

Justice Department Touts FY2019 False Claims Act Statistics as Evidence of Administration’s “High Priority” Against Fraud, but the Numbers Show Less of a Priority on Qui Tams

January 28, 2020 – FCA Now
by Kirk Schuler and Alex Hontos

Earlier this month, the United States Department of Justice issued a [press release](#) to announce recoveries of over \$3 billion from False Claims Act cases in FY2019. In making the announcement, Assistant Attorney General Jody Hunt of the Civil Division emphasized, “The significant number of settlements and judgments obtained over the past year demonstrate the high priority this administration places on deterring fraud against the government and ensuring that citizens’ tax dollars are well spent.”

But what do the numbers say about the administration’s reliance on qui tam actions to deter fraud? In short, qui tam actions appear to be less of a priority than they have been historically.

The \$3 billion in recoveries were announced in conjunction with FY2019 statistics revealing that \$2.2 billion of those recoveries came from qui tam actions—lawsuits brought by whistleblowers or “relators” suing on behalf of the government under the FCA’s qui tam provisions. In addition, the FY2019 statistics showed the relators’ shares of the \$2.2 billion topped \$271 million.

These qui tam numbers may appear robust on their own, but the following chart shows they are well below their five and ten year historical averages:

	Qui Tam Recoveries	Total Recoveries (Qui Tam & Non-Qui Tam)	% Qui Tam Recoveries to Total Recoveries	Relators’ Share of Qui Tam Recoveries	% of Relators’ Share to Total Recoveries
FY2019	2,210,401,366	3,054,425,050	72%	271,941,791	9%
5 Yr Avg.	2,587,832,	3,493,333,98	75%	437,397,496	13%

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10 Yr Avg.	2,902,873, 770	3,791,266,74 8	78%	489,500,130	13%

The decline in qui tam recoveries to total recoveries, and the decline in the share of relators' recoveries to total recoveries, perhaps are not that surprising. Blog readers may remember FCA Now's [earlier reports](#) on Attorney General William Barr's [documented disdain](#) for the FCA's qui tam provisions in 1989 when he served in the Office of Legal Counsel to provide advice to the President and executive branch agencies. In that role, Attorney General Barr wrote a memorandum arguing that the qui tam provisions of the FCA were "patently unconstitutional" and that private qui tam actions were a "devastating threat to the Executive's constitutional authority."

Those earlier views may have influenced the present based on the Department's latest historical data, but there are other factors in play, too. For example, in January 2018, over a year before Barr became the Attorney General in February 2019, the Department of Justice instructed its prosecutors in what is known as the "Granston Memo" to more seriously consider dismissing meritless FCA qui tams when in the government's best interest to do so. The Department's announcement, in fact, emphasized that the FCA provides "authority for the government to dismiss cases that do not advance the goal of fraud prevention, and during the past year the government made increasing use of this tool to help prioritize and protect the expenditure of government resources." In addition, the United States Supreme Court's decision nearly four years ago in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), which required courts to apply a "rigorous" and "demanding" standard of materiality in FCA actions, may have resulted in more dismissals and smaller settlements. In other words, relators and their counsel—the ones responsible for filing qui tams—may be less willing to pursue such cases in today's post-Granston and post-*Escobar* world.

Time will tell of course whether the downward trend of qui tam recoveries continues, but because the Department's announcement also revealed that new qui tam matters for FY2019 (636) are at their lowest number since 2011 (634), and are well below the five and ten year historical averages (662 and 665, respectively), lower overall qui tam and relator recoveries seem certain for FY2020.