What We Know About DOJ's New FCA Enforcement Priorities

By **Anne Robinson, Danielle McCall and Morgan Maddoux** (March 16, 2026, 3:52 PM EDT)

On Feb. 19, Brenna Jenny, deputy assistant attorney general for the commercial litigation branch of the civil division of the U.S. Department of Justice, delivered the keynote address at the Federal Bar Association's Qui Tam Conference in Washington, D.C.

Jenny addressed the DOJ's False Claims Act enforcement priorities under the current administration, tools to investigate and resolve potential FCA violations, and the DOJ's overall strategic approach to FCA enforcement under Jenny's leadership.

Jenny's remarks provide critical insight into the way the DOJ will evaluate, prioritize and pursue FCA cases, as heightened enforcement becomes the new normal.

FCA Enforcement Priorities

Jenny confirmed that this administration will continue to use the FCA as an enforcement tool. The DOJ has issued over 1,000 new civil investigative demands every year for the last few years, a trend Jenny noted and expects will continue. Jenny identified specific areas of focus for future FCA enforcement, some that are new in this administration and may turn on yet-unsettled theories of FCA liability.

Healthcare Fraud

Healthcare remains a key FCA enforcement area, and Jenny identified three enforcement priorities in this space:

1. Managed care, including the submission of fraudulent diagnosis codes, improper use of physician queries, inappropriate home health assessment, inflated medical loss ratios, fraudulent enrollment of beneficiaries, and other predatory conduct by insurance providers and brokers;

2. Artificially inflated or unsupported drug pricing — particularly where the reported bases for drug prices are inconsistent with companies' internal analysis, or companies improperly manipulate drug prices through co-pay assistance programs or steering of drug utilization; and

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3. The provision of unnecessary or substandard care and defective medical devices.

The DOJ will continue to work closely with the DOJ-HHS FCA Working Group — a partnership between the DOJ and the U.S. Department of Health and Human Services, which the DOJ relaunched in July 2025 to combat healthcare fraud — to investigate possible FCA violations and pursue appropriate actions.

Discrimination

Jenny emphasized the DOJ's commitment to prosecute FCA violations based on noncompliance with federal anti-discrimination laws, saying such cases will receive expedited priority treatment.

FCA enforcement targeting discrimination will focus on organizational programs and practices that systemically restrict access or confer benefits based on race, sex and other protected characteristics.

In earlier remarks, Jenny stated that it is not the existence of diversity, equity and inclusion programs alone that triggers FCA liability. Rather, the DOJ intends to build FCA cases on evidence of unlawful discrimination, which Jenny stated includes (1) preferential hiring or training programs where companies allegedly bypass qualified candidates because they are not part of a protected class, (2) creating and tracking demographic goals, and (3) tying compensation to those goals or requiring managers to meet those goals in hiring and promotion decisions.

The DOJ would likely argue that these types of programs rendered false an express or implied certification with civil rights laws such as Title VI or Title VII of the Civil Rights Act. The strength of such a theory will be fact-specific, as well as subject to legal challenges on key FCA elements such as materiality and scienter.

Trade Fraud

Illustrating the DOJ's focus on trade-related fraud, Jenny touted the record-high number of qui tam cases (and settlements) surrounding trade and tariffs in fiscal year 2025, a trend she said the DOJ expects to continue. According to Jenny, trade-related FCA enforcement will continue to focus on the underpayment of duties relating to knowing misclassification, or undervaluation of goods or misrepresentation of products' country of origin to avoid duties owed.

This list of priorities is not exhaustive — the DOJ continues to pursue cybersecurity-related FCA actions through the Civil Cyber-Fraud Initiative announced in October 2021 — but it nonetheless provides an important road map as to the matters most likely to draw the DOJ's interest in the coming year.

FCA Enforcement Tools

Jenny confirmed the DOJ will continue to rely heavily on both data mining and whistleblowers to identify and investigate possible FCA violations. She emphasized the importance of using tools like data analysis earlier in the DOJ's case evaluation process to determine more efficiently whether and to what extent the government will get involved in FCA actions, providing swifter resolutions for relators and defendants.

Jenny pledged that the DOJ would leverage its dismissal authority to terminate cases that are meritless or otherwise do not serve the DOJ's policy and programmatic interests.

Data mining continues to play a critical role in the DOJ's evaluation of FCA cases.

Jenny acknowledged the growing use of data mining as a tool to identify FCA cases, pointing to a 33% increase in qui tam complaints last year, which she attributed to relators' heightened use of data mining. She cautioned that external data mining efforts — by relators that are not company insiders — often rely on incomplete information, such as publicly available datasets that might be inaccurate or lacking critical context.

By contrast, Jenny said, the DOJ has extraordinary data capabilities, noting that its internal data analytics platforms incorporate data not accessible to external data miners and provide the DOJ with a more thorough picture of the potentially implicated conduct.

Jenny explained that the DOJ uses data mining to identify cases it may initiate and to assess the strength of relators' cases. Both relators and defendants should expect the DOJ to analyze new and ongoing FCA cases with its own in-house tools and come to case discussions armed with those insights.

Relators remain a core component of the DOJ's FCA enforcement strategy.

Qui tam complaints filed by whistleblowers remain the dominant source of FCA cases, and data mining will not replace qui tam relators. According to Jenny, approximately 480 new qui tam complaints have been filed so far this fiscal year.

Jenny framed the whistleblower's role as essential to correcting information asymmetries. She underscored that government programs operate at an extraordinary scale and agencies must rely on company certifications because they have limited visibility into internal company dynamics. Accordingly, whistleblowers may provide early, specific inside information that allows the government to better and more quickly detect and evaluate potential fraud.

Jenny also clarified, however, that whistleblowers are fallible, and that a core component of the DOJ's role is to evaluate the credibility of qui tam allegations and decide how to proceed.

The DOJ is willing to exercise its dismissal authority, both at the point of declination and beyond.

Jenny emphasized the DOJ's willingness to dismiss FCA cases pursuant to its authority under Section 3730(c)(2)(A), noting that the DOJ dismissed approximately 25 FCA actions last year. She acknowledged that not every qui tam case advances the FCA's core goal of protecting federal programs from fraud, and the reality that meritless cases impose real costs on both the government and American businesses. Jenny stated that the DOJ is committed to exercising its dismissal authority where cases are meritless, inconsistent with current law or unsupported by the payor agency.

Rather than evaluating whether to dismiss on an ad hoc basis, the DOJ will now assess the appropriateness of dismissal at the point of declination, though Jenny acknowledged that the DOJ may decline to intervene without making a dismissal decision. Where the DOJ declines but does not dismiss, it will continue to evaluate whether dismissal is appropriate during the life of the case.

DOJ Decision-Making Process

Jenny addressed factors relevant to the DOJ's decision to prioritize or pursue FCA actions, decline to intervene or exercise its dismissal authority. Her remarks provide defense counsel with a potential road

map for engagement with the DOJ, including the types of arguments that may be persuasive to the DOJ in reaching a decision on declination or dismissal.

Harm Caused by Fraudulent Conduct

Harm caused by fraudulent conduct is a key factor in the DOJ's case prioritization and intervention decisions. According to Jenny, the DOJ will continue to focus on cases involving products or services that are dangerous, defective, or jeopardize patient health and safety. Jenny explained that facts indicating a highly speculative or theoretical harm will weigh in favor of declination, but conduct that puts people in harm's way is problematic regardless of whether harm actually occurred.

To illustrate the difference between the DOJ's views of no actual harm and merely speculative harm, Jenny provided an example related to cybersecurity: Jenny explained that a government contractor's failure to comply with cybersecurity requirements and contractual provisions can cause harm even in the absence of an actual cyber breach.

From the DOJ's perspective, it can be sufficient that government data may have been vulnerable to bad actors. Jenny stated that even damages that are hard to quantify can still be quantified, and that programmatic harm matters to the DOJ even absent clear, easily measurable or precise damages.

Timing of Conduct

Jenny explained that defense arguments that the challenged conduct is stale carry little weight. Instead, arguments she views as more persuasive to the DOJ's declination or dismissal decision include that the intervening law or legal theory has changed, or that the passage of time resulted in evidentiary issues that make it difficult for the DOJ or relator to prove a case.

Scienter and Materiality

Jenny addressed common arguments defendants advance related to materiality and scienter, specifying which arguments she finds more persuasive than others.

On materiality, Jenny stated that because federal agencies often lack real-time visibility into the conduct at issue, continued government payment does not equate to approval or acceptance of the defendant's conduct. While companies facing FCA enforcement actions should continue to emphasize continued government payment as part of their materiality arguments, Jenny advised that such arguments should be bolstered by evidence that payments continued despite the government's demonstrated knowledge of the relevant conduct.

In discussions with the DOJ, defendants should highlight: government knowledge at the payor agency, and specifically by the government employees involved in the relevant program or contract; that the government knew of the conduct at issue when it made continuing payments; and that the government understood the full scope of the challenged conduct.

Jenny cautioned that the DOJ will not be persuaded by materiality or scienter arguments that everyone in the industry engages in similar conduct. The DOJ is more receptive to defense arguments that the widespread industry practice demonstrates government knowledge or approval of the challenged conduct or regulatory ambiguity.

Limitations on Use of Subregulatory Guidance

Finally, consistent with Attorney General Pam Bondi's February 2025 memo titled "Reinstating the Prohibition on Improper Guidance Documents," Jenny reaffirmed that the DOJ will not bring FCA actions solely based on a company's failure to comply with subregulatory guidance, including nonbinding documents issued by federal agencies without following notice-and-comment procedures.

Key Takeaways

The DOJ remains committed to enforcing the FCA aggressively, particularly in key areas, including healthcare fraud, trade fraud, antidiscrimination and cybersecurity. Government contractors should prepare to see an uptick in DOJ-initiated FCA actions and qui tam complaints in all these areas.

Based on these insights, companies doing business with the government — particularly those already facing an FCA enforcement matter — should note the following.

Leverage data mining to mitigate risk.

Jenny's remarks confirmed that the DOJ and whistleblowers are increasingly using data mining as an investigative tool to identify anomalies, correlations or patterns that may signal noncompliance in various enforcement areas. Companies, particularly those operating under complex regulatory frameworks, should consider periodic, privileged assessments of their data to mitigate compliance risks and FCA exposure. Industry-level data, where available, may also provide insights into material differences between a company's practices and those of its peers.

Proactively build and enhance compliance programs.

Given the enforcement climate, companies should continue to prioritize building and enhancing compliance programs focused on risk assessment and management. Compliance efforts may include the maintenance of documentation related to compliance functions, including documentation related to and supporting certifications, control testing and remediation efforts, which may be critical evidence in FCA investigations and litigation.

Explore options to advocate for the DOJ to exercise its dismissal authority.

The welcome news for FCA defendants is Jenny's commitment to exercise the DOJ's dismissal authority and provide meaningful opportunities to advocate for dismissal in addition to declination. The DOJ's increased openness to dismissing cases provides a powerful tool for defendants in situations where there are strong arguments that a qui tam action does not advance the FCA's purpose or conflicts with other agency priorities.

Conclusion

Based on Jenny's remarks, defendants should keep in mind that the DOJ appears less likely to pursue FCA actions based on novel theories of FCA liability, speculative harm or alleged violations of subregulatory guidance, or cases that involve apparent and sustained government knowledge of the alleged conduct.

Companies and the defense bar should continue to keep an eye on these emerging trends in an evolving FCA enforcement landscape.

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