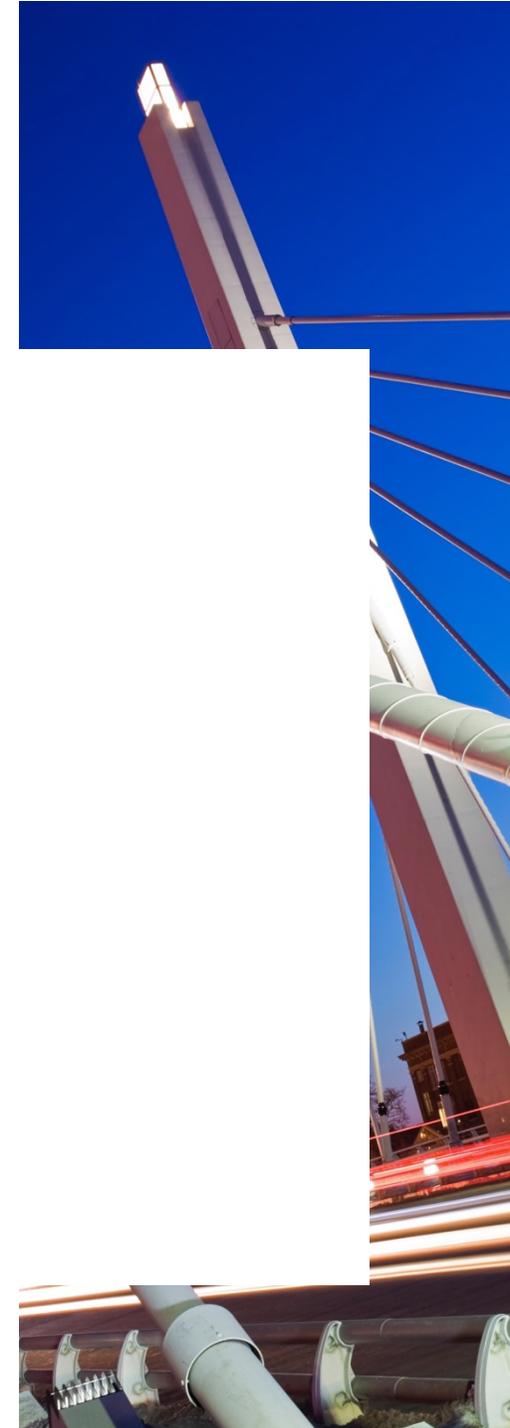
Foley Resources

- Insurance coverage – consider adding a FCA rider
 - Policy’s definition of a “claim” can be broadened to include civil “investigative demands”
- Districts with the most FCA actions: Tampa, Los Angeles, San Francisco, Newark & Chicago
- GEDI FCA Litigation Partners: Tampa (Mehta, Adams, Matthews), Los Angeles (Johnston), San Francisco (Carlucci), Chicago (Noller), Boston (Tuteur, Kraus), D.C. (Rubin), Milwaukee (Krueger)
 - Our partners are a combination of former prosecutors + attorneys who have spent their careers dedicated to the defense of FCA actions
 - Our practice is national and not limited to districts where Foley has an office
 - We partner with subject matter experts where appropriate





● Jurisdictions in Which Foley & Lardner LLP Has Handled FCA Matters

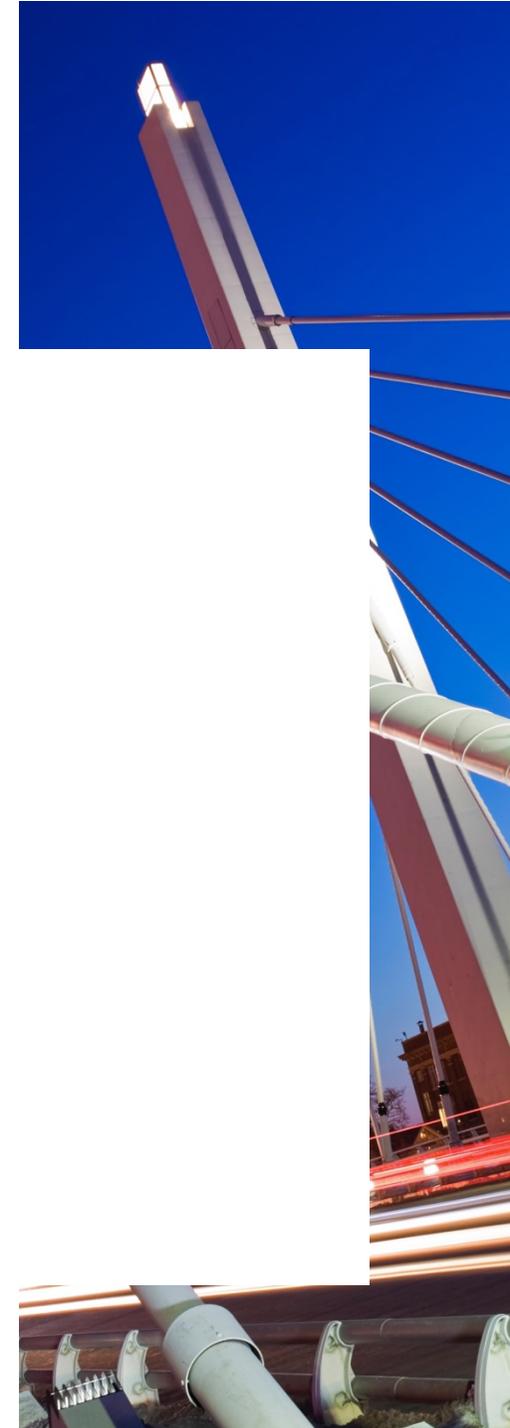


Presenters



Lisa Noller
Partner, Chicago

312.832.4363
lnoller@foley.com



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