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FEATURE COMMENT: Weathering The Storm: Forecasts For FCA Enforcement In The Trump Era

The recent election of Donald J. Trump as president of the United States was both dramatic and unpredicted by many pollsters, prognosticators and pundits alike. In many respects, the campaign and election were unlike anything we have seen in recent history in American politics. The shock of his election is beginning to wear off, however, as President-elect Trump and his transition team are now picking his cabinet, top advisors and approximately 4,000 political appointees. As the transition process moves forward, we cannot help but ask an important question that is near and dear to our hearts as False Claims Act lawyers: What does Trump's success mean for FCA enforcement?

To be sure, President-elect Trump has, at some point, played both sides of virtually every issue. Despite his lack of firmly held policy positions, the effect he will have on FCA enforcement is beginning to take shape. First, President-elect Trump's expensive infrastructure proposals will likely lead to more opportunities for Government contractors, but concomitantly, greater FCA and qui tam litigation. Second, notwithstanding the downstream effects from his infrastructure plans and the direct benefits of them inuring to Government contractors, under the Trump Administration's leadership, political appointees in the Department of Justice may take a more "hands off" approach than that taken under the Obama Administration. Third, the FCA itself may be subject to significant revision, particularly if President-elect Trump's promise to

repeal the Patient Protection and Affordable Care Act (ACA) is carried out.

FCA Scrutiny Will Follow Trump's \$1 Trillion Infrastructure Plan—President-elect Trump, backed by a Republican Congress, plans to spend \$1 trillion on infrastructure over the next decade. As recent history teaches, where federal dollars go, FCA litigation tends to follow.

Take for example the American Recovery and Reinvestment Act (Recovery Act), which provided \$787 billion to various projects throughout the U.S. The Recovery Act was followed by two developments in the FCA world: first, and perhaps most obviously, an uptick in FCA litigation arising out of contracts paid for from Recovery Act funds. See, e.g., *U.S. ex rel. Calilung v. Ormat Indus., Ltd.*, 2015 WL 1321029 (D. Nev. March 24, 2015); *U.S. ex rel. Cohen v. City of Palmer, Alaska*, 2013 WL 4510772 (D. Alaska Aug. 26, 2013); *Sears v. Cnty. of Monterey*, 2012 WL 368688 (N.D. Cal. Feb. 3, 2012). And second, the passage of the Fraud Enforcement Recovery Act (FERA), expanded the FCA's reach to a wider range of transactions; reduced the intent required to establish FCA liability; and lowered hurdles for qui tam relators (colloquially referred to as "whistleblowers"). Indeed, FERA was seen by some in Congress as a necessary follow-up to the Recovery Act. See Prepared Statement of Sen. Chuck Grassley: Senate Floor Debate on Fraud Enforcement and Recovery Act (April 20, 2009), available at www.grassley.senate.gov/news/news-releases/false-claims-act-and-fraud-enforcement ("This is a timely piece of legislation given the current economic downturn and the unprecedented amounts of taxpayer dollars that are being expended to shore up banks and financial institutions, corporations, Fannie Mae and Freddie Mac. On top of that, the economic stimulus bill handed out nearly \$1 trillion in new spending. Whether a member supported or opposed these expenditures, he or she must agree that we simply cannot allow unscrupulous individuals to defraud the Government and rip off taxpayers.").

If the Recovery Act was any indication, the passage of a \$1 trillion infrastructure plan would likely result in more FCA litigation and enforcement actions. The infrastructure bill may contain explicit provisions that make certain types of certifications and submissions FCA violations. Such provisions, combined with the significant amount of federal funds that may be appropriated, would inevitably result in more FCA litigation and enforcement.

Trump’s Political Philosophy, Which Is Still Unknown, Will Likely Influence Government Enforcement—DOJ’s enforcement efforts usually reflect the enforcement philosophy of the president. So what is President-elect Trump’s enforcement philosophy? The truth is, we do not yet know with any modicum of certainty. On one hand, the election of President Trump brings with him Republican control of the legislative and executive branches of Government, along with the opportunity to nominate a new Supreme Court justice. We would typically associate a Republican Government with a more industry-friendly regulatory regime in tandem with a more “hands off” approach to enforcement.

President-elect Trump, however, is not your typical Republican. Many of his policies are not well known and are not necessarily conservative. Repeatedly labeled a populist over the past few months, President-elect Trump has promised to pay (at least in part) for many of his plans by cracking down on fraud and abuse. Thus, his anti-establishment mentality may actually mean that contractors, while provided greater opportunities to participate in Government funded projects, are on the eve of a more aggressive era of FCA enforcement.

Repealing and Replacing the Affordable Care Act May Affect Key Provisions of the False Claims Act—Finally, one of the biggest changes to FCA enforcement may stem from President-elect Trump’s plan to repeal President Obama’s signature health care bill—the ACA, which made key changes to the FCA. Trump has repeatedly touted his intention to repeal and replace the ACA. A complete repeal would dramatically affect key provisions of the FCA.

The ACA amended the FCA in three critical ways: (1) the ACA amended the FCA sections regarding the public disclosure bar, changing what constitutes an original source and what would trigger the public disclosure bar; (2) the ACA made a failure to refund Medicare or Medicaid overpayments within 60 days a violation of the FCA; and (3) the ACA made a violation

of the Anti-Kickback Statute a violation of the FCA. Any repeal or change to the current ACA could eliminate or undermine key FCA amendments that were intended to increase and expand FCA enforcement by both the Government and qui tam relators alike.

The ACA has had a remarkable effect on FCA enforcement. Since the ACA’s enactment, the number of relator-initiated suits per year has increased by 200, and 2015 marked the sixth consecutive year of over 700 new FCA actions, with over 600 of those claims attributable to qui tam relators. Furthermore, the relator’s share of awards for successful FCA claims increased by nearly \$200 million from 2008 to 2010, and reached an all-time high of roughly \$600 million in fiscal year 2015. See U.S. Dep’t of Justice, Civil Division, Fraud Statistics—Overview: Oct. 1, 1987—Sept. 30, 2015, available at www.justice.gov/opa/file/796866/download. In 2015, 32 percent of the year’s FCA recoveries came from suits brought by qui tam relators where the Government declined to intervene, the highest percentage of success in the history of FCA enforcement. *Id.*

Making a Forecast—Typically, Republican administrations bring with them more business-friendly policies and lighter enforcement regimes. Although President-elect Trump is not a typical Republican, his words and deeds following the election suggest a tempering of his bombastic campaign rhetoric. He has already suggested that his promises to “repeal and replace” the ACA are not set in stone. In light of his post-election rhetoric, there are a few forecasts we can make about the FCA enforcement environment, which will be ushered in with the Trump Administration:

1. Qui tam suits will continue to proliferate in quantity, probing new theories of liability.
2. Government intervention in FCA litigation will decrease (at least on a percentage basis), owing to decreases in funding and a more laissez faire approach to enforcement—particularly with regard to allegations involving only alleged technical regulatory violations where the amounts in controversy are low.
3. Government resources will be devoted to “big dollar” cases where the potential for \$100 million-plus headline-grabbing settlements is a real possibility.



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