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2017 Outlook

Trump's Infrastructure Spending Could Boost FCA Enforcement

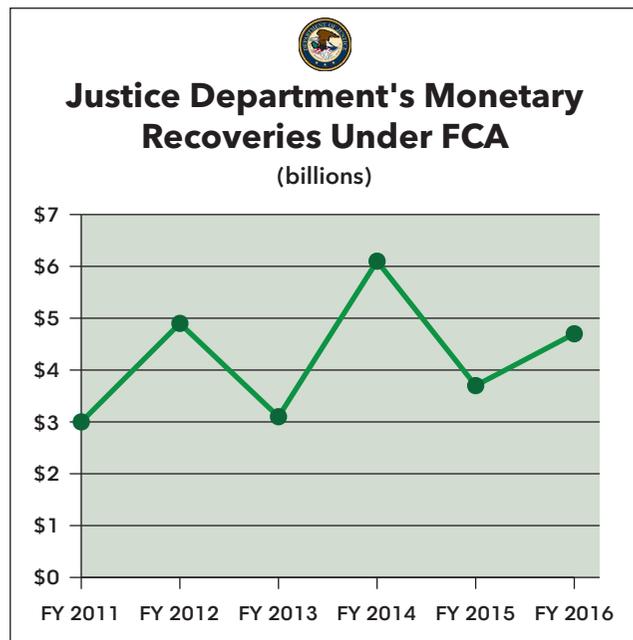
BY DANIEL SEIDEN

Following through on the promise to invest in infrastructure and defense could cause the Trump administration to rely heavily on the False Claims Act (FCA) to deter fraud in these areas, government contracts attorneys told Bloomberg BNA.

If trends continue, however, the FCA's next four years may largely depend on whistle-blowers and long-time government personnel rather than top administration officials.

Attorneys also agreed that it's difficult to predict to what extent the new administration would use the FCA against contractors in a business-friendly environment, or if the FCA could be a significant tool for addressing government-related corruption.

The Justice Department (DOJ) obtained more than \$4.7 billion in cases under the FCA in fiscal 2016 — a \$1 billion jump from fiscal 2015 — it announced Dec. 14.



Source: Department of Justice

a Bloomberg BNA graphic/fcr650g1

Big Spending, Bigger Enforcement. President-elect Donald Trump “has given every indication that he will be ‘friendly’ to U.S. businesses and that domestic spending, particularly on infrastructure and defense, will be among his key priorities,” Bradley D. Wine, a Washington-based partner at Morrison & Foerster LLP and co-chair of the firm’s government contracts and public procurement practice, told Bloomberg BNA.

“Those views are not necessarily inconsistent with robust efforts to prevent fraud, waste and abuse,” he said.

Significant spending increases have historically been followed by “robust” FCA enforcement to ensure the government receives proper value from contractors, Wine said.

“Initial reports indicate that the president-elect is considering in excess of a trillion dollars in domestic infrastructure spending,” he said. “That type of increased contracting activity will provide ripe conditions for FCA enforcement efforts.”

Whistle-Blowers' Role Has Grown. Even though Republican administrations are typically viewed as more contractor-friendly, Trump’s promise to “drain the swamp” could mean “more aggressive enforcement against contractors alleged to have defrauded the government,” said John G. Horan, a Washington-based partner in Dentons’ government contracts practice group.

However, the role of whistle-blowers has a bigger impact on enforcement than the administration in office does, he said.

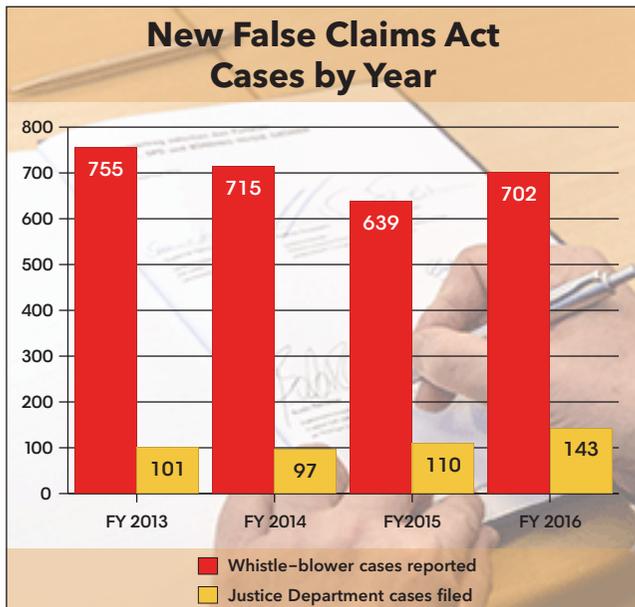
Horan suspected enforcement trends will remain consistent given the history of qui tam — whistle-blower — enforcement under the FCA, he said.

Since 1995, whistle-blowers have brought more FCA cases than the Justice Department, and their cases in 2014 outnumbered DOJ’s by more than seven to one, he said.

Whistle-blowers’ recoveries in recent years have “significantly exceeded recoveries under cases initiated by DOJ, often by more than three to one,” Horan said.

“Thus, without a change to the qui tam rules — which is not likely to happen — FCA enforcement will remain robust through the action of qui tam relators regardless of which administration is in power,” he said.

Layers Between FCA, Trump. The FCA is a powerful tool for combating fraud and corruption that the Trump administration should like, said Brian D. Miller, a shareholder at Rogers Joseph O’Donnell PC in Wash-



ington and a member of the firm's government contracts practice group.

Yet, the FCA lately has "a regulatory feel to it," he said.

"The implied certification theory expanded the FCA's regulatory sphere," Miller said. "If it is seen as regulatory, the Trump administration will want to rein it in."

The Supreme Court in *Universal Health Servs. v. United States ex rel. Escobar*, U.S., No. 15-7, 6/16/16, adopted the implied certification theory of FCA liability, which allows cases to proceed without broken express promises of compliance with contract requirements or statutes.

Career lawyers at the Justice Department and political policy makers below Trump will likely guide the government's approach to FCA enforcement, said Miller, who earlier in his career advised the U.S. deputy attorney general on FCA matters.

"It may be some time before the Trump administration addresses FCA enforcement, especially if the Justice Department puts the brakes on some of the implied certification cases — though relators may force the issue," he said.

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