Notes

Payment Is Not Enough: Materiality in Implied False Certifications Under the False Claims Act

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In Universal Health Services, Inc. v. United States ex rel. Escobar, *the United States Supreme Court resolved a longstanding circuit split by holding that implied false certifications—transactions involving a failure to disclose noncompliance with material ancillary requirements—can expose government contractors to liability under the False Claims Act. But in seeking to clarify the materiality requirement for such claims, the Court opened the door to further circuit splits. This Note examines one such split: whether, and to what extent, the government's decision to continue to pay a claim despite knowledge of allegations of fraud should preclude a finding that the noncompliance was material. This Note contends that such a decision should create a rebuttable presumption against materiality, which may be defeated upon a showing that: (1) the agency's decision to continue payment was not a commentary on the merits of the allegations; (2) the agency has withheld payment on the basis of the violation(s) at issue in the past; or (3) the violation(s) at issue is so central to the bargain that, even in the face of continued payment, no reasonable person would argue that the alleged violation(s), if true, was immaterial.*

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INTRODUCTION

A fraud on the government is a fraud on us all. The False Claims Act (FCA) protects our tax dollars by creating a civil cause of action against U.S. contractors who perpetrate certain frauds against the federal government.[1] These actions may be brought by the United States Attorney General, or by *qui tam* relators,[2] commonly referred to as whistleblowers, in the spirit of the "old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue.'"[3]

The FCA prohibits seven forms of misconduct by government contractors: (1) knowingly submitting false or fraudulent claims for payment; (2) knowingly creating false records or statements in support of fraudulent claims; (3) conspiring to violate the FCA; (4) knowingly delivering less than what was owed to the government; (5) creating and submitting a false receipt; (6) knowingly receiving property from officials not authorized to convey such property; and

1. *See* 31 U.S.C. §§ 3729–33 (2012).

2. A *qui tam* relator is a private citizen who files a lawsuit under the FCA both "for the person and for the United States Government." *Id.* § 3730(b)(1). While a sense of right and wrong and of fraud prevention may motivate *qui tam* relators to bring suits against government contractors, they also stand to receive up to thirty percent of any award or settlement resulting from their FCA claim(s), *see id.* § 3730(d)(1)–(2).

3. United States *ex rel*. Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 (N.D. Cal. 1989) (internal quotation marks omitted) (quoting CONG. GLOBE, 37th Cong., 3d Sess. 956 (1863) (remarks of Sen. Howard)).

(7) falsifying records to avoid or reduce an obligation to pay.[4] In modern times, the FCA has been used to combat government contracting fraud across industries as disparate as defense, health care, for-profit higher education, and financial services.[5]

On June 16, 2016, the United States Supreme Court decided *Universal Health Services, Inc. v. United States ex rel. Escobar*, vacating the First Circuit's judgment and remanding for reconsideration of whether the relators had sufficiently pled a violation of the FCA.[6] Justice Thomas, writing for a unanimous Court, resolved a longstanding circuit split in holding that an implied false certification can form a valid basis for liability under the FCA.[7] Liability under the implied false certification theory attaches when a defendant, in submitting a claim, omits "violations of statutory, regulatory, or contractual requirements" that "render the defendant's representations misleading with respect to the goods or services provided."[8] The Court explained that omitted violations need not be express conditions of payment to be actionable, and that "[w]hether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality inquiry" required of all claims under the FCA.[9]

The Court went on to explain how lower courts should enforce the FCA's materiality requirement.[10] It rejected the government's view that any statutory, regulatory, or contractual violation is material "so long as the defendant knows the Government would be entitled to refuse payment were it aware of the violation."[11] Instead, the Court announced a "demanding" standard, which requires the government to corroborate its assertion of materiality rather than simply labeling a particular provision a condition of payment.[12] This standard was justified by the longstanding principle that the FCA is not "'an all-purpose antifraud statute' or a vehicle for punishing garden-variety breaches of contract or regulatory violations."[13]

Under *Escobar*, proof of materiality includes, but is not limited to, "evidence that the defendant knows that the Government consistently refuses to pay claims" in cases based on noncompliance with a particular requirement.[14]

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4. 31 U.S.C. § 3729(a)(1)(A)–(G).

5. Christopher L. Martin, Jr., Comment, *Reining in Lincoln's Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 CALIF. L. REV. 227, 229 (2013).

6. Universal Health Servs., Inc. v. United States *ex rel.* Escobar (*Escobar III*), 136 S. Ct. 1989, 1996 (2016), *remanded to* United States *ex rel.* Escobar v. Universal Health Servs., Inc. (*Escobar IV*), 842 F.3d 103 (1st Cir. 2016).

7. *Escobar III*, 136 S. Ct. at 1999. Implied false certification claims deal with *legally* false certifications (delivering goods or services while failing to comply with material ancillary regulations) as opposed to *factually* false certifications (accepting payment for goods or services that were never delivered or provided). *See infra* Part II.

8. *Escobar III*, 136 S. Ct. at 1999.

9. *Id.* at 2001.

10. *Id.* at 2002–04.

11. *Id.* at 2004.

12. *Id.* at 2003.

13. *Id*. (quoting Allison Engine Co., v. United States *ex rel.* Sanders, 553 U.S. 662, 672 (2008)).

14. *Id*.

The Court also provided examples of factual scenarios that would present "strong evidence" that a given requirement is *not* material, such as the payment of a claim in full despite actual knowledge of a violation, or the regular payment of a particular type of claim in full, despite actual knowledge of violations and the absence of any signal that the government intends to stop paying such claims.[15] In a footnote, the Court rejected the idea that materiality is too fact-intensive to be decided on motions to dismiss or at summary judgment.[16]

But in resolving one circuit split, the Court has set the stage for new ones. *Escobar*'s focus on situations where the government has actual knowledge of an FCA violation has left several unanswered questions for the lower courts.[17] This Note focuses on whether, and to what extent, a defendant should be able to defeat a finding of materiality by showing that an agency continued to pay its claims despite actual knowledge of *allegations* of the defendant's noncompliance with ancillary requirements. While a standard allowing FCA claims to be defeated on such grounds would provide an easily administrable bright-line approach to materiality, this Note contends that a bright-line approach would be inconsistent with *Escobar*, the history and text of the FCA, and the balance of interests at stake in FCA litigation.

Instead, this Note proposes a flexible hybrid standard for reviewing false certification claims involving continued payment despite actual knowledge of allegations of a contractor's noncompliance, which combines the best elements of the circuits' divergent approaches in *Escobar*'s wake. First, the hybrid standard maintains that the government's decision to pay claims in the face of allegations of noncompliance should not, on its own, be sufficient to defeat a relator's allegations of materiality. Rather, the government's decision should create a rebuttable presumption against materiality, such that a relator, on a motion to dismiss or for summary judgment, should be required to show evidence that: (1) the agency's decision to pay was not a commentary on the merits of the allegations; (2) the agency has withheld payment on the basis of the violation(s) at issue in the past; or (3) the violation at issue is so central to the bargain that, even in the face of continued payment, no reasonable person could argue that the alleged violations, if true, would not be material.

This Note reaches this conclusion as follows. Subpart I.A provides an overview of the FCA and the history of the FCA's materiality requirement. Subpart I.B outlines the history of the *Escobar* case up to, and including, Supreme Court review. Part II considers the divergent approaches courts have taken in analyzing materiality post-*Escobar*, including what appears to be a split within the First Circuit.[18] Finally, Part III recommends the flexible hybrid

15. *Id.* at 2003–04.

16. *Id.* at 2004 n.6 ("We reject [the] assertion that materiality is too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment.").

17. *See* Brian Tully McLaughlin & Jason M. Crawford, *Materiality Rules!* Escobar *Changes the Game*, GOV'T CONTRACTOR, May 10, 2017, ¶ 135, at 1.

18. *Compare* United States *ex rel.* Escobar v. Universal Health Servs., Inc. (*Escobar IV*), 842 F.3d 103, 112 (1st Cir. 2016) ("[M]ere awareness of allegations concerning noncompliance with regulations is different

standard, arguing that legal, historical, and practical considerations weigh in favor of such a standard.

I. THE FALSE CLAIMS ACT

The FCA, sometimes known as Lincoln's Law, was enacted in 1863 to stop the "massive frauds perpetrated by large contractors during the Civil War."[19] Such frauds included substituting sand for gunpowder, rye for coffee, or "spavined beasts and dying donkeys" for healthy horses and mules.[20] Since then, the FCA has "evolved into a powerful civil weapon against fraud" in realms such as federal health care programs.[21] The FCA primarily imposes liability to the United States on one who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval,"[22] as well as one who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[23] The FCA's knowledge requirement may be satisfied by actual knowledge of falsity, as well as deliberate ignorance or reckless disregard.[24] FCA violations occurring after February 3, 2017 incur civil penalties from $10,957 to $21,916 per claim, plus treble damages.[25]

As stated, the FCA's *qui tam* provision allows private parties to bring claims on behalf of the United States.[26] Successful plaintiffs may recover between fifteen to twenty-five percent of the proceeds if the United States intervenes, or twenty-five to thirty percent should the United States decline.[27] Claims must be brought within six years of the violation, or within three years of the date when facts material to the claim are known, or reasonably should have been known, by the United States.[28] Actions under the FCA generally fall into two categories: (1) factually false claims, or claims for goods not actually rendered; and (2) legally false claims, or false certifications, where contractors falsely affirm their compliance with the terms of a contract, statute, or regulation in the process of rendering goods and services.[29] The implied certification theory

from knowledge of actual noncompliance."), *with* D'Agostino v. EV3, Inc., 845 F.3d 1, 7 (1st Cir. 2016) ("The fact that CMS has not denied reimbursement for Onyx in the wake of D'Agostino's allegations casts serious doubt on the materiality of the fraudulent representations that D'Agostino alleges.").

19. United States v. Bornstein, 423 U.S. 303, 309 (1976).

20. United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 (N.D. Cal. 1989) (internal quotation marks omitted) (quoting Robert Tomes, *The Fortunes of War*, 29 HARPER'S MONTHLY MAG. 227, 228 (1864)).

21. Joan H. Krause, *Holes in the* Triple Canopy*: What the Fourth Circuit Got Wrong*, 68 S.C. L. REV. 845, 848 (2017).

22. 31 U.S.C. § 3729(a)(1)(A) (2012).

23. *Id.* § 3729(a)(1)(B).

24. *Id.* § 3729(b)(1).

25. 28 C.F.R. § 85.5 (2018).

26. 31 U.S.C. § 3730(b).

27. *Id.* § 3730(d).

28. *Id.* § 3731(b).

29. *See* Krause, *supra* note 21, at 848–49; *see also* United States v. Krizek, 859 F. Supp. 5, 7 (D.D.C. 1994) (example of a factually false claim); United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1215–17 (10th Cir. 2008) (example of a false certification claim).

extends the FCA's reach from outright false statements of compliance to "potentially any failure to comply with the larger universe of federal program rules, even if they are not explicitly reflected in any compliance statement."[30] Thus, a contractor can violate the FCA by knowingly submitting a claim for payment while in violation of such provisions, absent any affirmative misstatement, unless the contractor explicitly discloses the violation.[31]

A. MATERIALITY UNDER THE FALSE CLAIMS ACT

The FCA is meant to reach only material frauds against the government.[32] But until the expansion of *qui tam* enforcement in 1986,[33] few cases expressly discussed materiality under the FCA, because most cases dealt with factually false claims, rather than the legally false claims contemplated in false certification actions.[34] After the 1986 amendments to the FCA, materiality issues began to arise in the eighty percent of FCA cases in which the government did not intervene.[35] These cases generally dealt with claims of legal falsity, in which goods and services were delivered, but relators argued that alleged ancillary violations still rendered the claims false.[36] Materiality was not expressly stated as a requirement under the FCA until Congress enacted the Fraud Enforcement and Recovery Act of 2009 (FERA), which defines materiality as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[37] But as Professor Krause notes, the FERA materiality standard applies only to false records claims under 31 U.S.C. § 3729(a)(1)(B), and not false or fraudulent claims under § 3729(a)(1)(A), the provision under which implied false certification claims are brought.[38] So the statute's text on its own does not appear to require materiality for either legally or factually false claims.[39]

Prior to FERA's enactment, courts were divided as to what standard of materiality was required under the FCA. Some applied an outcome materiality standard, which required a showing that the alleged actions had either the

30. Krause, *supra* note 21, at 849.

31. Martin, *supra* note 5, at 230–31.

32. John T. Boese, *The Past, Present, and Future of "Materiality" Under the False Claims Act*, 3 ST. LOUIS U. J. HEALTH L. & POL'Y 291, 295 (2010); United States v. McNinch, 356 U.S. 595, 599 (1958).

33. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3155–57 (codified as amended at 31 U.S.C. § 3730(c)–(g) (2012)).

34. Boese, *supra* note 32, at 295; *see also McNinch*, 356 U.S. at 597; United States v. Hibbs, 568 F.2d 347, 351 (3d Cir. 1977); Woodbury v. United States, 232 F. Supp. 49, 52 (D. Or. 1964).

35. Boese, *supra* note 32, at 297.

36. *Id*.; *see also* United States *ex rel*. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997).

37. Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4(a)(1), 123 Stat. 1617, 1623 (codified as amended at 31 U.S.C. § 3729(a)(1)(B) (2012)).

38. *See* Krause, *supra* note 21, at 851 ("However, implied certification cases arise instead under the basic false claims prohibition in § 3729(a)(1)(A) . . . .").

39. *See id.* ("As a purely textual matter, [], it would appear that the statute does not require materiality for a basic false claim, regardless of whether that falsity is 'legal' or 'factual' in nature.").

purpose or effect of causing the United States to pay money it was not obligated to pay, or that such actions intentionally deprived the United States of money it was owed.[40] Others applied a less-stringent claim materiality standard, which asked whether the alleged statements had the potential to influence the government's decisions.[41] FERA's passage was interpreted by courts to resolve this debate in favor of claim materiality.[42] Its provisions were largely based on Department of Justice (DOJ) proposals to amend the FCA,[43] which ignored or often opposed amendments put forward by *qui tam* relator lobbying groups.[44] While FERA provided a definition of materiality, courts diverged in their application of that definition almost immediately,[45] presaging the landscape the Supreme Court confronted in *Escobar*.

B. THE *ESCOBAR* "CLARIFICATION": NOTHING IS DISPOSITIVE

Escobar concerned the death of Yarushka Rivera, a seventeen-year-old girl who died while under the care of Arbour Counseling Services ("Arbour").[46] Rivera had been referred to Arbour for counseling due to behavioral issues in middle school.[47] A nurse practitioner prescribed her an anti-seizure medication, which doubled as an off-label treatment for bipolar disorder.[48] Rivera ceased taking the medication after suffering an adverse reaction, and had a seizure less than a week later, despite having no prior history of seizures.[49] Five months later, Rivera suffered another seizure and died.[50] Rivera's parents brought an FCA *qui tam* action against Universal Health Services ("Universal Health") after learning that she had been treated by unlicensed and unsupervised personnel while at Arbour, in violation of Massachusetts state regulations.[51] Rivera's parents alleged that Universal Health, acting through Arbour, defrauded Medicaid by

40. *See, e.g.*, United States *ex rel*. A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc., 400 F.3d 428, 445 (6th Cir. 2005).

41. *See, e.g.*, United States *ex rel*. Longhi v. Lithium Power Techs., Inc., 575 F.3d 458, 470 (5th Cir. 2009).

42. *See id.* ("If Congress intended materiality to be defined under the more narrow outcome materiality standard, it had ample opportunity to adopt the outcome materiality standard in FERA.").

43. Boese, *supra* note 32, at 302 ("The DOJ proposals, however, became the basis of the 2009 amendments to the FCA . . . .").

44. *Id*. at 301.

45. *See id.* at 302. There are cases where, even after FERA, courts continue to use the "prerequisite for payment standard," rather than FERA's "capable of influencing" standard. *Compare* United States *ex rel*. Longhi v. United States, 575 F.3d 458, 570 (5th Cir. 2009) (using the "capable of influencing" test to *qui tam* suit), *with* United States *ex rel*. Bauchwitz v. Holloman, No. 04-2892, 2009 WL 4362819, at *13 (E.D. Pa. Dec. 1, 2009) (applying the "prerequisite for payment standard"); United States *ex rel.* Dillahunty v. Chromalloy Okla., No. CIV-08-944-L, 2009 WL 3837294, at *4 (W.D. Okla. Nov. 16, 2009) (same).

46. United States *ex rel*. Escobar v. Universal Health Servs., Inc. (*Escobar I*), No. 11-11170-DPW, 2014 WL 1271757, at *2 (D. Mass. Mar. 26, 2014), *aff'd in part, rev'd in part*, United States *ex rel*. Escobar v. Universal Health Servs., Inc. (*Escobar II*), 780 F.3d 504 (1st Cir. 2015), *vacated sub nom.* Universal Health Servs. v. United States *ex rel.* Escobar (*Escobar III*), 136 S. Ct. 1989 (2016).

47. *Escobar I*, 2014 WL 1271757, at *2.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Escobar III*, 136 S. Ct. at 1993.

submitting claims that failed to disclose these violations of state regulations, as the program would not have reimbursed those claims had it known the claims were for mental health services performed by unlicensed and unsupervised staff.[52] The United States declined to intervene.[53]

Universal Health moved to dismiss the complaint for failure to state a claim, arguing that none of the regulations Arbour violated were a condition of payment.[54] While First Circuit precedent had previously recognized the implied false certification theory,[55] the district court ruled in favor of Universal Health.[56] In doing so, the district court distinguished between conditions on participation in Medicaid, and conditions in payment, holding that only the latter could give rise to an FCA claim.[57]

The First Circuit reversed on appeal, finding the payment/participation distinction to be irrelevant.[58] The court took a "broad view of what may constitute a false or fraudulent statement" under the FCA, asking "simply whether the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material condition of prepayment."[59] Under this standard, the court found that the relators had pleaded sufficient allegations to survive a motion to dismiss.[60] Analysis of the materiality of the alleged violations was brief: "The express and absolute language of the regulation in question, in conjunction with repeated references to supervision throughout the regulatory scheme, 'constitute dispositive evidence of materiality.'"[61]

The Supreme Court unanimously rejected the First Circuit's formulation of materiality under the FCA.[62] Justice Thomas explained that, under such an approach, were the government to require contractors to comply with the entirety of the U.S. Code and Code of Federal Relations, "failing to mention noncompliance with any of those requirements would always be material," regardless of whether the government routinely pays claims despite knowledge of noncompliance.[63] Instead, the Court looked to the language of 31 U.S.C.

52. *Id.* at 1998.

53. *Id.*

54. *Escobar I*, No. 11-11170-DPW, 2014 WL 1271757, at *1, *6–12 (D. Mass. Mar. 26, 2014), *aff'd in part, rev'd in part*, United States *ex rel.* Escobar v. Universal Health Servs., Inc. (*Escobar II*), 780 F.3d 504 (1st Cir. 2015), *vacated sub nom.* Universal Health Servs. v. United States *ex rel.* Escobar (*Escobar III*), 136 S. Ct. 1989 (2016).

55. *See, e.g.*, United States *ex rel*. Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 385–87 (1st Cir. 2011).

56. *Escobar I*, 2014 WL 1271757, at *13.

57. *Id.* at *6; *see also* New York v. Amgen Inc., 652 F.3d 103, 110 (1st Cir. 2011)).

58. *Escobar II*, 780 F.3d at 513 ("As in *Amgen*, the provisions at issue in this case clearly impose conditions of payment."), *vacated*, *Escobar III*, 136 S. Ct. 1989.

59. *Id.* at 512 (internal quotation marks omitted) (quoting United States *ex rel.* Jones v. Brigham & Women's Hosp., 678 F.3d 72, 85 (1st Cir. 2012)).

60. *Id*. at 514.

61. *Id*. at 514 (quoting United States *ex rel*. Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 394 (1st Cir. 2011)).

62. *See supra* text accompanying note 4.

63. *Escobar III*, 136 S. Ct. at 2004.

§ 3729(b)(4), which defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[64] The Court found this definition similar to language applied to other federal fraud statutes, and noted that such materiality requirements descend from "common-law antecedents."[65] The Court declined to decide whether the materiality requirement was governed by the language of § 3729(b)(4) or common law principles, reasoning that "[u]nder any understanding of the concept, materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'"[66]

As Professor Krause notes, the Court's description of a "demanding" materiality standard under the FCA elides the fact that the "natural tendency to influence" language had previously been interpreted as "signifying a relatively low threshold for implied certification cases."[67] *Escobar* also seems to have revisited a previously resolved debate on whether claim or outcome materiality was required under the FCA. Lower courts had previously assumed that FERA had adopted the less stringent claim materiality threshold,[68] but the Supreme Court instead adopted a standard that "strongly resembled the more stringent 'outcome materiality' approach."[69] The Court's elision of these inconsistencies may explain, at least in part, the striking divergence in lower courts' application of *Escobar*.

II. THE POST-*ESCOBAR III* CIRCUIT SPLITS

In the wake of *Escobar*, lower courts have applied several divergent frameworks for analyzing materiality under the FCA. The first of these is an "allegations are not enough" standard, which seems to require evidence that the government had actual knowledge of *violations*, and decided to pay claims despite that knowledge, to defeat a finding of materiality.[70] A second standard treats the government's decision to continue payment in the face of *allegations* of noncompliance as dispositive evidence against materiality, defeating a relator's case.[71] A third standard looks to whether the falsehood in question *could have* influenced the government's decision to pay; in such cases, the government's decision to pay acts as "strong" but not dispositive evidence against materiality.[72] A fourth and final standard views evidence of the

64. 31 U.S.C. § 3729(b)(4) (2012).

65. *Escobar III*, 136 S. Ct. at 2002 (internal quotation marks omitted) (quoting Kungys v. United States, 485 U.S. 759, 769 (1988).

66. *Id.* (second alteration in original) (quoting 26 RICHARD A. LORD, WILLISTON ON CONTRACTS § 69:12, at 549 (4th ed. 2003)).

67. Krause, *supra* note 21, at 856.

68. *Id.* (citing United States *ex rel*. Longhi v. Lithium Power Techs., Inc., 575 F.3d 458, 470 (5th Cir. 2009 (explaining that Congress rejected "the more narrow outcome materiality standard")).

69. *Id*.

70. *See infra* Subpart II.A.

71. *See infra* Subpart II.B.

72. *See infra* Subpart II.C.

government's continued payment despite *allegations* of noncompliance as creating a rebuttable presumption against materiality.[73]

A. THE "ALLEGATIONS ARE NOT ENOUGH" STANDARD

On remand, the First Circuit analyzed the materiality of Arbour's alleged noncompliance with state regulations under the "demanding" standard promulgated by the Court.[74] Universal Health's primary argument on remand was that the government's continued payment of claims, despite "knowledge that [Universal Health] was not in compliance with the applicable regulations" constituted strong evidence against materiality, but the First Circuit disagreed for two reasons.[75]

First, the court found no evidence that the government had actual knowledge of the extent of the violations alleged until well after litigation had commenced.[76] Even assuming that state regulators had notice of complaints against Arbour prior to the litigation, "mere awareness of allegations concerning noncompliance with regulations is different from knowledge of actual noncompliance."[77] The court also noted the absence of evidence showing that the entity that paid the Medicaid claims "had actual knowledge of any of the[] allegations (much less their veracity)" as it paid the claims out claims.[78] Accordingly, it declined to decide whether actual knowledge of the violations would have been sufficiently strong evidence against materiality to support dismissal.[79]

Second, the First Circuit refused to require that Rivera's parents "learn, and then to allege, the government's payment practices for claims unrelated to services rendered to [Yarushka Rivera] in order to establish the government's views on the materiality of the violation" at the motion to dismiss stage.[80] The court noted that federal and state privacy regulations in healthcare would make the possibility of relators acquiring such information "highly questionable."[81] Thus, the First Circuit's reaction to *Escobar* was to construe its requirement to consider the actual conduct of the government as narrowly as possible. The First Circuit's concern that Rivera's parents would have been unduly burdened by a requirement that they provide evidence of past payment practices to survive a motion to dismiss may have informed this relator-friendly standard.

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73. *See infra* Subpart II.D.

74. *Escobar IV*, 842 F.3d 103, 109–12 (1st Cir. 2016).

75. *Id.* at 111–12.

76. *Id.* at 112 ("It would appear that [the Department of Public Health] did not conclusively discover the extent of the violations until March of 2012, well after the commencement of the litigation.").

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

B. THE "GOVERNMENT CONTINUES TO PAY" STANDARD

Just one month after the First Circuit decided *Escobar* for the second time, it rendered a seemingly inconsistent decision in *D'Agostino v. EV3, Inc.*[82] There, the court found that the Centers for Medicare and Medicaid Services' (CMS) decision to continue reimbursing the defendant "in the wake of [the relators'] allegations casts serious doubt on the materiality of the fraudulent representations" alleged.[83] While the court's discussion of materiality was limited to this one statement, its subsequent discussion of causation provides useful background. The court noted that, in the six years since the relators had commenced the action, the Food and Drug Administration (FDA) had not demanded the recall or relabeling of the drug that was at issue in the case.[84] The failure to do so, in the face of relators' allegations, precluded a finding that the FDA's approval was fraudulently obtained.[85] To hold otherwise would, in the court's view, allow juries to destroy the value of FDA approval and effectively mandate that products subject to such allegations be withdrawn from the market, even if the FDA found such action unnecessary.[86] This would transform the FCA from a tool to protect the United States from paying fraudulent claims into a vehicle for second-guessing agency judgments.[87] The court also considered the practical difficulties that would prevent a relator from proving that a fraudulent representation was the cause of the FDA's approval in "the absence of some official agency action confirming its position."[88] The D.C. Circuit, along with the Third, Seventh, and Ninth Circuits, have adopted materiality standards similar to *D'Agostino*'s.[89]

C. THE "REASONABLE PERSON" STANDARD

Other circuits have applied what appears to be a "reasonable person" standard.[90] In *United States v. Triple Canopy, Inc.*, the Fourth Circuit considered

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82. 845 F.3d 1, 7 (1st Cir. 2016).

83. *Id.* (citing *Escobar III*, 136 S. Ct. 1989, 2003–04 (2016)).

84. *D'Agostino*, 845 F.3d at 8 (noting the FDA's ability to impose post-approval requirements, 21 C.F.R. § 814.82(a) (2018), to suspend approval temporarily, *id.* § 814.47(a), and to withdraw approval entirely, *id.* § 814.46(a)).

85. *Id.*

86. *Id.*

87. *Id.*; *see also* United States *ex rel*. D'Agostino v. EV3, Inc., 153 F. Supp. 3d 519, 539 (D. Mass. 2015) ("Surely, where the FDA was authorized to render the expert decision on . . . use and labeling, it, and not some jury or judge, is best suited to determine the factual issues and what their effect would have been on its original conclusions." (alteration in original) (internal quotation marks omitted) (quoting King v. Collagen Corp., 983 F.2d 1130, 1140 (1st Cir. 1993) (Aldrich, J., concurring)).

88. *Id*. at 9.

89. *See, e.g.*, United States *ex rel*. Petratos v. Genentech Inc., 855 F.3d 481, 492–93 (3d Cir. 2017); United States *ex rel*. McBride v. Halliburton Co., 848 F.3d 1027, 1032 (D.C. Cir. 2017); United States *ex rel*. Nargol v. DePuy Orthopaedics, Inc., 865 F.3d 29, 35 (1st Cir. 2017); United States v. Sanford-Brown, Ltd., 840 F.3d 445, 447–48 (7th Cir. 2016).

90. *See, e.g.*, United States v. Triple Canopy, Inc., 857 F.3d 174, 175 (4th Cir. 2017); United States *ex rel*. Miller v. Weston Educ., Inc., 840 F.3d 494, 504 (8th Cir. 2016).

an FCA claim against security contractors whose guards were unable to satisfy contractual marksmanship requirements—requirements that the contractors did not have to certify their compliance with.[91] Prior to *Escobar*, the Fourth Circuit in *Triple Canopy* analyzed materiality by determining whether the falsehood was "capable of influencing the Government's decision to pay."[92] It found that materiality was sufficiently alleged based on "common sense and [the defendant's] own actions in covering up the noncompliance."[93]

On remand from the Supreme Court, the Fourth Circuit found no reason to alter its conclusion, reasoning that the standard in *Escobar* was, if anything, less stringent than its own.[94] The court analogized to the scienter discussion in *Escobar*, which laid out a hypothetical government contract for guns that failed to specify that the guns ordered must actually shoot.[95] In the Supreme Court's view, a defendant who knew that the government rescinds contracts for guns that cannot shoot, yet still accepted payment for nonfunctioning guns, would have known that its omission was material.[96]

Turning to the violations at issue in *Triple Canopy*, the Fourth Circuit found that "[g]uns that do not shoot are as material to the Government's decision to pay as guards that cannot shoot straight."[97] The court also looked to the government's decision not to renew its contract, and its immediate intervention in the litigation, both of which constituted evidence that the violations were material to the government's decision to pay.[98] In addition to the Fourth Circuit, the Eighth Circuit has also applied what appears to be a "reasonable person" standard in analyzing materiality post-*Escobar*.[99]

D. THE BURDEN-SHIFTING STANDARD

The Fifth Circuit has articulated a fourth approach to the materiality analysis post-*Escobar*, or at least a refinement of the "reasonable person" standard.[100] In *Abbott v. BP Exploration & Production, Inc.*, the court affirmed a U.S. district court's grant of summary judgment to the defendant because the Department of Interior (DOI), after a "substantial investigation" into alleged regulatory violations by the defendant, had allowed the defendant to continue drilling operations on the DOI's behalf.[101] The court found that this decision

91. *Triple Canopy*, 857 F.3d at 175.
92. *Id.* at 178.
93. *Id.*
94. *Id.* at 178 n.4.
95. *Id.* at 179.
96. Universal Health Servs., Inc. v. United States *ex rel.* Escobar (*Escobar III*), 136 S. Ct. 1989, 2001–02 (2016).
97. *Triple Canopy*, 857 F.3d at 179.
98. *Id.*
99. *See, e.g.*, United States *ex rel.* Miller v. Weston Educ., Inc., 840 F.3d 494, 504 (8th Cir. 2016).
100. Abbott v. BP Expl. & Prod., Inc., 851 F.3d 384, 388 (5th Cir. 2017).
101. *Id.* at 388. The allegations against defendant were that defendant lacked the "necessary documentation" for their drilling platform, and that many of the documents defendant did have were not approved by engineers, as required by regulations. *Id.* at 386.

represented "strong evidence" that the regulatory requirements at issue were not material under the *Escobar* standard, but wrote further to clarify that the "strong facts" of DOI's decision had not been rebutted by any evidence proffered by the plaintiffs, which supported the court's finding that no genuine dispute of material fact existed as to materiality.[102] Thus, the Fifth Circuit declined to treat the government's decision not to take action against the defendant as dispositive, leaving open the possibility of a relator showing that a violation could be material, even in the face of the government's continued payment.

III. THE HYBRID STANDARD PROPOSAL

Given the striking divergence in approaches taken by the circuits post-*Escobar*, it seems necessary for the Supreme Court to step in and promulgate a uniform standard. No standard currently in use fully embodies the principles set forth in *Escobar*, so this Note offers a solution in the form of a hybrid standard which incorporates elements of the "Reasonable Person," "Government Continues to Pay," and "Burden-Shifting" standards. This hybrid standard comports with *Escobar* as well as the history and text of the FCA, and also strives to achieve a balance between the interests at stake in FCA actions. But given the relative infancy of these standards, especially the Fifth Circuit's burden-shifting approach, and the lack of evidence with which to analyze the rebuttable presumption,[103] how would such a standard operate in practice?

A. THE HYBRID STANDARD IN ACTION

Under the hybrid standard, a defendant to an FCA action, at the motion to dismiss or summary judgment stage, would be required to make a threshold showing that the government continued to pay the defendant, despite knowledge of allegations of noncompliance. Knowledge of such allegations of noncompliance could be demonstrated by: (1) the complaint itself;[104] (2) reports of allegations made directly to the paying agency prior to or concurrent with FCA litigation;[105] or (3) reports of a government investigation into the defendant that relates to the claims at issue in the litigation. Upon such a showing, relators would then be required to allege particularized facts, given the heightened requirements of Federal Rule of Civil Procedure 9(b),[106] to rebut the

102. *Id.* at 388.

103. *Id.*

104. As the government has sixty days to elect to intervene in an FCA *qui tam* action before it proceeds, 31 U.S.C. § 3730(b)(2) (2012), by the time the parties are at the motion to dismiss or summary judgment stage, the agency in charge of making payment decisions should have received notice of the allegations and come to a decision on how to proceed.

105. *See, e.g.*, *Escobar I*, No. 11-11170-DPW, 2014 WL 1271757, at *3 (D. Mass. Mar. 26, 2014) ("Plaintiffs filed complaints with a variety of agencies including . . . ."), *aff'd in part, rev'd in part, Escobar II*, 780 F.3d 504 (1st Cir. 2015), *vacated*, *Escobar III*, 136 S. Ct. 1989 (2016).

106. FED. R. CIV. P. 9(b) (requiring particularized statements of fact as to the circumstances constituting an alleged fraud); *see also* United States *ex rel*. Clausen v. Lab. Corp. of Am., Inc., 290 F.3d 1301, 1308 n.14 (11th Cir. 2002) (citing cases applying Rule 9(b) to actions under the FCA).

presumption against materiality created by the government's continued payment. Relators may defeat this presumption with factual allegations or evidence indicating that: (1) the agency's decision to continue to pay was not a commentary on the materiality of the noncompliance at issue; (2) the agency has previously withheld payment because of noncompliance with the requirement(s) at issue, with the defendant or another similar contractor; or (3) the requirement at issue is so central to the bargain that, even in the face of continued payment, no reasonable person would argue that the alleged violations, if true, were not material.

The *Abbott* case provides an example of this standard's application.[107] *Abbott* concerned an oil platform owned by British Petroleum (BP) which, according to the relators, either lacked required documents or, where such documents were available, lacked approval by engineers as required by regulations.[108] The court focused on a DOI investigation into the relator's allegations, which culminated in a report that expressly rejected the allegations and declared BP in compliance with the applicable regulations.[109] Under the hybrid standard, the defendant could cite to the decision not to suspend its operations over the course of the investigation to make the threshold showing that gives rise to the rebuttable presumption against materiality. The relators would then have to rebut the presumption to sustain their claim(s).

First, the relators could attempt to rebut the presumption by showing that the agency's decision was not motivated by a commentary on the merits. Explained more fully below, the animating principle here is that government agencies have limited resources, which they have great discretion to allocate as they see fit.[110] But beyond simple discretion, there remains the possibility of extenuating circumstances necessitating continued payment.

Suppose the facts of the *Abbott* case arose during a critical national oil shortage. The government might reasonably decide to continue paying in the face of BP's noncompliance if the nation's need for oil outweighs the government's interest in preserving a potential FCA claim. Such circumstances would negate the otherwise reasonable inference that continuing to pay despite regulatory noncompliance demonstrates the government's lack of concern with the failure, thereby rebutting the presumption against materiality. Similarly, a showing by the relators that the government has previously suspended operations of other oil platforms due to similar violations would allow a court to infer that the DOI regularly finds such violations material.

Finally, relators could attempt to argue that the violation(s) at issue in a given case are so central to the government's bargain, that no reasonable person

107. *See supra* text accompanying notes 67–69.

108. *Abbott*, 851 F.3d at 386.

109. *Id.* at 388.

110. *See infra* text accompanying notes 118–122; *see also* Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

would believe that such violation(s) are not material to the government's decision to pay. For example, consider *Escobar*'s hypothetical involving guns that cannot shoot.[111] Because a reasonable person "would realize the imperative of a functioning firearm," the Court opined that a defendant's failure to recognize the materiality of a gun's ability to shoot would amount to deliberate ignorance or reckless disregard, even where the government failed to spell such a requirement out.[112] Returning to *Abbott*, the deficiencies alleged in BP's documentation included missing stamps and drawings not specifically marked as "As-Built."[113] Whatever the significance of these deficiencies, they are unlikely to be of the same magnitude as guns that do not shoot.

Consider instead a scenario where the deficiencies in BP's documentation related to whether the oil platform's construction comported with federal regulations aimed at preventing an explosion. Given BP's recent history with oil platform explosions, and the billions of dollars paid to restore the resulting damage,[114] such deficiencies would necessarily be central to the government's bargain in certifying an oil platform. Even if the government never specified that the oil platform be built to minimize the likelihood of an explosion, BP's failure to do so, in contravention of existing federal regulations, should serve to rebut the presumption against materiality.

Of course, not all cases will be as obvious as guns that do not shoot or oil platforms that explode. Sometimes a court will be called upon to determine the materiality of adding sodium hexametaphosphate[115] directly to molten cheese, in violation of FDA identity regulations which enumerate the ingredients that may be used to make mozzarella cheese.[116] In *United States ex rel. Simpson v. Leprino Foods Dairy Products Co.*, an FDA field inspector observed violations of the FDA identity regulations, prompting the U.S. Department of Agriculture (USDA) to issue a statement of intent to revoke the C17 status of the defendant's plant,[117] unless the defendant either stopped using sodium hexametaphosphate in its cheese, or stopped labeling its cheese as mozzarella.[118] But the USDA,

111. *See Escobar III*, 136 S. Ct. 1989 (2016).

112. *Id.* at 2001.

113. *Abbott*, 851 F.3d at 388.

114. *Deepwater Horizon Oil Spill*, NAT'L OCEANIC & ATMOSPHERIC ADMIN.: OFF. RESPONSE & RESTORATION (Sept. 28, 2018, 3:34 PM), https://response.restoration.noaa.gov/oil-and-chemical-spills/significant-incidents/deepwater-horizon-oil-spill.

115. Generally recognized as safe, 21 C.F.R. § 182.6760 (2018), sodium hexametaphosphate is a sequestrant, or a chemical compound designed to bind dissolved metal salts. *Sequestrant—an Overview*, SCIENCEDIRECT, https://www.sciencedirect.com/topics/agricultural-and-biological-sciences/sequestrant (last visited Jan. 19, 2019).

116. United States *ex rel.* Simpson v. Leprino Foods Dairy Prods. Co., No. 16-cv-00268-CMA-NYW, 2018 WL 1375792 (D. Colo. Mar. 19, 2018).

117. In order to bid for mozzarella cheese contracts with the USDA, vendors must meet the FDA requirement that their "product be produced at a plant with the C17 designation." United States *ex rel*. Simpson v. Leprino Foods Dairy Prods. Co., No. 16–cv–00268–CMA–NYW, 2018 WL 3062004, at *1 (D. Colo. Jan. 11, 2018), *recommendation aff'd in part, adopted in part*, No. 16-cv-00268-CMA-NYW, 2018 WL 1375792 (D. Colo. Mar. 19, 2018).

118. *Id.* at *10–11.

despite its warning, did not revoke the defendant's C17 status, and later executed purchase agreements with the defendant for mozzarella cheese, even as the defendant continued to use sodium hexametaphosphate while labeling its cheese as mozzarella.[119]

Though the *Leprino Foods* court dismissed the complaint for failing to comport with the particularity requirements of Federal Rule of Civil Procedure 9(b),[120] the facts of the case are useful for demonstrating the flexibility of the hybrid standard. Assuming the relators could draft a complaint sufficient to survive Rule 9(b), the hybrid standard would allow them to demonstrate materiality, even in the face of the USDA executing purchase agreements after discovering the defendant's noncompliance, by showing, for instance, that the USDA has revoked C17 status on this basis in the past.

Another potential basis for demonstrating materiality would be a budding trade war with Italy, in which the USDA felt it necessary to buy from noncompliant U.S. producers to meet American demand for mozzarella cheese in the face of pricier Italian imports.[121] There, the USDA's decision not to revoke C17 status, and indeed buy from the defendant, would likely not be meant as a commentary on the merits of the relator's case. But without such circumstances, or some other compelling evidence, the *Leprino Foods* court would likely still find in favor of dismissal, even under the hybrid standard. Unlike some of the more rigid theories adopted by the circuits post-*Escobar*, the hybrid standard allows for peculiar facts to rebut circumstances that might otherwise tend to defeat a finding of materiality, while still providing a rigorous inquiry at the outset to weed out deficient cases.

B. THE HYBRID STANDARD CONFORMS WITH *ESCOBAR*

While the *Escobar* opinion did not directly contemplate the impact of government decisions to pay, despite allegations of noncompliance, the hybrid standard more closely conforms to *Escobar* than any of the other standards currently in use. *Escobar* makes it clear that the actions of the United States are relevant to the materiality inquiry. The Court expressly disagreed with the First Circuit's formulation, which looked solely to whether the defendant knew the government could lawfully withhold payment.[122] Thus, a pure reasonable person standard that looks only to the possibility that a violation would be material, where actual conduct demonstrates a violation's materiality, or lack thereof, would be inconsistent with *Escobar*.

Similarly, requiring the government's actual knowledge of the violations before considering government action, as the First Circuit appeared to require

119. *Id.* at *11.

120. *Id.* at *12–13.

121. Given the general safety of sodium hexametaphosphate, *see supra* note 115, it seems at least plausible that the USDA could make such a choice because of changing economics alone. If such noncompliance were to implicate consumer health concerns instead, such action by the USDA seems far less likely.

122. *Escobar III*, 136 S. Ct. 1989, 2004 (2016).

post-*Escobar*,[123] would run counter to the Court's view that materiality looks to the effect on both likely and actual behavior of the recipient of the misrepresentation.[124] If, for example, an agency receives notice of allegations of violations and declines to investigate, that decision would imply that the agency does not care about violations of that sort, or at least finds them less worthy of the agency's scarce resources than others.

But treating the agency's decision as dispositive without further inquiry, as courts applying the "Government Continues to Pay" standard appeared to do, would also contravene *Escobar*. The Court emphasized that none of the factors it outlined, including the government's decision to pay with actual knowledge of the alleged violations, were dispositive to the materiality inquiry.[125] If actual knowledge of violations would be insufficient for continued payment to be dispositive evidence against materiality, it seems illogical to find the mere knowledge of allegations dispositive. Requiring the United States to decide on payment, before any inquiry into the veracity of the allegations, would force an awkward choice between protecting continuity of contract and protecting the government's right to a remedy under the FCA should the allegations prove true. Such a regime would allow relators to potentially destabilize the businesses of government contractors simply by filing a complaint. As the FCA was enacted to combat fraud, not the business of government contractors in general, such a result would be inappropriate.

A standard that looks to whether a decision operated as a commentary on the merits is self-evidently malleable. But any attempt at creating bright lines or rigid standards for materiality under the FCA would ignore the Court's refusal to deem anything dispositive in the materiality inquiry. The hybrid standard strikes a middle ground that realizes both the importance *Escobar* places on the government's actual conduct, as well as the Court's unwillingness to treat any factor as dispositive in analyzing materiality. The need for a balanced approach is even more important when understood in the context of the FCA's history and purpose.

C. THE HYBRID STANDARD COMPORTS WITH THE HISTORY AND PURPOSE OF THE FCA

The proposed hybrid standard would also comport with the purpose of the FCA, which was expressly adopted to stop the "plundering of the public treasury" that occurred during the Civil War.[126] Congress, in an 1861

123. *Escobar IV*, 842 F.3d at 112 ("Because we find no evidence that MassHealth had actual knowledge of the violations at the time it paid the claims at issue, we need not decide whether actual knowledge of the violations would in fact be sufficiently strong evidence that the violations were not material to the government's payment decision so as to support a motion to dismiss in this case.").

124. *Escobar III*, 136 S. Ct. at 2002.

125. *See id.* at 2002–04 ("Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.").

126. United States v. McNinch, 356 U.S. 595, 599 (1958).

investigation, uncovered illegal and fraudulent activities that demonstrated how government contracting officials, through both negligence and outright collusion, bore significant blame for the widespread frauds perpetrated by contractors during the Civil War.[127] The Senate, in its expansion of the FCA in 1986, reported that most fraud goes undetected because government agencies fail to hold contractors accountable.[128] A U.S. Merit Systems Protection Board study found that sixty-nine percent of government employees with knowledge of fraud failed to report the information; the most frequently cited reason for this was a belief that nothing would be done to correct the fraud.[129]

Congress recognized the sordid history of contracting officials being complicit in frauds against the United States, as well as their failure to act on their knowledge of such frauds. It would be antithetical to the FCA's purpose to vest contracting officials with the power to defeat potentially valid claims at the stroke of a pen, accidentally or otherwise. The hybrid standard addresses this issue by providing relators with a way to defeat the presumption created by potentially negligent or collusive decision-making on the part of contracting officials, while maintaining a "demanding" materiality standard that shields defendants from non-meritorious claims.

Setting aside potential misconduct or negligence by contracting officials, there are many reasons, wholly unrelated to the merits, that might inform the decision to continue paying claims in the face of allegations of noncompliance with material conditions. The DOJ, in considering whether to intervene in a given action, must consider the impacts of the case on its limited resources, as well as the social and private interests such cases might raise.[130] Likely for this reason, some courts have expressly held that the DOJ's decision not to intervene will not, as a matter of law, operate as government commentary on the merits of a given case.[131] This principle seems appropriate, given that the FCA clearly contemplates the possibility of a *qui tam* action succeeding in the absence of government intervention.[132] If the government's decision not to intervene could, by itself, defeat the FCA's materiality requirement, such provisions would be rendered superfluous.

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127. United States *ex rel.* Marcus v. Hess, 127 F.2d 233, 236 (3d Cir. 1942) (citing 1 FRED ALBERT SHANNON, ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY: 1861–1865, at 56–58 (1928)), *rev'd on other grounds*, 317 U.S. 537 (1943).

128. S. REP. NO. 99-345, at 3 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5268.

129. *Id.* at 5.

130. Doan Phan, Comment, *Redefining Lincoln's Law: How to Shape the Theory of Implied Certifications Post-*Escobar, 13 J.L. ECON. & POL'Y 113, 134 (2017) (citing Michael Lawrence Kolis, *Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claim Amendments Act*, 7 ADMIN. L.J. AM. U. 409, 438 (1993); Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 SUP. CT. ECON. REV. 135, 154 (2006)).

131. *See, e.g.*, United States *ex rel*. Williams v. Bell Helicopter Textron, Inc., 417 F.3d 450, 455 (5th Cir. 2005); United States *ex rel*. Chandler v. Cook Cty., 277 F.3d 969, 974 n.5 (7th Cir. 2002).

132. *See* 31 U.S.C. § 3730(d)(2) (2012) (outlining the standards for payment of a relator bringing an action or settling a claim in which the government did not choose to proceed).

In a similar vein, contracting officials could be confronted with situations where maintaining contractual relations may outweigh concerns of potentially fraudulent claims, such as where the goods or services at issue are essential to the United States, or where terminating the contract could damage third parties, exposing the United States to liability.[133] In those circumstances, a rule treating the government's continued payment as dispositive against materiality could force contracting officials to choose between preserving the government's statutory right to an FCA claim, should the allegations of fraud be revealed to be something more, or protecting the government from litigation that might arise from refusing to pay. If contracting officials decide to err on the side of withholding payment to preserve claims, a seemingly defendant-friendly standard could operate to their detriment, as government contracts would become unstable things, subject to potential rescission whenever a complaint is filed. This necessarily supposes that contracting officials would even be aware of the potential legal effects of their decision-making. Is the worse regime one where officials are forced to balance these concerns in addition to their normal duties, or one where such officials operate in ignorance, preserving and destroying causes of action by accident alone?

The hybrid standard would relieve us of this undesirable dichotomy by rendering the contracting official's decision to pay despite knowledge of noncompliance prima facie evidence of non-materiality, rebuttable on a proper showing by the relator. Thus, the power of individual officials to facilitate fraud on the government, whether through ignorance, negligence, or collusion, will be curtailed, while preserving the integrity of government contracts and acknowledging the "strong, but not dispositive" effect that *Escobar* requires continued payment to have under the materiality inquiry.[134]

D. RELATORS HAVE THE TOOLS TO OVERCOME THE HYBRID STANDARD'S EVIDENTIARY HURDLES

When the United States is a party to an FCA action, relators may serve the government with requests for discovery, to determine how the government responded to allegations of noncompliance.[135] But while all FCA actions must be brought on behalf of the United States, the government is only a party to the action when it brings the action directly or, in the context of a *qui tam* action, when it intervenes.[136] Thus, a relator seeking discovery from the government may succeed only if the government decides to intervene in the action. This does not necessarily preclude a relator from obtaining the information necessary to satisfy the hybrid standard.

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133. Brief for United States as Amicus Curiae Supporting Affirmance at 15, United States *ex rel.* Harrison v. Westinghouse Savannah River Co., 352 F.3d 908 (4th Cir. 2003) (Nos. 02-2020, 02-2092) (citing United States v. Ehrlich, 643 F.2d 634, 639 (9th Cir. 1981)).

134. *Escobar III*, 136 S. Ct. 1989, 2003–04 (2016).

135. *See* FED. R. CIV. P. 34(a)(1).

136. United States *ex rel*. Eisenstein v. City of New York, 556 U.S. 928, 933 (2009).

First, the FCA provides that the government may issue civil investigative demands ("CIDs") on persons whom the government has reason to believe possesses information relevant to a claim.[137] CIDs may be issued up to, and until, government intervention, and empower the government to demand production of documents, testimony, and answers to interrogatories.[138] FERA enhanced the value of CIDs in two relevant ways: by allowing the Attorney General to delegate power to issue CIDs,[139] and by allowing the government to share with the relators any information obtained through CIDs, even when the government declines to intervene.[140] The government is incentivized to use CIDs aggressively, as the government's failure to intervene would preclude any later claims on the fraud alleged, as well as subsequent suits on the same claims.[141] Therefore, the government would be likely to issue CIDs that are responsive to the hybrid standard's demands. When the government declines to intervene, information obtained from CIDs would be passed on to the relators.

Relators may also attempt to subpoena agencies for nonprivileged information relevant to their claim(s).[142] Such subpoenas would necessarily be limited by the provisions governing privilege and undue burden,[143] as well as the agency's *Touhy* regulations, which provide the basis upon which a relator may request documents or information.[144] These regulations operate pursuant to a federal housekeeping statute which provides that the head of an executive department may prescribe regulations for the "custody, use and preservation of its records, papers, and property."[145] In *United States ex rel. Touhy v. Ragen*, the Supreme Court interpreted 5 U.S.C. § 301 to "permit agencies to promulgate regulations centralizing their processing of subpoenas."[146] *Touhy* regulations thus provide a method, subject to approval by an agency official, for relators to request documents and information from agencies when the government does not intervene.[147]

Relators may also look to the Freedom of Information Act (FOIA) as a potential vehicle for seeking agency information.[148] A relator seeking information on the materiality of a given provision in an agency's decision to pay more appropriately serves FOIA's purpose of "open[ing] agency action to

137. *See* 31 U.S.C. § 3733(a)(1).

138. Michael Lockman, Comment, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. CHI. L. REV. 1559, 1584 (2015).

139. *Id*. at 1584 n.138.

140. *Id*. at 1586.

141. *Id.* at 1585.

142. FED. R. CIV. P. 26(b)(1).

143. FED. R. CIV. P. 45(c)(3)(A)–(B); FED. R. CIV. P. 45(d)(2).

144. *See* United States *ex rel.* Touhy v. Ragen, 340 U.S. 462, 467 (1951) (upholding agency refusal to produce subpoenaed documents where Attorney General's order prohibited such production).

145. 5 U.S.C. § 301 (2012).

146. Daniel C. Taylor, Note, *Taking* Touhy *Too Far: Why It Is Improper for Federal Agencies to Unilaterally Convert Subpoenas into FOIA Requests*, 99 GEO. L.J. 1227, 1230 (2011).

147. *See id*. at 1230.

148. 5 U.S.C. § 552(a)(3).

the light of public scrutiny," unlike situations where litigants seek information on private citizens contained in government files, which the Supreme Court has expressly disfavored.[149] That said, FOIA requests are subject to much broader grounds for objection than subpoenas,[150] and federal agencies are not especially known for cooperating easily with FOIA requests. Further, FOIA requests may not yield information in a particularly timely manner,[151] especially given the Supreme Court's opinion that ongoing litigation does not demonstrate any special need for materials.[152] These concerns notwithstanding, FOIA requests are at least a potentially viable method for obtaining information necessary to FCA claims, so long as the information at issue is not normally privileged[153] or subject to a statutory exemption.[154]

The hybrid standard may increase the costs of litigating FCA claims, given that its focus on agency action, both in the past and in the wake of allegations of noncompliance, will likely require relators to obtain and sift through reams of agency documents to demonstrate materiality.[155] But outside of the "Government Continues to Pay" standard, all the post-*Escobar* approaches to materiality appear to place additional evidentiary burdens on the parties. And given the Court's clear command not to treat any factor as dispositive, the "Government Continues to Pay" standard is inappropriate. The hybrid standard works within *Escobar*'s framework to guide relators on what evidence they will need to defeat the presumption against materiality created by the government's continued payment after notice of allegations of noncompliance.

Even when the government declines to intervene, aggressive use of CIDs allows the government to assist *qui tam* relators in proceeding alone. Where CIDs are not enough, relators may avail themselves of an agency's *Touhy* regulations. Following *Touhy*, regulations and the FOIA process provide a path forward for prospective relators to successfully allege materiality. The hybrid standard is certainly more palatable to relators than the "Government Continues to Pay Standard," which would operate to defeat every claim where an agency pays with knowledge of mere allegations. And to the extent defendants are inordinately burdened by discovery expenses, such concerns seem better addressed through reform to the discovery process itself, rather than ad hoc changes to individual causes of action.[156]

149. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771–73 (1989) (internal quotation marks omitted) (quoting Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976)).

150. Taylor, *supra* note 146, at 1242–45.

151. *See id.* at 1248–49 (stating that, while FOIA has statutory time limits for agency compliance, they are "more aspirational than binding, and agencies routinely fail to comply").

152. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 n.23 (1978).

153. *See* United States v. Weber Aircraft Corp., 465 U.S. 792, 801–02 (1984).

154. *See, e.g.*, 5 U.S.C. § 552(b) (2012) (outlining nine exemptions).

155. *See* Robert Hardaway et al., *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 531–32 (2011) (noting a study estimating that collection and review of documents can account for thirty to forty percent of total litigation costs).

156. *See, e.g.*, *id.* at 538–39 (proposing a fifty-fifty cost-sharing regime for all civil cases and all types of discovery).

CONCLUSION

In 2016, relators filed 706 FCA *qui tam* actions, nearly five times the claims filed by the DOJ.[157] Total recovery under the FCA in 2016 was over twenty-six times higher when the DOJ intervened.[158] But these numbers also show that Senator Howard's idea of sending rogues to catch rogues was not so old-fashioned after all. In 2016 alone, we saw nearly one-hundred and five million reasons to preserve the possibility of successful *qui tam* actions in the absence of government intervention.[159] *Escobar*'s call for a "demanding" materiality standard may cause *qui tam* actions to be treated skeptically, but the Court's reluctance to treat anything as dispositive evidence that a fraud is not material indicates the Court's willingness to be convinced.

The divergent approaches the circuits have taken in applying the *Escobar* inquiry demonstrate the need for further guidance by the Court. The recent decision to deny certiorari in several FCA cases,[160] at least one of which implicated the *Escobar* materiality standard,[161] may reveal that the Court sees no need to revisit this issue yet, but hopefully the Court will not keep us waiting too long. Division within the circuits will likely only deepen, to the detriment, not just of relators, defendants, or the government, but of us all.

157. *Fraud Statistics—Overview: October 1, 1986–September 30, 2017*, U.S. DEP'T JUSTICE, https://taf.org/wp-content/uploads/2018/04/FCA-Stats-2017-ALL-8-PAGES.pdf (last visited Jan. 19, 2019).

158. *Id.*

159. *See id.*

160. Marcia Coyle, *Justices Pass Up False Claims Disputes, but More Cases Are in the Wings*, NAT'L L.J. (Oct. 6, 2017, 10:49 AM), https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/10/06/justices-pass-up-false-claims-disputes-but-more-cases-are-in-the-wings.

161. *See* Petition for Writ of Certiorari, United States *ex rel.* McGrath v. Microsemi Corp., No. 17-412, 2017 WL 4162297 (9th Cir. Sept. 13, 2017), *cert. denied*, 138 S. Ct. 407 (2017).