

Washington Law Review

Volume 96 | Number 2

6-1-2021

Health Care Fraud Means Never Having to Say You're Sorry

Jacob T. Elberg

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Administrative Law Commons](#), [Health Law and Policy Commons](#), [Insurance Law Commons](#), [Law and Economics Commons](#), [Legislation Commons](#), [Public Law and Legal Theory Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Jacob T. Elberg, Health Care Fraud Means Never Having to Say You're Sorry, 96 Wash. L. Rev. 371 (2021).

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact jafrank@uw.edu.

HEALTH CARE FRAUD MEANS NEVER HAVING TO SAY YOU'RE SORRY

Jacob T. Elberg*

Abstract: For decades, the Department of Justice (DOJ) has issued a steady flood of press releases announcing False Claims Act (FCA) settlements against health care entities and extolling the purportedly sharp message sent to the industry through these settlements about the consequences of engaging in wrongdoing. The FCA is the primary mechanism for government enforcement against health care entities engaged in wrongdoing, and it is expected to be DOJ's key tool for addressing fraud arising out of government programs in response to the COVID-19 pandemic. DOJ has pointed to three key goals of its enforcement efforts (deterrence, incentivizing cooperation, and building a culture of compliance in the health care industry). However, careful examination of the settlements touted in those DOJ press releases calls into question whether DOJ's settlement practices are conveying the message DOJ seeks to impart or having the impact it hopes to achieve.

Virtually all FCA cases resolve without requiring the defendant to admit wrongdoing, and many defendants issue explicit public denials of wrongdoing when the resolution is announced. The absence of any need to admit wrongdoing has fueled a cost-of-doing-business narrative in which health care entities are required periodically to pay inconsequential settlements to the government regardless of their conduct. DOJ thereby risks both diminishing the general deterrence value of resolutions and lending credence to the vocal skepticism among industry and the defense bar that DOJ could, in fact, prevail at trial.

DOJ's willingness to allow settlements in health care fraud cases without admissions is diametrically contrary to DOJ's policy in criminal cases, which is against permitting resolutions without defendants' clear and unequivocal acceptance of responsibility for violating the law. Permitting no-responsibility settlements in the civil FCA context suggests both that DOJ pursues, illegitimately, weak cases it cannot prove at trial, and potentially weakens the general deterrence value of civil FCA claims in general. New defendants may be left with cover that they are not wrongdoers but are merely ensnared in an illegitimate money grab. Even defendants who frankly recognize that they are in violation of the statute may be comforted that they likely face paying little more than restitution, and no significant penalties or social opprobrium. These practices suggest that DOJ rewards willingness to settle, and the monetary recovery it brings, above all other factors. DOJ's focus on settling and monetary recoveries in turn lends credence to the widespread belief that civil health care fraud settlements simply do not signal wrongdoing.

There is no law, policy, or practice that prevents DOJ from requiring admissions in FCA settlements. Yet an in-depth review of nearly 200 FCA resolutions involving health care entities over the past two years reveals that approximately 92% did not include defendants'

* Associate Professor of Law and Associate Director, Center for Health & Pharmaceutical Law, Seton Hall University School of Law. J.D., Harvard Law School; A.B., Dartmouth College. Thank you to participants at the Syracuse University College of Law Faculty Workshop, and to my colleagues on the faculty of the Seton Hall University School of Law. I am grateful for the comments of Miriam Baer, Joan Krause, Brian Murray, Jenn Oliva, and Jon Romburg. I also thank the Department of Justice attorneys whose thoughts and suggestions contributed to the drafting of this Article, as well as Bryan Castro and Aneri Shah for their excellent research assistance.

clear acceptance of responsibility, and approximately 37% involved defendants actively denying responsibility.

The absence of any DOJ policy favoring admissions has important negative consequences, undermining DOJ's goals of deterrence, incentivizing cooperation, and building a culture of compliance. First, when corporate actors believe DOJ will pursue claims regardless of wrongdoing and the consequences of even a settlement will be relatively painless from a financial and reputational perspective, those actors have reduced incentive to put in place compliance structures dedicated to preventing wrongdoing. Second, and perhaps more importantly, when corporate actors diminish the force of settlements with DOJ by denying responsibility, they undermine the system's legitimacy vital for DOJ to encourage cooperation and for the government and well-meaning corporate actors to cultivate an industry-wide culture of compliance. This Article examines DOJ policy both from an economic incentive perspective and in light of research surrounding the psychology of legal authority, concluding that under both lenses DOJ undercuts its own goals. With DOJ actively reforming FCA policy and the FCA poised to take center stage in the government's fight against COVID-19 program abuse, it is beyond time to address this gap in DOJ's enforcement policy.

INTRODUCTION	373
I. THE FALSE CLAIMS ACT	377
A. The FCA Is the Government's Primary Health Care Fraud Enforcement Tool	377
B. Background and Structure of the FCA	378
II. DOJ'S POLICIES AND PRACTICES SURROUNDING FCA SETTLEMENTS AND ADMISSIONS.....	379
A. Analysis of DOJ's FCA Settlements Between Early 2018 and April 2020.....	379
B. DOJ Rarely Obtains Admissions in Its FCA Resolutions, and Many Settling Defendants Deny Wrongdoing	382
C. DOJ's Use of Covered Conduct Language for Purposes of Both Allegations and Releases Exacerbates Problems Caused by Lack of Admissions	385
D. DOJ's FCA Resolutions Appear to Contradict Recent Changes to DOJ's FCA Policy	386
III. DOJ CRIMINAL POLICY REQUIRES ADMISSIONS IN VIRTUALLY ALL CASES	391
IV. THE SEC'S MUCH-MALIGNED "NEITHER ADMIT NOR DENY" POLICY GOES FURTHER THAN DOJ'S FCA PRACTICE	394
V. DOJ'S LACK OF A POLICY FAVORING ADMISSIONS THREATENS TO UNDERMINE ITS ENFORCEMENT GOALS.....	398
A. Deterrence	399
B. Legitimacy.....	403
1. Incentivizing Cooperation	405
2. Creating a Culture of Compliance in the Health Care Industry	407
VI. POSSIBLE RATIONALES FOR THE NO ADMISSIONS PRACTICE.....	409

VII. POLICY IMPLICATIONS.....	413
A. Efficiency/Management of Government Resources.....	413
B. Litigation Risk.....	416
C. Potential Benefits of a Targeted Approach to Admissions	418
CONCLUSION	420

INTRODUCTION

The Department of Justice (DOJ) has for decades used the Civil False Claims Act (FCA) as its primary mechanism for prosecuting wrongdoing by health care companies. DOJ regularly points to the billions of dollars recovered and the thousands of FCA settlements it has entered into as significant not only in terms of recouping money for the government, but as the centerpiece of DOJ's efforts to prevent health care fraud through deterrence. At the same time, DOJ has sought to supplement that deterrence by creating a partnership with industry in support of compliance and by encouraging companies to cooperate with government investigations in order to secure individual prosecutions. Although the FCA has been one of DOJ's most apparently successful and visible programs, little study has gone into whether DOJ's practices fully support the goals it seeks to achieve. This Article is the second in a series examining DOJ's health care FCA resolutions in light of DOJ's stated priorities.

In *A Path to Data-Driven Health Care Enforcement*, I unearthed and analyzed data made available by recent changes to the tax code, allowing insight into what, if anything, DOJ requires FCA offenders to pay beyond restitution when settling claims.¹ The study for the first time demonstrated that DOJ prioritizes entering into some form of settlement, rather than seeking more significant (if somewhat less likely and in any event less immediate) recoveries that would increase general deterrence—most resolutions amounted to little more than restitution in the form of defendants putting the cookies back in the jar, when time value of money is taken into account.² Moreover, DOJ seemingly declines to provide a benefit to defendants for engaging in what I have termed compliant behaviors (maintenance of a pre-existing compliance program, post-enforcement adoption of an effective compliance program, cooperation with a government investigation, and self-disclosure of misconduct)

1. Jacob T. Elberg, *A Path to Data-Driven Health Care Enforcement*, 2020 UTAH L. REV. 1169.

2. *Id.* at 1194–96.

despite DOJ policy that such behaviors should be rewarded.³ This Article examines an even more troubling aspect of DOJ practice—not only failing to require settling defendants to accept responsibility, but allowing them to deny wrongdoing publicly, thereby undermining DOJ’s goals and the legitimacy of the health care fraud enforcement system.

An in-depth review of nearly 200 FCA resolutions involving health care entities over the past two years reveals that approximately 92% did not include defendants’ clear acceptance of responsibility, and approximately 37% involved defendants actively denying responsibility.

Notably, the few cases in which defendants did admit wrongdoing do not differ by way of their subject matter, the facts, or available evidence. Instead, they are distinguishable only on the basis of the U.S. Attorney’s Offices pursuing the cases, which have unique internal, and informal, policies favoring admission of wrongdoing.

Data analysis also reveals an additional troubling fact with respect to these settlements. In 2019, DOJ announced a policy position that acceptance of responsibility would be rewarded with more favorable settlement terms.⁴ The data described in this Article provides no evidence of any such benefit, and anecdotal evidence provides substantial reason for skepticism that such a benefit exists at all. DOJ moving toward favoring admission of wrongdoing, and actually rewarding acceptance of responsibility in the terms of settlements that include such admissions would benefit DOJ’s own enforcement goals.

The proper role of admissions in civil enforcement actions is not a new topic. Most notably, the policy of the Securities and Exchange Commission (SEC) to have settling defendants “neither admit nor deny” wrongdoing has been the subject of considerable controversy. An influential federal judge took aim at the practice through multiple high-profile decisions.⁵ A powerful United States Senator held hearings and issued a report slamming the SEC, *Rigged Justice: 2016: How Weak Enforcement Lets Corporate Offenders Off Easy*.⁶ Scholars debated the

3. *Id.* at 1171–72; see Press Release, U.S. Dep’t of Just., Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual (May 7, 2019) [hereinafter DOJ May 7, 2019 Press Release], <https://www.justice.gov/opa/pr/departments-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual> [https://perma.cc/39CU-3Y6A].

4. DOJ May 7, 2019 Press Release, *supra* note 3.

5. SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 309 (S.D.N.Y. 2011); SEC v. Citigroup Glob. Mkts. Inc., 827 F. Supp. 2d 328, 332–33 (S.D.N.Y. 2011).

6. OFF. OF SEN. ELIZABETH WARREN, RIGGED JUSTICE: 2016: HOW WEAK ENFORCEMENT LETS CORPORATE OFFENDERS OFF EASY (2016), https://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf [https://perma.cc/5VRP-SJRN].

policy's impact and the appropriate remedy.⁷ The SEC announced a policy change and its leadership gave numerous speeches explaining the agency's move towards seeking admissions.⁸ Scholars and other observers measured and debated the impact of the SEC's change.⁹ Strangely, none of that attention has been focused on the FCA—which plays a parallel role in health care enforcement to that of the SEC in securities enforcement. The lack of attention is even more stark considering that DOJ continues to announce multi-billion dollar annual FCA recoveries, health care fraud continues to make up a sizable portion of the government's expanding health care spend, and defendants continue to do what even the SEC defendants did not—not only fail to admit wrongdoing, but affirmatively deny it.¹⁰

DOJ's reluctance to require admissions in FCA cases is surprising and

7. See, e.g., Samuel W. Buell, *Liability and Admissions of Wrongdoing in Public Enforcement of Law*, 82 U. CIN. L. REV. 505, 510 (2013) (noting “[t]here is something troubling about a public enforcement action that ends with a conclusion of ‘maybe he (they) did it, maybe he (they) didn’t, but he’s (they are) paying a price for it in any event’”); Verity Winship & Jennifer K. Robbennolt, *Admissions of Guilt in Civil Enforcement*, 102 MINN. L. REV. 1077, 1109–18 (2018) (referencing press reports of “neither admit nor deny” resolutions).

8. See, e.g., Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n, *Deploying the Full Enforcement Arsenal*, Speech at the Council of Institutional Investors Fall Conference (Sept. 26, 2013) [hereinafter *Speech at the Council of Institutional Investors*], <http://www.sec.gov/News/Speech/Detail/Speech/1370539841202#.Ukd93kKhDzI> [<https://perma.cc/7QJG-JWZG>] (remarking that “there are some cases where monetary penalties and compliance enhancements are not enough. An added measure of public accountability is necessary, and in those cases we should demand it”); Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n, *A New Model for SEC Enforcement: Producing Bold and Unrelenting Results*, Speech at the New York University Pollack Center for Law & Business (Nov. 18, 2016) [hereinafter *Speech at NYU*], <https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html> [<https://perma.cc/FH88-K7BP>] (stating “[t]he deterrent message of settlements, and the public’s confidence in civil law enforcement, can be enhanced significantly by requiring admissions of wrongdoing”).

9. See, e.g., John C. Coffee, Jr., *‘Neither Admit nor Deny’: Practical Implications of SEC’s New Policy*, LAW.COM: N.Y. L.J. (July 18, 2013), <https://www.law.com/newyorklawjournal/almID/1202611288235/> [<https://perma.cc/DYE7-UE72>] (describing the new policy as “shrewd, savvy and largely symbolic”); Verity Winship & Jennifer K. Robbennolt, *An Empirical Study of Admissions in SEC Settlements*, 60 ARIZ. L. REV. 1, 50 (2018) (analyzing settlements and concluding that the change fell short of being “transformative”); David Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution that Wasn’t*, 103 IOWA L. REV. 113, 175 (2017) (concluding that SEC rarely required admissions even after the policy change and that it “calls into question the SEC’s claims concerning the success of the admissions policy and whether the policy is worth maintaining”).

10. See Press Release, U.S. Dep’t of Just., *Justice Department Recovers over \$3 Billion from False Claims Act Cases in Fiscal Year 2019* (Jan. 9, 2020) [hereinafter *DOJ Jan. 9, 2020 Press Release*], <https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019> [<https://perma.cc/D6SJ-NPDZ>].

The Federal Bureau of Investigation has estimated health care fraud at between 3% to 10% of health care expenditures. FED. BUREAU OF INVESTIGATION, *FINANCIAL CRIMES REPORT TO THE PUBLIC 2007* (2008), https://www.fbi.gov/stats-services/publications/fcs_report2007 [<https://perma.cc/K5FA-WM8H>].

problematic not only because it undermines its enforcement goals, but because it flies in the face of DOJ's clear, and well-reasoned, criminal-side (both as to health care matters and beyond) policy against allowing resolutions without acceptance of responsibility.¹¹ With DOJ examining other aspects of its FCA practice and the FCA poised to take center stage in DOJ's efforts to prosecute fraud associated with COVID-19 funds, the moment has arrived for DOJ to address its settlement policy.¹²

Part I provides the background of the FCA. Part II analyzes DOJ's FCA settlement policies and practices, particularly those focused on admissions, revealing that DOJ rarely requires admissions and defendants regularly make public statements denying wrongdoing. Part III compares DOJ's FCA settlement practice with that of DOJ in criminal cases, where DOJ policy requires admissions in virtually all cases and is based on concerns about undermining accountability for defendants and the credibility of DOJ's enforcement efforts. Part IV compares DOJ's FCA settlement practice with that of the SEC—a parallel area, as the SEC is a primary means of enforcement in securities matters while the FCA is DOJ's primary means of enforcement against health care entities. The SEC's policy is stricter than DOJ's FCA practice regarding admissions, yet the SEC has faced substantial criticism of its policy as insufficient, while DOJ has to-date largely escaped scrutiny in this area. Part V places DOJ's FCA policy in the context of its enforcement goals by examining how DOJ's failure to require admissions—and worse yet its willingness to allow denials—harms DOJ's efforts to incentivize cooperation and create a culture of compliance in the health care industry. Part VI considers potential rationales for DOJ's current policy surrounding admissions.

Part VII examines the costs and benefits of a new DOJ policy requiring admissions in FCA cases. The Article concludes the potential costs are likely not as significant as DOJ might fear, and the benefits are likely greater than DOJ currently comprehends. Taking into consideration both

11. It must be noted that all admissions are not equal. In criminal pleas, defendants typically make admissions not only as to facts but as to their legal consequence—establishing guilt. Civil resolutions, however, may alternatively involve solely admissions of fact, which may take a variety of forms. See Winship & Robbennolt, *supra* note 7, at 1095–1109 (identifying various admissions models). While there are arguments weighing in favor and against requiring each in the context of FCA settlements, it is beyond the scope of this article to engage in that nuanced discussion at this time, as DOJ has thus far largely been unwilling to require admissions of any sort, or even to prevent explicit denials.

12. See, e.g., Ethan P. Davis, Principal Deputy Assistant Att'y Gen., Civ. Div., U.S. Dep't of Just., Speech at the United States Chamber of Commerce's Institute for Legal Reform (June 26, 2020), <https://www.justice.gov/civil/speech/principal-deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims> [<https://perma.cc/QAG4-Z29B>] (describing the False Claims Act as “one of the most effective weapons in [DOJ's] arsenal” in the effort to “prevent wrongdoers from exploiting the COVID-19 crisis”).

practical, short-term concerns as well as DOJ's broader enforcement goals, the Article concludes that DOJ should, at minimum, require acceptance of responsibility in the most significant FCA cases, while insisting upon "no denial" language in any cases which do not include admissions.

I. THE FALSE CLAIMS ACT

This Part provides an overview of the FCA and its critical role in health care enforcement.

A. *The FCA Is the Government's Primary Health Care Fraud Enforcement Tool*

While for some industries criminal prosecutions are DOJ's primary enforcement mechanism, in the health care industry, DOJ's efforts have long been focused on civil cases brought under the False Claims Act.¹³ In Fiscal Year 2019 alone, DOJ recovered \$2.6 billion from settlements and judgments in FCA cases involving the health care industry, representing the tenth consecutive year that DOJ's civil health care fraud settlements and judgments have exceeded \$2 billion.¹⁴ Between 2010 and 2019, DOJ recovered \$25.4 billion from settlements and judgments in FCA cases involving the health care industry.¹⁵ With eye-catching numbers year after year, FCA recoveries have been DOJ's primary method of targeting organizations for health care fraud.¹⁶

DOJ has noted that, particularly in the health care arena, FCA cases are a primary mechanism not only for punishing misconduct and recovering money, but also for deterring fraud. In the December 2018 press release announcing the Fiscal Year 2018 recoveries, DOJ noted "the Department's vigorous pursuit of health care fraud prevents billions . . . in

13. See, e.g., Lewis Morris & Gary W. Thompson, *Reflections on the Government's Stick and Carrot Approach to Fighting Health Care Fraud*, 51 ALA. L. REV. 319, 327–28 (1999) (referring to the FCA as "the Government's Primary Weapon Against Fraud" and pointing to the FCA's qui tam provision as a primary reason for its growth); Pamela H. Bucy, *Growing Pains: Using the False Claims Act to Combat Health Care Fraud*, 51 ALA. L. REV. 57, 59–60 (1999) (concluding that the FCA's qui tam provision, lower mens rea requirement, and lower burden of proof, combined with the fact that most health care providers have substantial assets, makes the FCA a "potent and appropriate weapon to use against fraudulent health care providers"); Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 ALA. L. REV. 239, 247–49 (1999) (noting DOJ's increasing reliance on the FCA to prosecute health care offenses).

14. DOJ Jan. 9, 2020 Press Release, *supra* note 10.

15. CIV. DIV., U.S. DEP'T OF JUST., FRAUD STATISTICS: HEALTH AND HUMAN SERVICES (2020), <https://www.justice.gov/opa/press-release/file/1354316/download> [https://perma.cc/RR6P-WZCV].

16. See Morris & Thompson, *supra* note 13, at 327.

losses by deterring those who might otherwise try to cheat the system for their own gain.”¹⁷

Experts and observers are already anticipating the FCA will be the primary tool used by the government to address fraud relating to the multi-trillion-dollar economic stimulus packages in response to the COVID-19 pandemic.¹⁸

B. *Background and Structure of the FCA*

The FCA was originally enacted by Congress during the Civil War in response to concerns regarding fraud against the government by contractors selling “sick mules, lame horses, sawdust instead of gunpowder, and rotted ships with fresh paint.”¹⁹ While the FCA remains a generally important tool for enforcement in government contracting, over the last thirty years it has been primarily used to address health care fraud.²⁰ In Fiscal Year 2019, for example, the \$2.6 billion recovered by DOJ from FCA cases involving the health care industry was roughly 87% of the \$3 billion recovered in total by DOJ from FCA cases.²¹

The FCA imposes penalties on anyone who “knowingly presents . . . a false or fraudulent claim for payment or approval” to the federal government.²² A violation of the FCA “includes four elements: falsity, causation, knowledge, and materiality.”²³ In the context of the FCA, “knowledge” means that a person “has actual knowledge,” “acts in

17. Press Release, U.S. Dep’t of Just., Justice Department Recovers over \$2.8 Billion from False Claims Act Cases in Fiscal Year 2018 (Dec. 21, 2018) [hereinafter DOJ Dec. 21, 2018 Press Release], <https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018> [https://perma.cc/F9LB-U4GD].

18. See, e.g., Memorandum from John D.W. Partridge, Jonathan M. Philips, James L. Zelenay, Jr. & Sean S. Twomey, Gibson, Dunn & Crutcher LLP to Clients & Friends (Mar. 31, 2020), <https://www.gibsondunn.com/implications-of-covid-19-crisis-for-false-claims-act-compliance/> [https://perma.cc/X3Z3-BPL4] (noting that “FCA enforcement has been particularly robust when emergency government spending ramps up, giving opportunists the chance to exploit the public fisc, even when lives are at stake”); Memorandum from Paul, Weiss, Rifkind, Wharton & Garrison LLP to Clients (May 19, 2020), <https://www.paulweiss.com/practices/litigation/white-collar-regulatory-defense/publications/false-claims-act-liability-in-the-age-of-covid-19?id=36918> [https://perma.cc/JCV4-ATR8] (stating a “heightened level of scrutiny [on government spending] has brought new focus on the False Claims Act”).

19. DOJ Dec. 21, 2018 Press Release, *supra* note 17.

20. See DOJ Jan. 9, 2020 Press Release, *supra* note 10.

21. *Id.*

22. 31 U.S.C. § 3729(a)(1)(A).

23. See United States *ex rel.* Petratos v. Genentech Inc., 855 F.3d 481, 487 (3d Cir. 2017) (first citing Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. ___, 136 S. Ct. 1989, 1996 (2016); and then citing United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 304–05 (3d Cir. 2011)).

deliberate ignorance of the truth or falsity of the information,” or “acts in reckless disregard of the truth or falsity of the information,” but does not require proof of intent to defraud.²⁴

The FCA provides that a person who violates the FCA “is liable to the United States Government for a civil penalty of not less than [\$11,181] and not more than [\$22,363], . . . plus 3 times the amount of damages which the Government sustains because of the act [of the person violating the FCA].”²⁵ Damages (referred to as single damages) are generally the amount of money the United States paid to the offending company as a result of the false claim.²⁶ Thus, recovering single damages can be seen as making the government whole.²⁷

II. DOJ’S POLICIES AND PRACTICES SURROUNDING FCA SETTLEMENTS AND ADMISSIONS

Aided by an empirical analysis of DOJ’s recent FCA resolutions with health care entities, this Part details DOJ’s policies and practices concerning damages multipliers, admissions, and statements of facts. This Part then compares DOJ’s FCA settlements to DOJ’s own statements and guidance surrounding the resolution of FCA matters, concluding that while DOJ guidance purports to reward acceptance of responsibility, the settlements reveal no evidence of any such reward. At the same time, a significant number of defendants deny wrongdoing while entering into FCA settlements, and appear to face no consequences for doing so.

A. *Analysis of DOJ’s FCA Settlements Between Early 2018 and April 2020*

Within the above framework, DOJ has long trumpeted its ability to obtain treble damages plus penalties—three times the amount of damages sustained by the Government.²⁸ One 2018 DOJ press release announcing a FCA settlement went so far as to note that treble damages are the “typical[]” liability under the FCA.²⁹ But DOJ is not required to demand

24. 31 U.S.C. § 3729(b)(1)(A)–(B).

25. *Id.* § 3729(a)(1); 28 C.F.R. § 85.5 (2020).

26. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550–52 (1943).

27. *Id.* As discussed in section II.A and recently recognized by DOJ, because of lost interest and other factors, a recovery actually must be beyond single damages to truly make the government whole.

28. 31 U.S.C. § 3729(a)(1)(G).

29. Press Release, U.S. Dep’t of Just., Medical Equipment Company Agrees to Pay \$5.25 Million to Resolve Allegations of Fraudulent Claims for Compounded Medical Creams (Oct. 22, 2018), <https://www.justice.gov/usao-edky/pr/medical-equipment-company-agrees-pay-525-million-resolve-allegations-fraudulent-claims> [<https://perma.cc/RDE2-TVP8>].

treble damages (or penalties) in resolving a FCA case. While industry and the defense bar have long believed that DOJ rarely seeks treble damages, notably, there is no guidance or publicly available information provided by DOJ as to what constitutes a standard settlement or what factors influence what DOJ will demand.³⁰

Despite DOJ's statements regarding the potential for treble damages plus penalties under the False Claims Act, analysis demonstrates DOJ does not regularly obtain treble damages in practice. A review of all civil-only FCA settlements entered into between health care business organizations and DOJ between early 2018 and May 31, 2019, found eighty-nine Civil Settlement Agreements (CSAs) for which the multiplier could be determined. The settlements were on average 1.78 times the single damages and the median multiplier was 2.0.³¹ Of those CSAs, only eleven (12%) were above double damages, let alone treble damages—forty-four were at double damages and thirty-four were between 1.0–1.9.³² The analysis “confirm[s] widespread sentiment amongst industry and the defense bar that settlement multipliers are rarely above double damages.”³³ Virtually all of those settlements involved conduct from several years prior, and therefore a multiplier substantially above 1.0 would have been required simply to cover restitution plus interest, given the time value of money. A significant number of FCA resolutions—touted by the government as sending a deterrent message to industry—effectively required defendants only to repay what amount to no-interest loans to the government, having kept some or all of the ill-gotten gains for a decade or more.³⁴

30. See, e.g., BRIAN C. ELMER & ALAN W.H. GOURLEY, CROWELL & MORING LLP, FCA SETTLEMENTS: A PRACTICAL GUIDE FOR DEFENSE COUNSEL (2003), https://www.crowell.com/documents/docassocfctype_presentations_440.pdf [<https://perma.cc/WZ87-KEED>] (“In settling, DOJ does not insist on treble damages, although it will not acknowledge any specific policy to settle for less than treble damages. It does insist that, at a minimum, the government must be compensated for its entire loss, and it usually strives for at least double damages.”).

31. Elberg, *supra* note 1, at 1194. A multiplier of 2.0 constitutes double damages, a multiplier of 3.0 constitutes treble damages, etc.

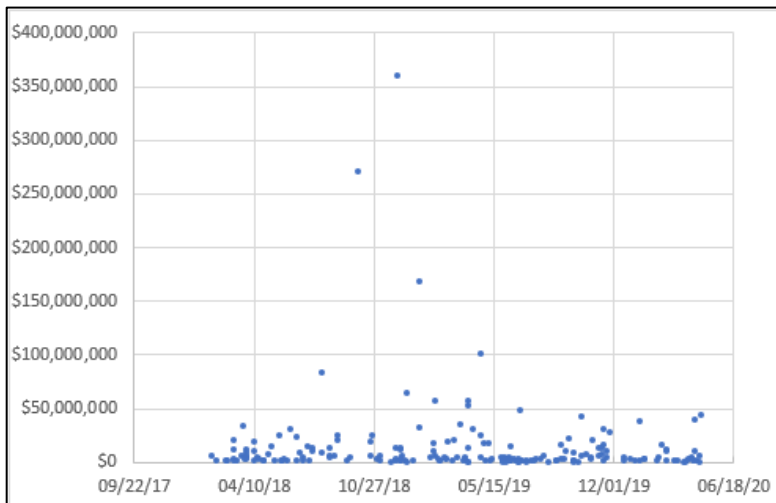
32. *Id.*

33. *Id.* It should be noted that some settlements contained language indicating that DOJ had considered the defendant's ability to pay in agreeing to the settlement. However, even removing those settlements from the analysis would not meaningfully change the statistical analysis. What is more, even where defendants do not have the ability to pay a full settlement in a lump sum at the time of settlement, DOJ can require defendants to pay a full settlement over time or include contingency arrangements rather than reduce the settlement amount. See Memorandum from Ethan P. Davis, Acting Assistant Att'y Gen., Civ. Div., U.S. Dep't of Just., to All Civ. Div. Emps. (Sept. 4, 2020), <https://www.justice.gov/civil/page/file/1313361/download> [<https://perma.cc/AR2D-TT43>].

34. See, e.g., Press Release, U.S. Dep't of Just., Pentec Health, Inc. to Pay \$17 Million to Settle False Claims Act Allegations (Feb. 4, 2019) [hereinafter DOJ Feb. 4, 2019 Press Release],

U.S. Attorney’s Offices have authority to settle claims without oversight when the gross amount of the original claim does not exceed \$10,000,000.³⁵ Settlements above those amounts must be approved by DOJ’s Civil Division—specifically the Commercial Litigation Branch in the case of health care FCA cases—unless the Civil Division delegates responsibility for the case to the individual U.S. Attorney’s Office.³⁶ While DOJ has recovered more than \$2 billion each year over the past decade from FCA cases involving the health care industry, the vast majority of FCA settlements have involved relatively small dollar amounts.³⁷ Of the 195 health care industry FCA resolutions between early 2018 and April 2020 reviewed for this Article, only four were at or exceeded \$100 million, nine were at or exceeded \$50 million, and thirty-one were at or exceeded \$20 million. At the same time, 115 were at or below \$5 million, of which fifty were at or below \$1 million. As Figure 1 shows, most FCA settlements during this time period did not involve eye-popping dollar figures.

Figure 1:
Dollar Value of Civil-Only FCA Agreements



<https://www.justice.gov/usao-edpa/pr/pentec-health-inc-pay-17-million-settle-false-claims-act-allegations> [<https://perma.cc/WDK7-493Q>] (describing the time period of the misconduct as “2007 to 2018”).

35. U.S. Dep’t of Just., Just. Manual: Civ. Res. Manual § 46 (2016).

36. *Id.*

37. See DOJ Jan. 9, 2020 Press Release, *supra* note 10.

B. DOJ Rarely Obtains Admissions in Its FCA Resolutions, and Many Settling Defendants Deny Wrongdoing

Unlike in other government enforcement contexts discussed below, FCA settlements have historically not required defendants to accept responsibility or admit wrongdoing. As strongly worded and triumphant as DOJ's FCA press releases might be—frequently boasting of “hold[ing] defendants] accountable”—most DOJ FCA press releases describe the settlements as “resolv[ing] allegations,” and include the disclaimer: “The claims resolved by the settlement are allegations only, and there has been no determination of liability.”³⁸ That is because the vast majority of FCA settlement agreements contain the following language:

This Settlement Agreement is neither an admission of liability by [defendant] nor a concession by the United States that its claims are not well-founded.³⁹

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows⁴⁰

With this language in place, defendants are empowered to publicly deny—often aggressively—DOJ's allegations.⁴¹ And they do. I conducted

38. See Press Release, U.S. Dep't of Just., Nursing Home Chain Saber Healthcare Agrees to Pay \$10 Million to Settle False Claims Act Allegations (Apr. 14, 2020), <https://www.justice.gov/opa/pr/nursing-home-chain-saber-healthcare-agrees-pay-10-million-settle-false-claims-act-allegations> [<https://perma.cc/V2DM-JWK8>]; Press Release, U.S. Dep't of Just., Reference Laboratory, Pain Clinic, and Two Individuals Agree to Pay \$41 Million to Resolve Allegations of Unnecessary Urine Drug Testing (Apr. 15, 2020), <https://www.justice.gov/opa/pr/reference-laboratory-pain-clinic-and-two-individuals-agree-pay-41-million-resolve-allegations> [<https://perma.cc/5L73-UQ83>].

39. See Settlement Agreement at 4, United States *ex rel.* Landis v. Genova Diagnostics, Inc., No. 1:17-CV-00341-MR-WCM (W.D.N.C. Apr. 27, 2020) [hereinafter *Genova Settlement*].

This language or its functional equivalent appeared in 151 of the 195 CSAs reviewed for purposes of this Article.

Some CSA's included additional language in which the defendant expressly denied some or all of the government's allegations in the CSA itself. Of the 195 CSAs reviewed for purposes of this Article, fifty—more than 25%—included explicit denials within the CSA.

Regardless of whether such language is included in the CSA, the standard language—included in virtually all agreements—allows the defendant to publicly deny the allegations.

40. See *Genova Settlement*, *supra* note 39, at 4. This language or its functional equivalent appeared in 167 of the 195 CSAs since early 2018 reviewed for purposes of this Article.

41. One particularly active district, the District of Massachusetts, did not include either paragraph in fourteen of the fifteen CSAs included in this Article's review. This silence, however, did not prevent two defendants from making public statements of denial outside of the CSA. See Nate Raymond, *Drugmakers Astellas, Amgen to Pay \$125 Million in U.S. Charity Kickback Probe*, REUTERS (Apr. 25, 2019, 7:07 AM), <https://www.reuters.com/article/us-usa-healthcare-charities-settlement/drugmakers-astellas-amgen-to-pay-125-million-in-u-s-charity-kickback-probe>

a review of CSAs between early 2018 and April 2020, as well as statements made by the defendants in press releases or in news media coverage related to the settlements.⁴² Of the 195 CSAs reviewed for purposes of this Article, in seventy-two cases (37%) the defendant affirmatively denied having committed misconduct.⁴³ Fifty of the CSAs (26%) included explicit denials by the defendants in the agreement, while in others the defendants denied wrongdoing either through corporate press releases or in response to media inquiries.⁴⁴

For example, when DOJ settled an FCA case against a hospital system for \$24 million in October 2018, the defendant provided a statement to the media the day of the announcement denying it did anything wrong, stating that the hospital system

continues to strongly disagree with the allegations, [but] we are relieved to put this issue behind us. The Board of Trustees carefully considered the ongoing costs and distraction that litigation would impose upon the system, our employees, and the communities we serve We believe that a settlement allows our system to put this difficult matter behind us⁴⁵

In another example, in February 2019, DOJ announced a \$17 million settlement with a compounding pharmacy alleging violations of the Anti-Kickback Statute and submission of duplicate bills.⁴⁶ The DOJ press release included a statement from a U.S. Attorney stating that “[t]hose who engage in these practices will be held accountable.”⁴⁷ The same day, the defendant issued a press release denying the settlement reflected wrongdoing:

[R]esolution of this civil matter represents a business decision made in the best interest of our company and nothing more. We firmly believe that, at all times, [the company] billed all government payors appropriately while providing countless patients with access to these life-saving nutritional

idUSKCN1S11TL [<https://perma.cc/VB3U-B3W5>] (“Neither company admitted wrongdoing. Amgen in a statement said it did not agree that its conduct was inappropriate but settled to put the matter behind it. Astellas also said it believed its actions were lawful.”).

42. A table summarizing the data is included at app. 1 and app. 2.

43. *Infra* app. 1.

44. *Infra* app. 2.

45. John Commins, *Montana Health System Pays \$24M to Settle Kickback Allegations*, HEALTHLEADERS (Oct. 1, 2018), <https://www.healthleadersmedia.com/montana-health-system-pays-24m-settle-kickback-allegations> (last visited Apr. 2, 2021).

46. See DOJ Feb. 4, 2019 Press Release, *supra* note 34.

47. *Id.*

therapies⁴⁸

The press release included a quote from the chief executive officer stating “we continue to deny the assertions and allegations made by the government pertaining to this settlement which in any way challenges our business practices.”⁴⁹

In another example, in April 2020, DOJ announced a \$43 million settlement involving allegations that a lab had fraudulently billed for unnecessary lab services, with the Assistant Attorney General boasting that providers billing for unnecessary services “will be held accountable.”⁵⁰ A company spokesman explicitly denied the allegations when contacted by reporters, stating

We conducted our own thorough investigation and are confident in the medical necessity of our tests and that [we] acted completely appropriately While we believed that [we] would have prevailed, we are pleased to avoid considerable distraction and expense by resolving this matter without any admission of guilt or wrongdoing.⁵¹

Defendants make these statements knowing not only that they are permissible under their settlements agreements, but also that DOJ policy prevents DOJ from providing additional information beyond the CSA and documents already in the public record to respond to defense denials.⁵² The policy holds despite the fact that defendants’ denials amount to suggestions that DOJ attorneys demanded settlements to end meritless lawsuits.⁵³

48. Press Release, Pentec Health, Pentec Health Announced the Closure and Settlement of a Civil Matter with the United States Attorney’s Office (Feb. 4, 2019), <https://markets.businessinsider.com/news/stocks/pentec-health-announced-the-closure-and-settlement-of-a-civil-matter-with-the-united-states-attorney-s-office-1027922824#> [<https://perma.cc/39F7-MEPP>].

49. *Id.*

50. Press Release, U.S. Dep’t of Just., Testing Laboratory Agrees to Pay Up to \$43 Million to Resolve Allegations of Medically Unnecessary Tests (Apr. 27, 2020), <https://www.justice.gov/opa/pr/testing-laboratory-agrees-pay-43-million-resolve-allegations-medically-unnecessary-tests> [<https://perma.cc/QG8P-JYS7>].

51. Daniel Walton, *Genova Diagnostics Settles Billing Fraud Claims for Up to \$43M*, MOUNTAIN XPRESS (May 9, 2020), <https://mountainx.com/news/genova-diagnostics-settles-billing-fraud-claims-for-up-to-43m/> [<https://perma.cc/ZK5B-GLYJ>]; Christopher Brown, *‘Unconventional’ Tests Bring \$17 Million False Claims Settlement (1)*, BLOOMBERG L. (Apr. 28, 2020, 8:40 AM), <https://news.bloomberglaw.com/health-law-and-business/unconventional-tests-bring-17-million-false-claims-settlement> (last visited Apr. 6, 2021).

52. U.S. Dep’t of Just., Just. Manual § 1-7.100 (2018).

53. *Id.*

C. *DOJ's Use of Covered Conduct Language for Purposes of Both Allegations and Releases Exacerbates Problems Caused by Lack of Admissions*

The lack of admissions is particularly problematic in FCA cases because the mechanics of DOJ's settlement model prevents the public, in most cases, from differentiating allegations which the government could clearly prove from those which were largely speculative.

FCA settlement agreements include a "Covered Conduct" section listing DOJ's allegations. Because the Covered Conduct determines the scope of the release, some defendants seek broad Covered Conduct descriptions as protection against future litigation. As one primer for FCA defense counsel described, "[t]he goal for every FCA defendant . . . is to negotiate the broadest possible release by writing the broadest definition of covered conduct."⁵⁴ As a result, at the drafting stage it is frequently the defendant seeking to add allegations to the Covered Conduct and many CSAs include several allegations. Yet, CSAs generally do not distinguish between allegations that are the centerpiece of DOJ's case—which presumably DOJ would expect to be able to prove at trial—and those the government would not have included in a filed complaint and which were added through negotiation at defendant's request. In effect, the public cannot read a CSA and know what the case was truly about.

For instance, if the Covered Conduct includes three allegations (for example, allegations of violating the Anti-Kickback Statute, of off-label marketing, and of causing billing for unnecessary goods or services) and the defendant agrees to pay \$5 million to resolve all of the allegations, there is no way for the public to know whether virtually all of that money was paid because of one of the allegations or whether it was evenly split amongst the several.⁵⁵ Put simply, a reader cannot know from a typical CSA what misconduct DOJ truly alleges occurred, never mind whether DOJ's allegations have merit, and there is no other mechanism through which an observer can obtain that information.

What is more, typical Covered Conduct language is terse and vague—most CSAs do not include detailed descriptions of the alleged wrongdoing, never mind describe any of the evidence DOJ had collected

54. Jonathan Cone, Robert Rhoad & Robert Sneckenberg, *Negotiating False Claims Act Settlements*, BRIEFING PAPERS, Feb. 2014, at 1, 2, <https://www.crowell.com/files/Negotiating-False-Claims-Act-Settlements.pdf> [<https://perma.cc/4KUY-28D2>].

55. *See, e.g.*, Genova Settlement, *supra* note 39, at 2–4 (listing four different allegations, ranging from violations of the Stark Law to billing for unnecessary services, without delineating the portion of the \$43 million settlement was attributable to the various allegations). The defendant explicitly denied the allegations, telling a media outlet it believed it would have won at trial had the case not resolved via settlement. *See* Brown, *supra* note 51.

to prove its case.⁵⁶ As detailed below, this too is a significant departure from DOJ's practice in criminal cases.⁵⁷

Even were the public able to discern DOJ's true allegations, that would not provide a complete picture because there may, or may not, be legitimate disagreement between the government and the defendant regarding the strength of DOJ's case. And while the settlement model encourages defendants to seek expanded Covered Conduct language, they can do so knowing they will be able to immediately distance themselves from the allegations, as described above. In fact, the FCA defense counsel primer referenced above even asserts: "It may seem counterintuitive, but once a company has fine-tuned the conduct for which it is buying a release, it needs to go back and point out that it never actually engaged in that conduct!"⁵⁸

D. DOJ's FCA Resolutions Appear to Contradict Recent Changes to DOJ's FCA Policy

While DOJ has not put in place a policy requiring acceptance of responsibility (or even prohibiting denials) in FCA cases, a recent change to DOJ policy regarding FCA resolutions did suggest DOJ sees a benefit in securing admissions. In May 2019, DOJ issued for the first time, formal guidance (FCA Guidance) regarding rewards for compliant behaviors—maintenance of an effective pre-existing compliance program, post-enforcement adoption of an effective compliance program, cooperation with a government investigation, and self-disclosure of misconduct—in

56. See, e.g., Settlement Agreement at 1–2, United States *ex rel.* Whitaker v. LifeCare Med. Transps., Inc., No. 1:17-CV-1327 (E.D. Va. Apr. 8, 2020) [hereinafter LifeCare Settlement] (describing Covered Conduct as "submission of claims to Medicare for non-emergency basic life support ambulance services and non-emergency advanced life support ambulance services . . . that were not medically reasonable or necessary and/or were not supported by the medical record," and without providing any additional details regarding the alleged wrongdoing or evidence supporting the government's allegations).

57. While virtually all criminal resolutions include a charging document (Indictment, Information, or Complaint), as described below, most civil FCA resolutions are reached without DOJ ever filing a Complaint with detailed allegations. This is in part because approximately two-thirds of FCA resolutions examined stemmed from qui tams, and qui tams accounted for more than two-thirds of money (\$2.1 billion out of \$3 billion) recovered by DOJ through FCA cases in Fiscal Year 2019. See DOJ Jan. 9, 2020 Press Release, *supra* note 10. When a qui tam is filed, the initial Complaint (and often the only Complaint) is drafted by the relator (whistleblower). The initial qui tam Complaint is often of little value in analyzing the basis for the ultimate resolution with DOJ, both because it does not reflect DOJ's investigation, and because the relator is incentivized by first-to-file rules to include all potential claims in the initial Complaint, even if some are merely speculative. See 31 U.S.C. § 3730(b)(5) ("[N]o person other than the Government may intervene or bring a related action based on the facts underlying the pending action.").

58. Cone, Rhoad & Sneckenberg, *supra* note 54, at 6.

FCA cases.⁵⁹ The FCA Guidance “identif[ies] factors that will be considered and the credit that will be provided” based on compliant behaviors.⁶⁰

While the FCA Guidance largely mirrors the Principles of Federal Prosecution of Business Organizations, which govern DOJ’s handling of criminal cases, there is a notable exception: the FCA Guidance includes “[a]dmitting liability or accepting responsibility for the wrongdoing or relevant conduct” among the “Forms of Cooperation” for which an entity can earn credit.⁶¹ Under the Guidance, DOJ states that acceptance of responsibility can lead to a reduction in the demanded multiplier.⁶² This is contrary to the criminal context where acceptance of responsibility is a pre-requisite for cooperation credit rather than an example of cooperation, both under DOJ criminal policy and the U.S. Sentencing Guidelines (where acceptance of responsibility without cooperation is separately rewarded), and where, as discussed below, DOJ requires it to resolve a case.⁶³

Despite DOJ’s new FCA Guidance claiming to reward acceptance of responsibility, examination of FCA resolutions over the past two years provides no support for DOJ’s claim that acceptance of responsibility is rewarded through a reduced multiplier. In fact, the settlements appear to demonstrate the opposite.

Notably, there is nothing that prevents DOJ from seeking admissions as a condition of FCA settlements—not statutorily, procedurally, or even as a matter of official DOJ policy. The almost universal failure to require an admission is instead an unofficial policy demonstrated by DOJ’s practice, as revealed by the analysis conducted for this Article. Of the 195 CSAs from the past two years reviewed for this Article, only sixteen (8%) included admissions which amounted to acceptance of responsibility—twelve handled by one of two U.S. Attorney’s Offices and only two with the involvement of the Commercial Litigation Branch.⁶⁴

59. DOJ May 7, 2019 Press Release, *supra* note 3; *see also* Elberg, *supra* note 1, at 1189–91; U.S. Dep’t of Just., Just. Manual § 4-4.112 (2019).

60. U.S. Dep’t of Just., Just. Manual § 4-4.112 (2019).

61. *Id.*

62. *Id.*

63. *See* U.S. SENT’G GUIDELINES MANUAL § 8C2.5(g)(2)–(3) (U.S. SENT’G COMM’N 2018).

64. *E.g.*, Stipulation & Order of Settlement & Dismissal at 3–4, *United States v. CareFusion Corp.* (S.D.N.Y. May 7, 2019) [hereinafter *CareFusion Settlement*]; Stipulation & Order of Settlement at 3–7, *United States ex rel. Markelson v. Lenox Hill Hosp.*, No. 17 Civ. 7986 (DLC) (S.D.N.Y. Nov. 7, 2019) [hereinafter *Lenox Hill Settlement*]; Stipulation & Order of Settlement & Dismissal at 3–6, *United States ex rel. Bixler Wood v. Avalign Technologies, Inc.*, No. 14 Civ. 4958 (ER) (S.D.N.Y. Aug. 9, 2019) [hereinafter *Avalign Settlement*]; Settlement Agreement at 3, *United States ex rel.*

The Commercial Litigation Branch's clear practice, and thus what is in effect its unofficial policy, is not to seek admissions in health care cases. While the Commercial Litigation Branch participated in 69 of the 195 settlements reviewed for purposes of this Article, only two (less than 3%) included admissions. DOJ is far more likely to allow an explicit denial within a CSA than insist upon an admission, particularly in cases involving the Commercial Litigation Branch.

However, approximately two-thirds of FCA cases are handled by individual U.S. Attorney's offices without the involvement of the Commercial Litigation Branch, and in the absence of limiting DOJ policy, those U.S. Attorney's Offices are free to adopt their own individual practices.⁶⁵ Two U.S. Attorney's Offices (the Southern District of New York and the Northern District of New York) have a practice of seeking admissions in virtually all cases, while two other districts (the Eastern District of Kentucky and the Eastern District of Texas) included admissions in two and one CSA, respectively.⁶⁶

Cretaro-Williams v. Dr. Fazeli & Dr. Broumand, PLLC, No. 5:15-CV-315 (N.D.N.Y. Nov. 30, 2018); Civil Settlement Agreement, United States *ex rel.* Katko v. Oviatt Hearing & Balance, LLC, No. 5:16-CV-1217 (N.D.N.Y. Dec. 7, 2018).

All of these admissions took the form of factual admissions rather than legal admissions. *See* Winship & Robbennolt, *supra* note 7, at 1104–07.

One of the two districts responsible for all but four of the CSAs with admissions was the Southern District of New York—the District in which Judge Rakoff issued the opinions discussed *infra* Part IV. The other was the Northern District of New York. Based on a review of CSAs from the Northern District of New York, the District appears to have instituted its policy of requiring admissions after a 2014 settlement without admissions led a prominent FCA attorney—and former head of DOJ's Criminal Fraud Section's Healthcare Fraud Unit—representing the defendant to aggressively deny wrongdoing, telling a reporter that the defendant settled only to avoid the cost and expense of litigation, and adding: “In a situation where there was absolutely no harm or inappropriate conduct of any kind, the government can extract money from cardiologists who make far less than the average doctor and treat all Medicaid patients who walk in the door.” James T. Mulder, *Syracuse-Area Medical Practice Pays \$1.3 Million to Settle Allegations It Improperly Paid Doctors*, SYRACUSE.COM (Mar. 22, 2019), https://www.syracuse.com/news/2014/08/medical_practice_pays_13_million_to_settle_allegations_it_improperly_paid_doctor.html [<https://perma.cc/622N-FR49>].

65. Of the 195 CSAs reviewed for purposes of this Article, 125, or 64%, were handled by individual U.S. Attorney's Offices without the involvement of the Civil Division's Commercial Litigation Branch, with more than two dozen U.S. Attorney's Offices resolving cases on their own. *See also* Elberg, *supra* note 1, at 1197 (noting that 74 out of 118 CSAs reviewed, or 63%, “were handled by individual U.S. Attorney's Offices without the involvement of the [Civil Division's] Commercial Litigation Branch”).

66. These resolutions not only call into question DOJ's commitment to the acceptance of responsibility benefit claimed in the May 2019 FCA Guidance, but also represent another striking example of lack of consistency across DOJ components—defendants will seemingly be pressed to make admissions if the case is handled by two of ninety-four federal districts, and may be if the case is handled by a few others, and will likely not if it is handled by any of the other districts. *See id.* at

Seemingly contrary to the May 2019 FCA Guidance, those sixteen settlements required the defendants to pay 9.73, 2.28, 2.05, 2.04, 2.0, 2.0, 2.0, 2.0, 2.0, 2.0, 2.0, 2.0, 1.74, 1.5, and 1.0 times restitution. The admissions settlements as a group had an average multiplier of 1.90 and all but two were above the mean multiplier of 1.73 for the 195 CSAs reviewed for purposes of this Article.⁶⁷ It is of course possible that there are unknown facts making these cases particularly egregious and that these defendants would have been required to pay even higher multipliers had they not accepted responsibility. But there is significant reason for skepticism, as DOJ resolves the vast majority of FCA cases at or below double damages.⁶⁸

At the same time, there are numerous examples of defendants not only declining to make admissions, but explicitly denying wrongdoing at the time of settlement, yet receiving notably low multipliers. For example, a lab that issued a clear denial on the day of the settlement, attributing the \$42.6 million settlement to “run[ning] out of energy to continue prolonged legal proceedings,” was permitted to settle the case for single damages.⁶⁹ The lab thus did nothing more than pay restitution, and without any interest despite the fact that the government alleged the wrongdoing took place as many as six years earlier.⁷⁰

The three defendants whose denials of wrongdoing were detailed in section I.D, similarly received low multipliers despite their denials. The health system was required to pay only single damages—again paying nothing more than restitution, without interest, despite the alleged

1198 (noting lack of uniformity in settlement multipliers across U.S. Attorney’s Offices).

The Eastern District of Texas entered into two other CSAs during the relevant time period, both of which not only did not include admissions, but included express denials by the defendants. The Eastern District of Kentucky entered into a total of seven CSAs during the relevant time period—two of the other five included express denials by the defendants, while the other three contained neither admissions nor denials.

67. See, e.g., CareFusion Settlement, *supra* note 64, at 5 (2.0 multiplier); Lenox Hill Settlement, *supra* note 64, at 7–8 (1.74 multiplier); Avalign Settlement, *supra* note 64, at 7 (2.0 multiplier). The analysis of the admissions cases includes multipliers from thirteen of the sixteen cases. The multiplier was not calculable for two cases and one (9.73) was excluded as an outlier. The analysis of the overall mean includes multipliers from 161 of the 195 cases. The multiplier was not calculable for thirty-three cases and one (9.73) was excluded as an outlier.

68. Elberg, *supra* note 1, at 1194. Providing further reason for skepticism, the Southern District of New York resolved eight cases during the relevant time period without requiring admissions, and did not require a multiplier above 2.0 in any of the eight.

69. Jonathan Stempel, *Gene Testing Firm Gets 25-Year Ban in \$42.6 Million Kickback Settlement*, REUTERS (Oct. 9, 2019, 3:09 PM), <https://www.reuters.com/article/us-usa-utc-labs/gene-testing-firm-gets-25-year-ban-in-42-6-million-kickback-settlement-idUSKBN1WO2TB> [<https://perma.cc/28DH-JPXS>].

70. See *id.*; Civil Settlement Agreement at 3–5, United States *ex rel.* Bergeron v. UTC Laboratories, Inc., No. 14-CV-2464 (S.D.N.Y. Sept. 27, 2019) [hereinafter UTC Settlement].

wrongdoing taking place as many as eight years prior.⁷¹ The compounding pharmacy was also required to pay only single damages without interest despite the alleged wrongdoing going back as far as eleven years,⁷² and the testing lab was required to pay only a multiplier of 1.41 despite the alleged wrongdoing taking place as many as ten years prior.⁷³

In another example, when a compounding pharmacy and its private equity fund owner agreed to pay \$21.4 million to settle allegations of a kickback scheme in September 2019, the U.S. Attorney for the responsible district hailed the resolution as “demonstrat[ing] the U.S. Attorney’s Office continuing commitment to hold all responsible parties to account for the submission of claims to federal health care programs that are tainted by unlawful kickback arrangements” and the government claimed the “settlement sends a clear message about [law enforcement’s] unwavering commitment” to protect government health care programs.⁷⁴ The clarity of this message is put into serious question by the fact that on that same day, a spokesperson for the settling private equity firm told Bloomberg Law: “There was no admission of wrongdoing . . . but we concluded that it was in our investors’ best interests to settle and avoid the cost and distraction of further time-consuming litigation and a jury trial.”⁷⁵ Again, the case settled for single damages—the defendants paid only restitution, again without interest, despite the wrongdoing allegedly taking place four to five years prior to the settlement.⁷⁶

An analysis conducted for this Article found that with regard to 72 of the 195 CSAs reviewed, the defendant included an explicit denial in the CSA or issued a statement at the time of the resolution denying having engaged in wrongdoing—in many cases attributing the settlement to a desire to avoid litigation costs. Some made statements more directly attacking the credibility of the system, with one stating that the company

71. Civil Settlement Agreement, United States *ex rel.* Mohatt v. Kalispell Reg’l Healthcare Sys., No. CV-16-125-M-DWM (D. Mont. Sept. 27, 2018).

72. Civil Settlement Agreement, United States *ex rel.* Brasher v. Pentec Health, Inc., No. 13-cv-05745-ER (E.D. Pa. Feb. 4, 2019) [hereinafter Pentec Settlement].

73. See Genova Settlement, *supra* note 39, at 2–4.

74. Press Release, U.S. Dep’t of Just., Compounding Pharmacy, Two of Its Executives, and Private Equity Firm Agree to Pay \$21.36 Million to Resolve False Claims Act Allegations (Sept. 18, 2019), <https://www.justice.gov/opa/pr/compounding-pharmacy-two-of-its-executives-and-private-equity-firm-agree-pay-2136-million> [<https://perma.cc/PF4R-4CM9>].

75. Valerie Bauman, *Specialty Pharmacy Pays \$21 Million in Anti-Kickback Settlement*, BLOOMBERG L. (Sept. 18, 2019, 2:27 PM), <https://news.bloomberglaw.com/pharma-and-life-sciences/specialty-pharmacy-pays-21-million-in-anti-kickback-settlement> (last visited Apr. 6, 2021).

76. Civil Settlement Agreement at 2–3, United States *ex rel.* Medrano v. Diabetic Care Rx, LLC, No. 15-62617-CV (S.D. Fla. Sept. 17, 2019).

was a “victim of allegations,”⁷⁷ and another stating that they “would have prevailed” had the case gone to trial.⁷⁸ Once again seemingly contrary to the May 2019 FCA Guidance, those seventy-two settlements had an average multiplier of 1.64—below the mean multiplier of 1.73.⁷⁹

While FCA resolutions are too fact-specific to reach definitive statistical conclusions regarding the impact of admissions on FCA multipliers, there is ample anecdotal evidence creating reason for skepticism that admissions are a factor that has led to reduced multipliers. Instead, it appears that although the FCA Guidance is explicit in distinguishing acceptance of responsibility from mere willingness to settle, DOJ has rewarded willingness to settle above all else, and without distinguishing between situations where defendants settle while continuing to deny wrongdoing from situations involving true acceptance of responsibility.

III. DOJ CRIMINAL POLICY REQUIRES ADMISSIONS IN VIRTUALLY ALL CASES

As noted above, DOJ’s policy and practice of requiring admissions of responsibility in virtually no FCA cases stands in sharp contrast to DOJ’s policy concerning admissions in criminal cases. Although the FCA has largely replaced criminal prosecution as a mechanism for DOJ’s enforcement of health care laws against business entities, DOJ’s admissions policy in civil cases more closely resembles that of private civil litigants than that of DOJ in criminal cases. In criminal cases, DOJ has, with few exceptions, insisted on acceptance of responsibility as a condition for resolving cases. Typical criminal pleas involve defendants admitting their guilt as part of the process by which the court determines that there is a factual basis for the plea.⁸⁰

Under the Federal Rules of Criminal Procedure, defendants may, with the court’s consent, resolve cases without making admissions via a *nolo contendere* plea.⁸¹ Defendants who plead *nolo contendere* are sentenced no differently than those who have accepted responsibility, with the primary concrete difference being that the plea cannot be used against the

77. Brooke Kansier, *Medical Provider Resolves Fraud Allegations, Pays \$600k to Federal Government*, TRAVERSE CITY REC. EAGLE (Oct. 13, 2019), https://www.record-eagle.com/news/local_news/medical-provider-resolves-fraud-allegations-pays-600k-to-federal-government/article_d2696400-ec69-11e9-963d-1fc30eda66f5.html [<https://perma.cc/W72Z-UPE3>].

78. Brown, *supra* note 51.

79. The analysis includes multipliers from sixty of the seventy-two cases. The multiplier was not calculable for the other twelve cases.

80. FED. R. CRIM. P. 11(a)(3).

81. *Id.* 11(a)(1).

defendant as an admission in a subsequent criminal or civil case.⁸² In addition to the implications for future litigation, many defendants would also simply prefer, if given the choice, to avoid admitting wrongdoing.⁸³ DOJ policy, however, strongly opposes the use of nolo contendere pleas. The relevant Justice Manual section titled “Offers to Plead Nolo Contendere—Opposition Except in Unusual Circumstances,” notes that DOJ “has long attempted to discourage the disposition of criminal cases by means of nolo pleas,” and states:

Government attorneys have been instructed for many years not to consent to nolo pleas except in the most unusual circumstances, and to do so then only with Departmental approval. Federal prosecutors should oppose the acceptance of a nolo plea, unless the United States Attorney and the appropriate Assistant Attorney General concludes that the circumstances are so unusual that acceptance of the plea would be in the public interest.⁸⁴

The Justice Manual goes on to direct DOJ attorneys to make “a forceful presentation” arguing in opposition to any defendant’s request for a nolo contendere plea, in order to “make it clear to the public that the government is unwilling to condone the entry of a special plea that may help the defendant avoid legitimate consequences of his/her guilt.”⁸⁵

The Justice Manual sections instructing against the use of nolo contendere pleas apply with equal force to prosecutions of business organizations, and DOJ has generally not strayed from the admission requirement even when allowing a Deferred Prosecution Agreement (DPA), or even a Non-prosecution Agreement (NPA) rather than requiring a guilty plea.⁸⁶ DOJ explicitly states that, even when consideration of the Principles of Federal Prosecution of Business Organizations (Corporate Resolution Principles) leads DOJ to permit a DPA or an NPA instead of a guilty plea, it is critically important that the resolution include acceptance of responsibility, as noted in a speech by then Assistant Attorney General Lanny Breuer:

One of the reasons why deferred prosecution agreements are such a powerful tool is that, in many ways, a DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea: when a company enters into a DPA with the government, or an NPA for

82. See FED. R. EVID. 803(22)(A); Nathan B. Lenvin & Ernest S. Meyers, *Nolo Contendere: Its Nature and Implications*, 51 YALE L.J. 1255, 1263 (1942).

83. See, e.g., Lenvin & Meyers, *supra* note 82, at 1263 (noting that defendants can avoid “the stigma attached to a guilty plea or conviction after trial” by entering a nolo contendere plea).

84. See U.S. Dep’t of Just., Just. Manual § 9-27.500 (2018); see also *id.* § 9-16.010 (2020).

85. *Id.* § 9-27.530 (2018).

86. See *id.* § 9-28.200 (2020).

that matter, it almost always must *acknowledge wrongdoing*, agree to cooperate with the government's investigation, pay a fine, agree to improve its compliance program, and agree to face prosecution if it fails to satisfy the terms of the agreement. *All of these components of DPAs are critical for accountability.*⁸⁷

Yet, nowhere in the Justice Manual or otherwise has DOJ provided an explanation as to why there should be a different policy as to admissions in criminal cases than in FCA cases, where corporate defendants (and third-parties) have similar concerns regarding follow-on litigation.

DOJ policy in criminal cases similarly includes strong opposition to the use of *Alford* pleas, where a defendant pleads guilty but maintains his or her innocence.⁸⁸ As with *nolo contendere* pleas, *Alford* pleas are forbidden “except in the most unusual of circumstances and only after recommendation for doing so has been approved by the Assistant Attorney General responsible for the subject matter or by the Associate Attorney General, the Deputy Attorney General, or the Attorney General.”⁸⁹ The Justice Manual instructs DOJ attorneys in such cases to “make an offer of proof of all facts known to the Government to support the conclusion that the defendant is in fact guilty.”⁹⁰

The Justice Manual includes a rationale for rejecting *Alford* pleas that would seemingly apply with equal force to FCA settlements:

[I]t is often preferable to have a jury resolve the factual and legal dispute between the government and the defendant, rather than have government attorneys encourage defendants to plead guilty under circumstances that the public might regard as questionable or unfair. . . . [A]ttorneys for the government in *Alford* cases should endeavor to establish as strong a factual basis for the plea as possible not only to satisfy the requirement of Rule 11(b)(3), but also to minimize the adverse effects of *Alford* pleas on public perceptions of the administration of justice.⁹¹

Yet, again, nowhere in the Justice Manual or otherwise has DOJ provided an explanation as to why FCA defendants are permitted to deny wrongdoing, despite DOJ's understanding that such denials may negatively impact public perceptions of the administration of justice.

87. Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't of Just., Address at the New York City Bar Association (Sept. 13, 2012) (emphasis added), <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html> [<https://perma.cc/E84M-Q6Y6>].

88. See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

89. See U.S. Dep't of Just., Just. Manual § 9-16.015 (2020); see also *id.* § 9-27.440 (2018).

90. *Id.* § 9-16.015.

91. *Id.* § 9-27.440.

IV. THE SEC'S MUCH-MALIGNED "NEITHER ADMIT NOR DENY" POLICY GOES FURTHER THAN DOJ'S FCA PRACTICE

To date, there has been no meaningful criticism, or even public discussion, of DOJ's no admissions policy in FCA cases. There has, however, been substantial controversy over the lack of admissions in settlements between corporate entities and the Securities and Exchange Commission.

There are clear parallels between the role of FCA settlements as an enforcement tool against health care fraud and the role of SEC settlements as an enforcement tool against financial misconduct. Just as DOJ's civil components play a far greater role in regulating the health care industry through FCA settlements than its criminal components do through criminal prosecutions, enforcement of financial misconduct is more frequently handled through civil SEC enforcement than through criminal prosecution by DOJ. And as with FCA cases, "the vast majority" of SEC cases settle rather than proceed to litigation.⁹²

SEC's settlements historically did not require defendants to make admissions, as with FCA settlements, though the SEC policy forbade denials of liability, unlike FCA settlements, and recent policy changes have tightened SEC settlement policy even further. For decades, the SEC's typical settlement included language that the defendant would "neither admit nor deny" wrongdoing—defendants were not required to admit they had engaged in the alleged wrongdoing, but they were also barred from denying it.⁹³

In 1972, the SEC announced the policy change that codified the "neither admit nor deny" language:

[The SEC will not] permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or

92. Aulana L. Peters, Comm'r, U.S. Sec. & Exch. Comm'n, Address at the Washington Bar Association: SEC Litigation: Thoughts on When to Settle and Try Cases (Apr. 17, 1985), <http://www.sec.gov/news/speech/1985/041985peters.pdf> [<https://perma.cc/PB5R-CRVV>]; see also Mary L. Schapiro, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks Before the Twentieth Annual Securities Regulation Institute: New SEC Enforcement Remedies (Jan. 20, 1993), <http://www.sec.gov/news/speech/1993/012093schapiro.pdf> [<https://perma.cc/4SQP-YKEF>] (describing that the SEC "instituted approximately seventy-four cease-and-desist actions [that year] . . . almost all of which [were] settled by consent").

93. See Theodore D. Edwards, *Of Truth, Pragmatism, and Sour Grapes: The Second Circuit's Decision in SEC v. Citigroup Global Markets*, 65 DUKE L.J. 1241, 1259 (2016).

respondent states that he neither admits nor denies the allegations.⁹⁴

As Judge Rakoff detailed in *SEC v. Vitesse Semiconductor Corp.*,⁹⁵ the SEC's focus in addressing the language in 1972 was not on allowing defendants to settle without admissions but on forbidding settling defendants from denying the allegations publicly.⁹⁶ Prior to the 1972 policy pronouncement, the "neither admit nor deny" language was already in regular use in SEC settlement agreements but was taken to mean only within the agreement itself. Prior to 1972, defendants regularly did exactly what many FCA defendants do now—publicly deny what SEC had accused them of doing. Thus, in addition to the above language, the SEC began, in 1972, requiring that a defendant who agreed to a consent judgment using the "neither admit nor deny" language not publicly deny the allegations—the SEC began including language in consent judgments that the defendant agrees "not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis."⁹⁷

In announcing the 1972 policy change, the SEC noted "it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur."⁹⁸

In a pair of cases in 2011, Southern District of New York Judge Jed Rakoff took aim at the SEC's use of "neither admit nor deny"

94. Consent Decrees in Judicial or Administrative Proceedings, Securities Act Release No. 33-5337, 37 Fed. Reg. 25,224 (Nov. 28, 1972) (codified at 17 C.F.R. § 202.5(e) (2020)). Typical language includes the following:

Defendant understands and agrees to comply with the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings." 17 C.F.R. § 202.5. In compliance with this policy, Defendant agrees: (i) not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis; and (ii) that upon the filing of this Consent, Defendant hereby withdraws any papers filed in this action to the extent that they deny any allegation in the complaint. If Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket. Nothing in this paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which the Commission is not a party.

Consent of Defendant Goldman, Sachs & Co. at 8-9, *SEC v. Goldman, Sachs & Co.*, No. 10-CV-3229 (S.D.N.Y. July 14, 2010).

95. 771 F. Supp. 2d 304 (S.D.N.Y. 2011).

96. *Id.* at 308-09.

97. *Id.* (describing the history of the SEC's "neither admit nor deny" policy).

98. Consent Decrees in Judicial or Administrative Proceedings, Securities Act Release No. 33-5337, 37 Fed. Reg. 25,224.

settlements.⁹⁹ Numerous commentators followed suit, the House Committee on Financial Services conducted a hearing on the subject, and the SEC announced in 2013 changes in the policy so as to require admissions in more cases.

Notably, as detailed above, even before Judge Rakoff's intervention and the SEC's subsequent policy shift in 2013, the SEC's settlement policy had for decades been significantly more restrictive than DOJ's FCA settlement policy—unlike FCA defendants, SEC defendants have, for almost forty years, been prevented from publicly denying the allegations underlying their settlements.

It was that more restrictive policy that Judge Rakoff sharply criticized in *Vitesse* and, more notably, in *SEC v. Citigroup Global Markets, Inc.*¹⁰⁰ In *Vitesse*, Judge Rakoff described the result as “a stew of confusion and hypocrisy.”¹⁰¹ Rakoff argued the policy amounted to a “disservice to the public” because it wrongly prevented the public from knowing whether or not the SEC's charges were true, and noted DOJ's criminal policy against allowing nolo contendere pleas, discussed above in Part III.¹⁰²

In *Citigroup*, Judge Rakoff reiterated the concerns he'd expressed in *Vitesse*, but went further by refusing to approve the proposed consent judgment.¹⁰³ Judge Rakoff held that without “a sufficient evidentiary basis” he could not determine the consent judgment to be “fair, reasonable, adequate, and in the public interest”—in the absence of admissions, Judge Rakoff held the court needed some other way to determine the true facts at issue.¹⁰⁴ Judge Rakoff also found that consent judgments without admissions and with modest penalties were “frequently viewed, particularly in the business community, as a cost of doing business imposed by having to maintain a working relationship with a regulatory agency, rather than as any indication of where the real truth lies.”¹⁰⁵

Scholars joined Judge Rakoff in criticizing the SEC's use of “neither admit nor deny” resolutions, with one scholar writing, “[t]here is something troubling about a public enforcement action that ends with a conclusion of ‘maybe he (they) did it, maybe he (they) didn't, but he's

99. See *SEC v. Citigroup Glob. Mkts. Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011); *Vitesse*, 771 F. Supp. 2d 304.

100. 827 F. Supp. 2d 328 (S.D.N.Y. 2011).

101. *Vitesse*, 771 F. Supp. 2d at 309.

102. *Id.*

103. *Citigroup*, 827 F. Supp. 2d at 335.

104. *Id.* at 330–32 (referring to the standard of review set forth by Judge Rakoff in *SEC v. Bank of America Corp.*, 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009)).

105. *Id.* at 333.

(they are) paying a price for it in any event.”¹⁰⁶

The Second Circuit Court of Appeals eventually reversed Judge Rakoff’s decision refusing to approve the consent decree, holding that he had abused his discretion by applying an incorrect legal standard both when assessing the consent decree and when requiring the SEC to establish the “truth” of the allegations.¹⁰⁷ The Second Circuit omitted “adequacy” from the standard to be applied by judges reviewing proposed consent judgments,¹⁰⁸ and clarified the “public interest” analysis to be one aimed solely at assuring that the “public interest would not be disserved,” which the district court could not define as “an overriding interest in knowing the truth.”¹⁰⁹

Between Judge Rakoff’s *Citigroup* decision and the Second Circuit’s reversal, however, the SEC announced two changes to its “neither admit nor deny” settlement policy. First, in January 2012, the SEC announced that defendants will have to make admissions as part of their SEC resolutions if they have been found guilty or admitted wrongdoing in parallel criminal cases.¹¹⁰ Second, and more significantly, in June 2013, the SEC announced that it would begin requiring admissions “in appropriate cases,” which SEC Chair Mary Jo White later described as including:

- Cases where a large number of investors have been harmed or the conduct was otherwise egregious.
- Cases where the conduct posed a significant risk to the market or investors.
- Cases where admissions would aid investors deciding whether to deal with a particular party in the future.
- Cases where reciting unambiguous facts would send an important message to the market about a particular case.¹¹¹

106. Buell, *supra* note 7, at 510.

107. SEC v. Citigroup Glob. Mkts., Inc., 752 F.3d 285, 295 (2d Cir. 2014).

108. *Id.* at 294–97.

109. *Id.* at 296–97.

110. Public Statement, Robert Khuzami, U.S. Sec. & Exch. Comm’n, Public Statement by SEC Staff: Recent Policy Change (Jan. 7, 2012), <http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1365171489600#UrjmY0KhDzI> [<https://perma.cc/PQ4Q-6Y4Z>].

111. White, Speech at the Council of Institutional Investors, *supra* note 8; White, Speech at NYU, *supra* note 8. The SEC denied that Judge Rakoff or his *Citigroup* decision had influenced the change in policy, but given the timing, that denial was understandably met with skepticism. Interestingly, SEC Chair Mary Jo White stated that even before Judge Rakoff’s rulings, she took note of the “neither admit nor deny” policy because it conflicted with her experience as a United States Attorney, given DOJ’s policy requiring admissions in criminal cases, as detailed above. James B. Stewart, *S.E.C. Has a Message for Firms Not Used to Admitting Guilt*, N.Y. TIMES (June 21, 2013),

White made clear that the new policy would only apply to particular cases, and the “neither admit nor deny” settlements would continue to be “a very important tool in our enforcement arsenal that we will continue to use when we believe it is in public interest to do so.”¹¹²

It is likely that DOJ’s criminal law policy, and the reasons for it, led to the criticism and ultimate adjustment to the SEC’s policy. Judge Rakoff himself served as a federal prosecutor, and Mary Jo White, who served as SEC Chair from 2013 through 2017, attributed her support for the change in policy not to Judge Rakoff’s criticism but to her background in criminal law, including as U.S. Attorney for the Southern District of New York.¹¹³

White’s prediction—that admissions would be sought in some cases while “neither admit nor deny” settlements would continue to be heavily used—has proven true over the past seven years. While White stated in November 2016 that the SEC had obtained admissions from seventy-seven defendants during the three years since the policy shift,¹¹⁴ critics have questioned the extent to which the SEC’s 2013 policy change has impacted a meaningful percentage of SEC’s resolutions, and pressure remains on the SEC to seek admissions in more cases.¹¹⁵ However far the SEC has moved since 2013 towards demanding admissions, and however much further the SEC might go, it has been nearly fifty years since the SEC forbade the type of denials commonly made by FCA defendants.

V. DOJ’S LACK OF A POLICY FAVORING ADMISSIONS THREATENS TO UNDERMINE ITS ENFORCEMENT GOALS

One goal of DOJ’s FCA efforts is, of course, the recovery of money.¹¹⁶

<https://www.nytimes.com/2013/06/22/business/secs-new-chief-promises-tougher-line-on-cases.html>
[<https://perma.cc/7A47-8HTH>].

112. White, Speech at the Council of Institutional Investors, *supra* note 8.

113. *See* White, Speech at NYU, *supra* note 8 (“My views on this are, of course, informed by my experience as a federal prosecutor where criminal defendants—individuals or entities—must voluntarily admit their guilt if they agree to plead guilty.”).

Scholars have been skeptical of White’s claim that the changes were not, at least in part, a result of Judge Rakoff’s urging. Coffee, *supra* note 9 (“Whatever the outcome in the SEC’s mandamus appeal of Judge Jed S. Rakoff’s *Citigroup* decision, Rakoff has effectively won the war, even if he loses the *Citigroup* battle.”).

114. White, Speech at NYU, *supra* note 8.

115. *See* Winship & Robbennolt, *supra* note 7, at 1116–17 (collecting criticism of SEC’s use of admissions post-2013 policy shift); *see also* Winship & Robbennolt, *supra* note 9, at 50 (concluding that very few SEC resolutions contained admissions even after the 2013 policy shift); Rosenfeld, *supra* note 9.

116. *See* Press Release, U.S. Dep’t of Just., Justice Department Recovers Over \$3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 21, 2020) [hereinafter DOJ Jan. 21, 2020 Press Release], <https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019> [<https://perma.cc/D6SJ-NPDZ>].

Between 2010 and 2019, DOJ recovered approximately \$25.3 billion from settlements and judgments in FCA cases involving the health care industry.¹¹⁷ Settlements, even absent admissions, do result in significant monetary recovery in an absolute sense. But the failure to seek the full scope of treble damages plus penalties permitted under the FCA suggests that DOJ is not motivated by seeking maximum recovery. Moreover, DOJ has made clear that its focus is not only on recovering money—an unsurprising fact given that the roughly \$2 billion recovered annually through health care FCA cases is approximately 0.2% of the more than \$1.4 trillion the federal government spent on Medicare and Medicaid alone in 2019, and roughly 0.05% of the approximately \$3.8 trillion in National Health Expenditure in 2019.¹¹⁸

Instead, DOJ has highlighted the presumed deterrent impact of its FCA enforcement efforts. In its December 2018 press release announcing DOJ's Fiscal Year 2018 recoveries, DOJ noted “the Department's vigorous pursuit of health care fraud prevents billions . . . in losses by deterring those who might otherwise try to cheat the system for their own gain.”¹¹⁹ DOJ has sought to deter wrongdoing both through pure economic coercion—incentivizing profit-maximizing companies to follow the law in order to avoid punishment—and in other ways as well. Two methods have held particular prominence in DOJ statements, and are thus discussed separately here—incentivizing cooperation and creating a culture of compliance in the health care industry. As discussed below, whether examined from an economic analysis perspective or through the lens of the psychology of legal authority, DOJ's goals of deterrence and of incentivizing cooperation are thwarted by its failure to require admissions and its willingness to allow defendants to deny wrongdoing at the time of settlement.

A. *Deterrence*

DOJ's current policies undercut its deterrence goals in two seemingly opposite ways. First, most FCA settlements are surprisingly lenient given the potential power of the FCA—very few cases resolve for more than

117. CIV. DIV., U.S. DEP'T OF JUST., FALSE CLAIMS ACT STATISTICS 3 (Dec. 21, 2018), <https://www.justice.gov/civil/page/file/1080696/download> [<https://perma.cc/5HR6-KAK4>] (health and human services); DOJ Jan. 21, 2020 Press Release, *supra* note 116.

118. *National Health Expenditure Data*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Dec. 16, 2020), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical> [<https://perma.cc/VW8N-8E5A>]; CTRS. FOR MEDICARE & MEDICAID SERVS., NATIONAL HEALTH EXPENDITURE 2019 HIGHLIGHTS 2, <https://www.cms.gov/files/document/highlights.pdf> [<https://perma.cc/FQ9H-LTM3>].

119. DOJ Dec. 21, 2018 Press Release, *supra* note 17.

double damages, while scholars have suggested that even treble damages and penalties are likely “too mild rather than too severe” and that “[t]o settle false claims cases routinely for significantly less ‘than the legally authorized penalties’ is to undermine even optimal deterrence and to risk encouraging improper billing.”¹²⁰ A large number of FCA settlements recovered no more—and often less—than the amount of damages plus interest.¹²¹ There is thus ample reason for concern that DOJ’s FCA settlements are too lenient to achieve deterrence, instead sending the message that, even as payment for wrongdoing, they are an acceptable cost of doing business. In that context, the failure to require admissions is problematic because such settlements reduce the penalties for wrongdoing that come not from the financial component but from collateral consequences, including the reputational impact of being found to have broken the rules. Moreover, resolutions without admissions can leave enforcers vulnerable to accusations of being inappropriately lenient on wrongdoers.¹²²

But DOJ’s policy to not require admissions, and indeed to allow denials of wrongdoing, is potentially even more harmful than the seemingly lenient financial components to FCA settlements. While scholars have debated whether the goal of general deterrence should be complete or optimal deterrence, all forms of penalty-based deterrence require potential wrongdoers to believe that potential penalties are tied to wrongdoing.¹²³ Put simply, deterrence is undermined if the parties to be deterred believe the government may require them to pay a penalty whether they engage in wrongdoing or not, and will not require them to pay a greater penalty for greater wrongdoing.

Because DOJ consistently threatens treble damages and penalties in order to obtain settlements from defendants for what end up being greatly reduced penalties, observers—including other health care providers deciding upon future conduct—may find it plausible that defendants are resolving cases not because they committed misconduct and would lose at trial. Instead, they may conclude that defendants are resolving cases because the government has threatened severe penalties and transaction costs that could be imposed through trial, and then allowed them to evade

120. Jost & Davies, *supra* note 13, at 308.

121. Elberg, *supra* note 1, at 1196. The deterrent value of amounts paid are further reduced by the tax deductibility of amounts paid as restitution.

122. Buell, *supra* note 7, at 511 (referring to the “the reputational or stigmatic effects of liability”); Winship & Robbennolt, *supra* note 7, at 1126 (suggesting that admissions in civil enforcement “can help to foster a sense among the public that the agency enforcement has teeth”).

123. Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1538–51 (1984); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1876–77 (1992).

that severe punishment by agreeing to a slap on the wrist without any need to admit wrongdoing.¹²⁴ That scenario seems all the more plausible when defendants freely and publicly proclaim, when resolving cases, that that is precisely what is happening.

While it may be in some cases, to some observers, that the settlement payment itself constitutes something of an admission—then-Attorney General of New York Eliot Spitzer once remarked, “[y]ou don’t pay a \$100 million fine if you didn’t do anything wrong”¹²⁵—such statements ignore the reality that, as noted above,¹²⁶ only a small number of FCA settlements are of the size where Spitzer’s maxim would apply, even were it credible.¹²⁷ And for the largest companies, \$100 million may not be particularly significant, especially when compared to government threats of lengthy litigation followed by the potential for a jury verdict several times that amount.¹²⁸

Cynical observers can come up with a long list of motivations that could pull FCA prosecutors consciously or subconsciously from their responsibility to seek settlements only from guilty defendants. Professor Samuel W. Buell, himself a former prosecutor, noted the potential for such pressures in the SEC context. While “[a]ssum[ing] it is not true” that prosecutors are so driven, he observed that “enforcers like settlements for boosting case statistics, generating press conferences, yielding checks with lots of zeros attached, and building credibility with a defense bar that typically hires enforcement attorneys to their next and higher-paying jobs.”¹²⁹ Applying the same assumption, such motivations would likely apply to seeking settlements in the absence of wrongdoing.

While Buell was writing about SEC enforcers, FCA enforcers arguably have an additional motivation to be aggressive in pursuing resolutions, potentially to the point of seeking settlements in the absence of wrongdoing—the mechanics of the *qui tam* system, through which many FCA cases originate with private whistleblowers. *Qui tams* filed by whistleblowers regularly account for a large majority of FCA actions and

124. This is particularly true in health care FCA matters, where settlements regularly involve defendants not only buying peace from DOJ, but also resolving a potential exclusion action by HHS-OIG without a period of exclusion.

125. Patrick McGeehan, *\$100 Million Fine for Merrill Lynch*, N.Y. TIMES (May 22, 2002), <https://www.nytimes.com/2002/05/22/business/100-million-fine-for-merrill-lynch.html> [<https://perma.cc/7KA6-TN4L>].

126. See *supra* section II.A and Figure 1.

127. Judge Rakoff dismissed the SEC’s proposed \$33 million as “a trivial penalty.” SEC v. Bank of Am. Corp., 653 F. Supp. 2d 507, 512 (S.D.N.Y. 2009). Of the 209 health care FCA settlements over the past two years, 192 were below \$33 million. See *supra* section II.A and Figure 1.

128. McGeehan, *supra* note 125.

129. Buell, *supra* note 7, at 518.

recoveries.¹³⁰ Because relators' counsel control in which district an FCA suit will be filed and thus which U.S. Attorney's Office will be assigned to work on the case, DOJ officials are aware that what they do—whether taking aggressive positions on cases or otherwise—will impact how their district is viewed by the attorneys who represent qui tam relators, and thus whether the district is attractive for such suits.¹³¹ And the health care industry and the defense bar have additional reason to be skeptical of the origin of cases—it is widely known that most FCA cases originate with whistleblowers who stand to gain between 15–30% of the government's recovery,¹³² again giving the cynical observer reason to doubt the legitimacy of the government's claims.

Such skepticism is furthered in the FCA context by the lack of detailed factual allegations contained in settlement agreements and DOJ press releases. Unlike in the SEC context, where the SEC regularly recounts lengthy, detailed factual allegations—the much-debated proposed settlement in *Citigroup* contained twenty pages of allegations—none of the FCA CSAs analyzed contained detailed allegations including the evidence supporting the government's case, with most including allegations of no more than a few sentences.¹³³

130. The rise in FCA cases, particularly in the area of health care fraud, can be traced back to amendments to the FCA in 1986, which provided substantial incentives for whistleblowers (referred to as “relators”) to file qui tam lawsuits on behalf of the government alleging false claims. 31 U.S.C. § 3730. Relators can recover between 15–30% of the proceeds of a resolution, depending on whether the government elects to take the case over from the relator (this is referred to as the government “intervening”) or if the relator proceeds without government intervention, and also depending “upon the extent to which the person [i.e., the relator] substantially contributed to the prosecution of the action.” *Id.* § 3730(d).

In Fiscal Year 2019, relators filed 633 such qui tam suits, \$2.1 billion of the \$3 billion recovered in Fiscal Year 2019 was attributable to qui tams, and the government paid out \$265 million to relators. DOJ Jan. 9, 2020 Press Release, *supra* note 10. Although only roughly one-quarter of filed qui tams are successful, they regularly account for a large majority of FCA actions and recoveries. BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY STOLTZFUS JOST, ROBERT L. SCHWARTZ, BRIETTA R. CLARK, ERIN C. FUSE BROWN, ROBERT GATTER, JAIME S. KING & ELIZABETH PENDO, *HEALTH LAW: CASES, MATERIALS AND PROBLEMS* 904 (8th ed. 2018).

131. One recently departing U.S. Attorney touted his achievement in leading his district to “becom[e] a favored environment for Qui Tam lawsuits.” Press Release, U.S. Att’y’s Off. N. Dist. Iowa, Dep’t of Just., After Nearly 23 Years with the Department of Justice, United States Attorney Deegan Announces Retirement (Feb. 9, 2021), <https://www.justice.gov/usao-ndia/pr/after-nearly-23-years-department-justice-united-states-attorney-deegan-announces> [<https://perma.cc/F2RB-8262>].

132. DOJ Jan. 9, 2020 Press Release, *supra* note 10 (noting that qui tam actions “comprise a significant percentage of the False Claims Act cases that are filed,” and that qui tam actions accounted for \$2.1 billion of the \$3 billion recovered by DOJ from FCA actions in Fiscal Year 2019).

133. Complaint at 1–20, *SEC v. Citigroup Glob. Mkts. Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011) (No. 11 Civ. 7387); *see, e.g.*, *LifeCare Settlement*, *supra* note 56, at 1 (describing Covered Conduct as “submission of claims to Medicare for non-emergency basic life support ambulance services and non-emergency advanced life support ambulance services . . . that were not medically reasonable or

Professors Verity Winship and Jennifer K. Robbennolt have argued that where such detailed allegations are present, “[i]t is not clear . . . whether the nonlawyer public distinguishes between a complaint or consent decree that details the wrongdoing, but does not include admissions, and an agreement that both details and admits the allegations.”¹³⁴ From their perspective, DOJ’s practice of not including detailed allegations would presumably be almost as significant a harm as DOJ’s failure to obtain admissions or its allowance of denials—it is the combination of these practices that exposes DOJ to allegations of forcing meritless settlements.¹³⁵

B. *Legitimacy*

The greatest harm from DOJ’s lack of admissions may flow not from its impact on deterrence in the form of a direct effect on compliance decisions made by health care entities but on the implication for the fundamental legitimacy of the health care fraud legal system. DOJ has regularly spoken of the idea that fraud, particularly in the health care industry, can be reduced through shared values rather than solely through threats of enforcement from DOJ. As Assistant Attorney General Brian A. Benczkowski told a room full of health care compliance professionals in 2019:

The Department greatly values the role of the corporate compliance community. Every day, you work hard to reinforce legal and regulatory compliance and ethical behavior in business organizations, work that benefits all of us.

The role of the federal prosecutor is, of course, different from that of a corporate compliance professional, but in many ways our goals are aligned. We both want to deter corporate criminal misconduct, and we both want to detect such misconduct when it does occur, holding wrongdoers to account in our respective ways.

With apologies for repeating a cliché—the corporate compliance function is in some ways more important than the

necessary and/or were not supported by the medical record,” and without providing any additional details regarding the alleged wrongdoing or evidence supporting the government’s allegations); Pentec Settlement, *supra* note 72, at 2 (describing Covered Conduct of three separate allegations in a total of three sentences and without providing any evidence supporting the government’s allegations); UTC Settlement, *supra* note 70, at 3–4 (describing Covered Conduct of three separate allegations in a total of one paragraph and without providing any evidence supporting the government’s allegations).

134. Winship & Robbennolt, *supra* note 7, at 1099–100.

135. *Id.*

prosecution function.¹³⁶

Of course, such hopes are pinned on the industry believing DOJ's claim that their "goals are aligned."¹³⁷ DOJ cannot hope to make allies of compliance professionals if the industry believes DOJ's goal is not addressing fraud but collecting settlement dollars and press releases, wooing relators' counsel, and preparing for future employment in the private sector.

Commentators have expressed two distinct lines of criticism arising from concerns regarding legitimacy of enforcement resolutions that do not include admissions. First, one concern is that observers will view resolutions without admissions as weak, as a practical matter, because of a failure to achieve accountability.¹³⁸ It is that concern that has seemingly driven critics of the SEC's no-admission policy.¹³⁹ The second, more fundamental concern is that observers will view resolutions without admissions as deeply suspect, reflecting inappropriate use of the government's authority. It is this second concern that strikes at the heart of critiques about DOJ's use of the FCA.¹⁴⁰

Historically, concerns about the legitimacy of DOJ's FCA enforcement have focused not on the structure of DOJ resolutions and on the practical implications of such settlements, but on what was viewed as government's problematic expansion of theories underlying FCA cases against health care defendants. Almost twenty years ago, Professor Joan H. Krause examined the health care "industry's distrust of FCA enforcement . . . [and its] important implications for the future of the health care anti-fraud agenda."¹⁴¹ While noting that the "single most important determinant of legitimacy is *procedural justice*: whether the legal system treats parties fairly and with respect, even when they do not prevail," Krause's focus was on the substantive—Krause expressed concern that, as theories of FCA liability expanded, health care defendants

136. Brian A. Benczkowski, Assistant Att'y Gen., Off. of Pub. Affs., U.S. Dep't of Just., Remarks at the 20th Annual Pharmaceutical and Medical Device Compliance Congress (Nov. 6, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-20th-annual-pharmaceutical> [https://perma.cc/7Y6K-2X6R].

137. *Id.*

138. *See, e.g.*, Winship & Robbenolt, *supra* note 7, at 1126 (obtaining admissions "can help to foster a sense among the public that the agency enforcement has teeth").

139. *Id.*

140. Both concerns are reflected in DOJ's language instructing criminal prosecutors to object to *nolo contendere* and Alford pleas. *See supra* Part III.

141. Joan H. Krause, *Health Care Providers and the Public Fisc: Paradigms of Government Harm Under the Civil False Claims Act*, 36 GA. L. REV. 121, 127 (2001).

would view enforcement as illegitimate.¹⁴² Krause pointed to theorists' arguments that "the perceived *legitimacy* and *moral credibility* of the law are crucial to effective crime control because they influence conduct through normative—rather than coercive—forces."¹⁴³ Even where there is seemingly sufficient enforcement to create deterrence, Krause concluded, "lack of legitimacy is likely to lead to greater noncompliance."¹⁴⁴

As Krause detailed, critics have argued that DOJ's FCA theories have expanded because the potentially exorbitant penalties under the FCA (as well as potential exclusion from participation in government health care programs) lead defendants to settle cases they could potentially win at trial.¹⁴⁵ Whether those critics are right or wrong, the perceptions of industry and the defense bar may be as important as the reality given the extent to which DOJ relies on its legitimacy to achieve its enforcement goals. Two areas of particular focus to the government—*incentivizing cooperation* and *creating a culture of compliance* in the health care industry—are particularly harmed by perceptions of illegitimacy, as demonstrated by recent empirical study of the psychology surrounding the exercise of legal authority. Because, as discussed above, failure to require admissions, and worse yet allowing denials, threaten the perceived legitimacy of the FCA enforcement system, there is reason for concern that they consequently threaten DOJ's efforts to incentivize cooperation and promote a culture of compliance.

1. *Incentivizing Cooperation*

DOJ has made obtaining cooperation from corporate defendants a focus of its enforcement efforts, particularly in the wake of Deputy Attorney General Sally Yates's memorandum seeking to improve DOJ's efforts at obtaining "Individual Accountability for Corporate Wrongdoing."¹⁴⁶ The

142. *Id.* (emphasis in original) (citing TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 162, 178 (1990)).

143. *Id.* (emphasis in original) (first citing PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 202 (1995) ("Our conclusion is that the moral credibility of the criminal law is its single most important asset."); and then citing TYLER, *supra* note 142, at 22–24 ("Two such bases [for securing public compliance with the law] are commonly noted: social relations . . . and normative values.")).

144. *Id.* at 212.

145. *Id.* at 204–05.

146. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Just., to Assistant Att'y Gen., Antitrust Div., Assistant Att'y Gen., Civ. Div., Assistant Att'y Gen., Crim. Div., Assistant Att'y Gen., Env't & Nat'l Sec. Div., Assistant Att'y Gen., Tax Div., Dir., F.B.I., Dir., Exec. Off. for U.S. Trs., & All U.S. Att'ys (Sept. 9, 2015) [hereinafter Yates Memo], <https://www.justice.gov/archives/dag/file/769036/download> [<https://perma.cc/BG6D-ESRB>].

Yates Memo identified six steps DOJ would take to “strengthen [DOJ’s] pursuit of individual corporate wrongdoing,” the first of which focused on detailing under what circumstances corporations can qualify for cooperation credit under the Corporate Prosecution Principles.¹⁴⁷ The Yates Memo’s explicit instruction to civil prosecutors to take corporate cooperation into account ended years of speculation about whether cooperation was valued by DOJ’s civil components, and has led to a series of changes to DOJ policy language, culminating most recently and most significantly in a May 2019 statement from Assistant Attorney General Jody Hunt and accompanying changes to the Justice Manual.¹⁴⁸ These changes amount to formal guidance that DOJ would reduce the FCA multiplier for damages recovered in a settlement based on the defendant’s cooperation during the litigation and settlement process.

These efforts stem from DOJ’s belief (and public criticism) that corporate enforcement is not enough—individual enforcement must be an important part of DOJ’s efforts—and that obtaining fulsome cooperation from corporate defendants is a key component to successful individual prosecutions.¹⁴⁹ Since the 2015 Yates Memo, DOJ’s efforts to incentivize cooperation have taken the form of speeches promising more favorable resolutions following cooperation, and guidance documenting those promises.¹⁵⁰ Adding to legitimacy concerns, DOJ’s efforts to obtain cooperation likely suffer from the inability of industry and the defense bar to see tangible benefits for cooperation in FCA resolutions—in fact, the

The Principles of Federal Prosecution of Business Organizations describes cooperation as “a mitigating factor, by which a corporation . . . can gain credit in a case . . . [by, among other things] identify[ing] all individuals substantially involved in or responsible for the misconduct at issue.” U.S. Dep’t of Just., Just. Manual § 9-28.700 (2019) (the value of cooperation).

147. *Id.*

148. DOJ May 7, 2019 Press Release, *supra* note 3; U.S. Dep’t of Just., Justice Manual § 4-4.112 (2019) [hereinafter FCA Guidance].

149. Yates Memo, *supra* note 146, at 1 (“One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public’s confidence in our justice system.”). Not surprisingly, the first, and longest, section of the Yates Memo focused on cooperation by corporate defendants.

150. See Jesse Panuccio, Assoc. Att’y Gen., Off. of Pub. Affs., U.S. Dep’t of Just., Remarks at the American Bar Association’s 12th National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 14, 2018), <https://www.justice.gov/opa/speech/acting-associate-attorney-general-jesse-panuccio-delivers-remarks-american-bar> [<https://perma.cc/BG5F-4CMY>]; Stephen Cox, Deputy Assoc. Att’y Gen., Off. of Pub. Affs., U.S. Dep’t of Just., Remarks at the 2019 Advanced Forum on False Claims and Qui Tam Enforcement (Jan. 28, 2019), <https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-delivers-remarks-2019-advanced-forum-false> [<https://perma.cc/JXK3-D5VL>]; FCA Guidance, *supra* note 148; U.S. Dep’t of Just., Just. Manual § 9-28.000 (2015) (Principles of Federal Prosecution of Business Organizations).

details of those resolutions give observers reason to be skeptical that cooperation is in fact meaningfully rewarded by DOJ in the settlement process.¹⁵¹ But seemingly little attention has been paid to what may be an additional roadblock to DOJ's efforts to obtain cooperation—industry and the defense bar's perception that DOJ is generally acting illegitimately in FCA prosecutions.

Cooperation involves not only a cold cost-benefit calculus of the likely practical consequences of potential enforcement, but also a more general, attitudinal willingness to aid law enforcement's efforts arising from the perceived legitimacy of the enforcement system. Professors Tom R. Tyler and Jonathan Jackson's recent research demonstrated a connection between belief in the legitimacy of legal authorities and a willingness to cooperate in those authorities' investigations, bolstering prior studies tying legitimacy to cooperation.¹⁵² Participants in their study were asked a series of questions on a variety of topics—including questions aimed at measuring their views of the legitimacy of law enforcement—as well as their willingness to engage in certain behaviors. Tyler and Jackson's regression analysis found that those who viewed legal authorities as more legitimate were more likely to report crime and criminals, and to cooperate with the legal system in prosecuting criminals.¹⁵³

Unfortunately for DOJ, these two concerns—that DOJ does not keep its promises to reward cooperation and that DOJ uses its substantial leverage to obtain settlements even in the absence of wrongdoing—go hand-in-hand, and both give industry and the defense bar reasons not to provide DOJ the cooperation it clearly wants and needs to achieve its enforcement goals.

2. *Creating a Culture of Compliance in the Health Care Industry*

Beyond law enforcement efforts to deter misconduct or encourage cooperation through the cost-benefit analysis corporate actors are likely to consider, studies have shown that legal authorities can motivate compliance (like cooperation) when the public views the law and law enforcement as legitimate and thus feel an obligation to follow the rules.¹⁵⁴ DOJ and congressional supporters of the FCA have expressed confidence

151. Elberg, *supra* note 1, at 1203, 1210 (providing examples of FCA CSAs in which the defendant entity cooperated but seemingly did not receive a reduced damages multiplier).

152. Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCH. PUB. POL'Y & L. 78 (2014); Ben Bradford, *Policing and Social Identity: Procedural Justice, Inclusion, and Cooperation Between Police and Public*, 24 POLICING & SOC'Y 22 (2014).

153. Tyler & Jackson, *supra* note 152, at 86.

154. *Id.* at 79.

that FCA enforcement has done exactly that. The sponsors of the 1986 amendments to the FCA, which are credited with a rise in FCA cases, pointed to the law's impact on "corporate culture":

Studies estimate the fraud deterred thus far by the *qui tam* provisions runs into the hundreds of billions of dollars. Instead of encouraging or rewarding a culture of deceit, corporations now spend substantial sums on sophisticated and meaningful compliance programs. That change in the corporate culture—and in the values-based decisions that ordinary Americans make daily in the workplace—may be the law's most durable legacy.¹⁵⁵

DOJ has similarly expressed a belief that corporations are not investing in compliance simply to avoid punishment from DOJ, but because they share DOJ's values and want to follow the rules.¹⁵⁶

Tyler and Jackson's recent study supported Tyler's previous work claiming a link between belief in the legitimacy of legal authorities and willingness to follow the law.¹⁵⁷ Their regression analysis found that those who viewed legal authorities as more legitimate were less likely to engage in criminal behavior—both major (e.g., fraud) and minor (e.g., littering).¹⁵⁸ Notably, Tyler and Jackson were able to draw a distinction between personal morality and normative justification. Their subjects' willingness to follow the law—both major and minor—was based not only on their own views of whether "particular behaviors are or are not immoral" (personal morality), but also "whether legal authorities share the values, purposes and goals of the community" (normative justification).¹⁵⁹ Assistant Attorney General Benczkowski was thus correct to speak of DOJ and industry's shared values, purposes, and goals as part of DOJ's efforts to encourage compliance—it is less clear whether those in the audience believed his claims regarding DOJ's values to

155. *The False Claims Act*, TAF EDUC. FUND, <https://www.taf.org/false-claims-act> [<https://perma.cc/4XFG-TYED>] (statement of Sen. Charles Grassley and Rep. Howard Berman).

156. See, e.g., Brian A. Benczkowski, Assistant Att'y Gen., Off. of Pub. Affs., U.S. Dep't of Just., Keynote Address at the Ethics and Compliance Initiative (ECI) 2019 Annual Impact Conference (Apr. 30, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and> [<https://perma.cc/PC42-2KCN>] (noting that "the interests of the Department and private industry to root out corporate crime are very much aligned" and referring to their "collective efforts"); Stuart Delery, Assistant Att'y Gen., Off. of Pub. Affs., U.S. Dep't of Just., Remarks at American Bar Association's 10th National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 5, 2014), <https://www.justice.gov/opa/speech/assistant-attorney-general-stuart-delery-delivers-remarks-american-bar-association-s-10th> [<https://perma.cc/AJK3-CMB9>] ("[M]ost companies doing business with the government are trying to play by the rules . . . many companies and individuals do their best to get it right.").

157. See generally Tyler & Jackson, *supra* note 152; TYLER, *supra* note 142.

158. Tyler & Jackson, *supra* note 152, at 83.

159. *Id.* at 87.

be sincere.

While DOJ has been explicit about the potential harm that would result from allowing no-admission criminal pleas, there has seemingly been no similar self-reflection when it comes to entering into FCA resolutions with defendants who admit nothing and instead publicly deny wrongdoing. DOJ's expressed fears in the criminal context of undermining public perceptions of the administration of justice have seemingly come to fruition in the context of the FCA and health care fraud, leading some to openly question the legitimacy of DOJ's corporate health care enforcement efforts. As detailed above, this comes at a potentially serious cost to DOJ's enforcement efforts.

Part VI considers the potential rationales for DOJ's practice—whether there is some significant gain by not requiring admissions or some meaningful harm that would come from a change in policy in this area—and concludes that any likely concerns are overstated or even misplaced.

VI. POSSIBLE RATIONALES FOR THE NO ADMISSIONS PRACTICE

Given DOJ's firm criminal policy against no-admission resolutions, the well-publicized criticism of the SEC's "neither admit nor deny" resolutions, and the detrimental impact on DOJ's enforcement goals detailed above, it is natural to wonder why DOJ has adopted and maintained the practice.

The most likely explanation is offered by Judge Rakoff in reference to the SEC's continued use of "neither admit nor deny" settlements when he posited they are used "presumably for no better reason than that it makes the settling of cases easier."¹⁶⁰ The SEC has confirmed as much, with the Director of the SEC's Division of Enforcement defending the policy during testimony before Congress by stating that litigating every case would lead to fewer enforcement actions, and that defendants would often refuse to settle cases if admissions were required because they would be opening themselves up to substantial follow-on litigation by third parties.¹⁶¹ The SEC has also cited the need to resolve cases quickly and to

160. SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 310 (S.D.N.Y. 2011).

161. *Examining the Settlement Practices of U.S. Financial Regulators: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 77 (2012) (statement of Robert Khuzami, Director of the Division of Enforcement United States Securities and Exchange Commission). Professor Coffee has noted that while an admission would likely be inadmissible in a subsequent civil trial, it could still have a powerful influence on judges ruling on motions to dismiss and would create issues for witnesses testifying at depositions or at trial. Coffee, *supra* note 9.

reduce litigation risk through “neither admit nor deny” settlements.¹⁶² Those resource concerns undoubtedly apply similarly to DOJ components handling FCA cases.

There is, however, one notable difference, which creates greater risk for the SEC in securities cases than for DOJ in FCA cases. If the SEC insists on a resolution a defendant will not accept and then loses the case at trial, it impacts the recovery for victims. Thus, the SEC has an important reason to be risk-averse: the desire to protect the interest of victims in each case. In FCA cases, on the other hand, the victim is always the same—the government. A loss in one case would therefore presumably be more than made up for through wins in other cases with higher recoveries because defendants would not receive the benefit of a greatly reduced settlement in exchange for settling the case.¹⁶³ DOJ therefore has more latitude to seek systemically optimal resolutions in the FCA context, justifying a more, rather than less, assertive policy as to admissions than in the SEC context.

In the world of FCA litigation, the enforcers do have an additional reason to seek the path of least resistance in the form of a settlement absent admission—the prominent role of the *qui tam* system. As noted in section IV.A, DOJ enforcers from U.S. Attorneys’ Offices have significant incentives to compete for the attention of relators’ counsel, who are generally repeat players. Because relators’ share of recovery (and thus relators’ counsel’s share) is based on a percentage of the government’s recovery, any tradeoffs in settlement negotiation that involve DOJ taking less money in exchange for admissions are likely to be viewed negatively by the *qui tam* bar (attorneys who represent relators in *qui tam* cases). Conversely, relators’ counsel are likely to look favorably upon prosecutors who resolve their cases more quickly through settlement rather than continuing litigation in order to secure admissions or trial verdicts. The resource pressures expressed by the SEC’s leadership thus likely apply with even greater force to DOJ’s FCA attorneys.¹⁶⁴

Given the lack of an official DOJ policy on the topic of admissions, in

162. *SEC’s Andrew Ceresney Defends Neither Admit nor Deny Settlements*, CORP. CRIME REP. (June 6, 2013, 2:01 PM), <https://www.corporatecrimereporter.com/news/200/secceresneyneitheradmitnordeny06062013/> [<https://perma.cc/RH67-BTMR>].

163. This assumption hinges, of course, on another assumption—that DOJ is settling only meritorious cases that they would likely win at trial. If, as skeptics charge, DOJ is using its leverage to settle significant numbers of cases it would lose if taken to trial, then DOJ is recovering more money for the government by settling cases rather than insisting on admissions.

164. *See False Claims Act Amendments: Hearings Before the Subcomm. on Admin. L. & Governmental Rel. of the H. Comm. on the Judiciary*, 99th Cong. 299 (1986) (statement of Sen. William S. Cohen, Sen. William V. Roth & Sen. Carl Levin) (referencing DOJ’s “limited” resources and the “extensive investments of time and resources required to litigate in federal court”).

the significant number of cases handled by individual USAOs without the involvement of the Commercial Litigation Branch, it is largely up to individual districts whether to require admissions. Because districts rely largely on qui tams as sources for corporate health care fraud cases, and relators and their attorneys have virtually unchecked power to select the district to handle their claims, there is reason to suspect that districts may shy away from demanding admissions for fear of being viewed as less hospitable by the relators' bar, in that the relators' bar has little or no interest in increased deterrence and cooperation in the industry, or in protracted litigation.¹⁶⁵

Of the three key players in a typical FCA case—the defendant, the relator, and DOJ—resolutions without admissions are clearly in the interest of the first two. And for DOJ, forgoing admissions in favor of quicker and potentially more lucrative resolutions is in its short-term interest—it is the long-term, less measurable benefits to DOJ of maintaining legitimacy, which weigh in favor of demanding admissions.¹⁶⁶

Another difference between the SEC process and DOJ's FCA process

165. At least one attorney representing corporate health care entities—a former principal deputy chief of the Civil Division of the U.S. Attorney's Office for the Eastern District of New York, where he was responsible for overseeing qui tam actions—has speculated that “*qui tam* relators who can choose to file in several districts may think twice about filing in the [Southern District of New York],” given its stated policy of requiring admissions from FCA defendants. Kevin P. Mulry, *Admission of Wrongdoing Requirement May Make SDNY Less Attractive to Qui Tam Relators*, N.Y. HEALTH L. (Sept. 19, 2013) (emphasis in original), <https://www.nyhealthlawblog.com/2013/09/19/another-false-claims-settlement-requires-admission-of-wrongdoing/> [<https://perma.cc/F3G3-29NW>] (stating that “[a] required admission of wrongdoing may stand in the way of – or significantly delay – an FCA settlement that could otherwise be in the interests of both relator and the defendant”).

Interestingly, however, it does not appear SDNY requires admissions in cases settled by relators without DOJ intervention. See, for example, Robert Holly's article *VNSNY Agrees to \$57M Settlement in Whistleblower Suit Related to Physician Care Plans*, which discusses a case where the relator settled the non-intervened case for \$57 million, and defendant's general counsel issued the following statement on the day of the settlement: “For more than five years, we have been forced to defend ourselves against a lawsuit based on allegations that are simply untrue: We did not bill for visits we didn't deliver, nor did we cause harm to our patients. By resolving these claims through the present, we can put this distraction behind us and move forward, now stronger and even better” Robert Holly, *VNSNY Agrees to \$57M Settlement in Whistleblower Suit Related to Physician Care Plans*, HOME HEALTH CARE NEWS (June 26, 2020), <https://homehealthcarenews.com/2020/06/vnsny-agrees-to-57m-settlement-in-whistleblower-suit-related-to-physician-care-plans/> [<https://perma.cc/EK5Q-GUF9>]; *United States v. Visiting Nurse Serv. of N.Y.*, No. 14-cv-05739, 2017 WL 5515860 (S.D.N.Y. Sept. 26, 2017).

166. If these motivations do provide an explanation, it is not clearly reflected in the make-up of the admissions and denials cases. Of the 195 CSAs reviewed for purposes of this article, 131—67%—stemmed from qui tams. While denials were more common in qui tams than in cases not involving qui tams—fifty-six of the seventy-two denial cases, or 78%, stemmed from qui tams, admissions were also more common in qui tams than in cases not involving qui tams—twelve of the sixteen admissions cases, or 75%, stemmed from qui tams. See *infra* app. 1.

may also provide an explanation. It is not a coincidence that a district court judge, Judge Rakoff, became the most well-known, and likely most influential, figure driving the movement against the SEC's "neither admit nor deny" policy. The SEC's frequent use of consent decrees entered by federal district courts to resolve its most serious enforcement actions makes the judge an additional key player in the resolution. Although the Second Circuit held that Judge Rakoff failed to give adequate deference to the SEC's discretion regarding what settlements are in the public interest, the requirement that he sign the consent decree interjected him into the resolution, providing him with the opportunity to comment.¹⁶⁷ Even under the more deferential standard adopted by the Second Circuit, the consent decree process still involves the SEC and the defendant coming before a court, asking the court to order a series of remedies, and providing the justification to the court why those remedies should be adopted.

The resolution of FCA cases involves none of that. In the approximately one-third of cases that do not stem from a *qui tam*, there is generally no judicial involvement at all—the parties enter into an out-of-court settlement agreement and that concludes the matter. And even in the numerous cases that do arise out of *qui tams*, the statute has thus far not been interpreted as requiring (or even allowing) judges to examine the merits of a resolution so long as DOJ and the defendant agree, and the relator does not object. The statute calls for a hearing for the court to determine that the settlement is "fair, adequate, and reasonable" only if the relator objects.¹⁶⁸ As a result, in FCA matters DOJ simply informs the court that a settlement has been reached and asks that the case be closed—there is no process of justifying any aspect of the resolution, not the dollar figure nor the lack of admissions.¹⁶⁹

Were the statute to call for judicial involvement in approving settlements, there is reason to suspect at least some judges would take issue with DOJ's handling of the resolutions—requiring DOJ to provide additional information to the court, and by doing so make it available to the public. Courts have increasingly pushed back on the terms of criminal

167. *SEC v. Citigroup Glob. Mkts., Inc.*, 752 F.3d 285, 291 (2d Cir. 2014).

168. *See* 31 U.S.C. § 3730(c)(2)(B) ("The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held *in camera*.").

169. *See, e.g.*, United States' Notice of Election to Intervene in Part and to Decline to Intervene in Part at 2, *United States ex rel. Katko v. Oviatt Hearing & Balance, LLC*, No. 5:16-CV-1217 (N.D.N.Y. Dec. 7, 2018) ("[T]he United States is filing a settlement agreement that it has entered with Oviatt and the relator. That agreement requires Oviatt to make payment to the United States within 10 days, after which the parties will file a Joint Partial Stipulation of Dismissal.").

resolutions between DOJ and health care entities, questioning or outright declining to go along with proposed plea agreement terms presented to courts under Federal Rule of Criminal Procedure 11(c)(1)(C).¹⁷⁰ As it stands currently, however, there is no avenue for a judge to criticize—or even for a judge, and thus the public, to learn the rationale for—an FCA settlement between DOJ and a health care entity.

VII. POLICY IMPLICATIONS

The benefits to DOJ in increased legitimacy and deterrence through demanding admissions in FCA cases must, of course, be balanced by the costs of adopting such a policy. One such cost relates to attracting qui tam cases, and the problems arising from the incentive for local offices to adopt policies in order to attract qui tam cases, as described in Part VI. That cost and problem can be solved through a national policy, thus taking the pressure off individual U.S. Attorney's Offices to adopt a practice they may fear would cause whistleblowers to stay away from their district. This Part examines the remaining potential costs—efficiency and litigation risk—in turn and concludes that the former is likely not nearly as significant as DOJ might fear, and the latter may not be a cost at all when viewed from the perspective of the public good and the system's legitimacy.

A. *Efficiency/Management of Government Resources*

In evaluating the impact on efficiency of an increased emphasis on admissions in FCA settlements, there are three important concepts to consider by way of background. First, DOJ's health care fraud enforcement is enormously profitable. In Fiscal Year 2019 alone, DOJ recovered \$2.6 billion from settlements and judgments in FCA cases involving the health care industry, representing the tenth consecutive year that DOJ's civil health care fraud settlements and judgments have exceeded \$2 billion.¹⁷¹ And the government has boasted that it has done so efficiently, recovering \$4 for every \$1 expended on its Health Care Fraud and Abuse Control Program between 2016–2018.¹⁷² Second, DOJ

170. *See, e.g.,* United States v. Aegerion Pharms., Inc., 280 F. Supp. 3d 217, 228 (D. Mass. Nov. 20, 2017) (rejecting pharmaceutical corporation's Federal Rule of Criminal Procedure 11(c)(1)(C) guilty plea to two misdemeanor counts of introducing misbranded drugs into interstate commerce as "not in the public interest").

171. DOJ Jan. 9, 2020 Press Release, *supra* note 10.

172. U.S. DEP'T OF HEALTH & HUM. SERVS. & U.S. DEP'T OF JUST., HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM ANNUAL REPORT FOR FISCAL YEAR 2018, at 10 (2019), <https://oig.hhs.gov/publications/docs/hcfac/FY2018-hcfac.pdf> [<https://perma.cc/E67F-BLXD>].

has accomplished this profitability despite failing to utilize the top end of FCA exposure through settlements above double damages.¹⁷³ Third, DOJ has, in contrast, consistently demanded treble damages and penalties after winning cases at trial.¹⁷⁴

There is reason to believe DOJ could demand and obtain admissions without causing a flood of trials. Because DOJ offers such a large financial incentive to FCA defendants to settle their cases rather than take them to trial, defendants take on greater financial risk than the government when an FCA proceeds to trial. Given the potential for treble damages and penalties, an FCA trial is often a “bet the company” event for a defendant, while the dollar figures are small in the context of federal health care spending.¹⁷⁵ In addition to the financial incentives, defendants also enjoy other benefits if they are able to avoid trial: Trials are expensive and time-consuming for defendants, even more so than they are for the government, and trials increase the negative publicity of government enforcement relative to resolutions in which the investigation and the resolution are frequently announced simultaneously.¹⁷⁶ There is meaningful, if limited, evidence to support the prediction that the government could insist on admissions without unleashing a flood of trials—the two districts that have demanded admissions in their FCA resolutions have continued to settle cases and have not been host to a large number of FCA trials.¹⁷⁷

Given the extent to which DOJ currently rewards settling defendants by reducing the damages multiplier, it is possible that DOJ’s health care fraud enforcement would become more profitable, not less, were more

173. Elberg, *supra* note 1 (finding that none of the eighty-nine resolutions examined between early 2018 and June 2019 involved the imposition of penalties or a multiplier higher than 2.75, only three had multipliers above 2.5, and only eleven above 2.0).

174. *See, e.g.,* United States v. Krizek, 111 F.3d 934, 936 (D.C. Cir. 1997) (noting the government’s demand of \$81 million based on \$245,392 in actual damages and civil penalties of \$10,000 for each of 8,002 separate CPT codes).

175. Concerns regarding potential HHS-OIG exclusion would also continue to create pressure for defendants to settle. *See supra* Part IV. For the government, the roughly \$2 billion recovered annually through health care FCA cases is less than 0.2% of the more than \$1.3 trillion the federal government spent on Medicare and Medicaid alone in 2018, and less than 0.05% of the approximately \$3.6 trillion in National Health Expenditure in 2018. CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 118.

176. *See* 31 U.S.C. § 3730(b)(2) (“The complaint shall be filed in camera, [and] shall remain under seal”); Paul Radvany, *The SEC Adds a New Weapon: How Does the New Admission Requirement Change the Landscape?*, 15 CARDOZO J. CONFLICT RESOL. 665, 673–74 (2014).

177. *See* Elberg, *supra* note 1. Outside of the health care and FCA arena, DOJ notably required admission in numerous civil settlements with companies relating to residential mortgage backed securities (RMBS), again without leading to numerous trials. *See, e.g.,* Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., Credit Suisse Agrees to Pay \$5.28 Billion in Connection with Its Sale of Residential Mortgage-Backed Securities (Jan. 18, 2017), <https://www.justice.gov/opa/pr/credit-suisse-agrees-pay-528-billion-connection-its-sale-residential-mortgage-backed> [<https://perma.cc/TF5Q-9XJR>] (announcing a settlement containing admissions).

defendants to refuse to settle and take their cases to trial rather than enter into a settlement including admissions. Although DOJ would have to expend (or at least threaten to expend) substantial additional resources at trial, the government would be rewarded with obtaining roughly twice as much (including the increase to treble damages and penalties) following a successful verdict because defendants would not obtain the settlement benefit of a reduced payment amount.¹⁷⁸

Were a policy change to lead more defendants to refuse settlement in favor of trial, it would mean DOJ would need to either increase resources by hiring more personnel or handling fewer cases. The former may be preferable, as the cost of increased personnel would be negligible compared to the dollars to be gained through increased FCA enforcement, particularly of cases involving the most egregious conduct or involving the greatest amount of damages.¹⁷⁹ In the context of the SEC, Professor John Coffee has suggested that the government taking on fewer cases could be a positive, as it would lead the enforcer to prioritize and put greater resources into the cases it brings.¹⁸⁰ His argument is even stronger in the FCA context, where DOJ does not have to simply drop lower priority cases and allow misconduct to go unpunished—DOJ has the ability to identify appropriate cases for capable and well-resourced relator’s counsel to take on a primary role, while shifting DOJ resources to higher priority cases.¹⁸¹

Greater deterrence would be achieved whether defendants make the admissions (thus increasing the severity of the resolution) or refuse to

178. While it is impossible to predict what percentage of additional trials would lead to victories for the government, it is worth noting that only a small percentage of federal criminal defendants are historically acquitted at trial. *See, e.g.*, U.S. DIST. CTS., TABLE D-4: U.S. DISTRICT COURTS—CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND OFFENSE, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30 2018, at 1 (2018), https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2018.pdf [<https://perma.cc/PJ6A-D5B7>] (compiling statistics and noting 237 defendants acquitted after jury trials and eighty-three after bench trials as compared to 73,109 convictions via plea or trial).

179. By way of comparison, while DOJ recovered more than \$1 million from 145 separate FCA settlements between early 2018 and April 2020 reviewed for purposes of this Article, DOJ annual salaries for Assistant U.S. Attorneys in 2021 ranged from a minimum of \$55,756 to a maximum of \$172,400. *See Salary Information: Administratively Determined Pay Plan Charts*, U.S. DEP’T OF JUST.: OFFS. OF THE U.S. ATT’YS (Jan. 11, 2021), <https://www.justice.gov/usao/career-center/salary-information/administratively-determined-pay-plan-charts> [<https://perma.cc/SM7C-YRC6>].

180. John C. Coffee, Jr., *The End of Phony Deterrence?* ‘SEC v. Bank of America,’ LAW.COM: N.Y. L.J. (Sept. 17, 2009, 12:00 AM), <https://www.law.com/newyorklawjournal/almID/1202433852330/the-end-of-phony-deterrence-sec-v-bank-of-america/> [<https://perma.cc/N9HT-A55W>].

181. *See* 31 U.S.C. § 3730(c)(3) (“If the government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.”).

make the admissions and the government wins at trial.¹⁸² Such benefits, as well as the benefits of increased legitimacy discussed in section IV.B, must also be factored into DOJ's resource allocation calculus.

B. *Litigation Risk*

If a policy of demanding admissions did result in an increased number of FCA trials, with that increase would come a greater risk that DOJ would lose some of those trials. From DOJ's internal perspective, the risk of losing at trial is, of course, a negative—losses bring consequences both financial and reputational. However, not only are those negatives outweighed in the aggregate by the likely benefits discussed above, but that increased litigation risk brings with it important benefits in the form of increased transparency and, assuming the cases are meritorious and DOJ prevails at trial, increased legitimacy.

At the heart of skepticism surrounding DOJ's FCA enforcement is the idea that DOJ may well be settling cases in which the defendant would prevail were the case to proceed to trial, asserting weak claims, avoiding trial, and incentivizing defendants to settle with a big stick and modest cost of buy-out.¹⁸³ This concern—which was an assumption of Krause's criticism of the FCA and is the message behind each statement by a settling defendant that they entered into the settlement solely to avoid the time and expense of litigation—is supported by the paucity of FCA trials and the dramatic incentives for defendants to settle created by the gap between FCA exposure and DOJ's settlement practices.¹⁸⁴ Thus, assuming DOJ were to be (or continued to be) careful about the claims it asserts, and more frequently requires admission or taking the case to trial,

182. See Radvany, *supra* note 176, at 703. The author was a former Deputy Chief of the Criminal Division of the United States Attorney's Office for the Southern District of New York where he oversaw the Securities Fraud Unit.

183. Krause, *supra* note 141, at 126, 204 (first citing Uwe E. Reinhardt, *Medicare Can Turn Anyone into a Crook*, WALL ST. J., Jan. 21, 2000, at A18; then citing Timothy P. Blanchard, *Medicare Medical Necessity Determinations Revisited: Abuse of Discretion and Abuse of Process in the War Against Medicare Fraud and Abuse*, 43 ST. LOUIS U. L.J. 91, 114 (1999) (arguing that FCA's "threat of draconian . . . sanctions coerces providers into settlements regarding issues on which providers would most likely prevail"); then citing John T. Boese & Beth C. McClain, *Why Thompson Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 ALA. L. REV. 1, 18 (1999) (arguing penalty structure "places great pressure on defendants to settle even meritless suits"); then citing Thomas S. Crane, *Health Care, Defense Industry Must Regroup Efforts to Reform False Claims Act*, 3 HEALTH CARE FRAUD REP. (BNA) 358 (1999) (arguing FCA penalties are among "the most abused tools in the government's arsenal to leverage exorbitant settlements"); and then citing William M. Sage, *Fraud and Abuse Law*, 282 [J]AMA 1179, 1180 (1999) (noting "large organizations have such a large stake in avoiding exclusion from Medicare that they readily settle pending charges, making much of fraud control resemble a rebate program more than a law enforcement exercise").

184. *Id.*

DOJ's increased cost of going to trial more often would be more than balanced out by not only the increased monetary recovery, but also by the enhanced legitimacy. Krause took issue with the conclusions of Professors Timothy Jost and Sharon Davies—who defended the FCA and argued that the statute's *mens rea* requirement protects against Krause's concern of punishing defendants who have made innocent mistakes within a complex system.¹⁸⁵ Krause responded that “the fact that no such finding of intent is required in a settlement raises the possibility that prosecutors will settle with defendants who might very well prevail at trial.”¹⁸⁶ A policy of requiring admissions would address Krause's concern, while simultaneously addressing Jost and Davies's concern that FCA settlements are insufficiently severe from a deterrence perspective.¹⁸⁷

As Krause noted, the problem of lack of trials goes beyond depriving courts of the opportunity to weigh in on grey area legal issues—it runs the risk of impairing views of the system's legitimacy by giving observers reason to question its procedural fairness.¹⁸⁸ Viewed in these terms, an increase in trials—even if some are lost by DOJ—would improve views of the system's legitimacy and thus might paradoxically advance DOJ's efforts to secure cooperation and to create a culture of compliance in the health care industry.

Transparency and thus legitimacy would benefit even before the trial at the end of the litigation process. Because most FCA cases not only settle, but settle without DOJ filing a complaint, there is virtually no transparency as to the scope of a defendant's culpable conduct—unlike in the criminal system, even the often-denied and only rarely admitted allegations are a product of negotiation, and motion practice allowing courts to weigh in on government theories and evidence are virtually non-existent.¹⁸⁹ Instead of bare bones allegations that are no sooner announced

185. *Id.* at 206; Jost & Davies, *supra* note 13, at 303.

186. Krause, *supra* note 141, at 207–08.

187. Jost and Davies conclude that “complete deterrence” rather than “optimal deterrence” is appropriate because health care fraud provides no social benefit. Jost & Davies, *supra* note 13, at 272–77.

188. Krause, *supra* note 141, at 211–12; *see supra* section V.B.

189. While there appears to be a recent uptick in the number of FCA complaints filed by DOJ, the number of complaints still pales in comparison to the number of matters resolved without the filing of a complaint. In addition, at least two districts (the Southern District of New York and the District of Vermont) have a practice of filing complaints at the time of settlement for purpose of providing details regarding DOJ's allegations, but these similarly account only for a small number of cases. *See, e.g.,* Complaint, *United States v. Centerlight Health Sys.*, No. 1:13-CV-08502 (S.D.N.Y. Mar. 28, 2018) (filing complaint on same day as filing a letter informing Judge “the parties have reached an agreement to settle the allegations”); Complaint, *United States v. Greenway Health, LLC*, No. 2:19-CV-00020 (D. Vt. Feb. 6, 2019) (filing complaint one day prior to filing Notice of Dismissal attaching Settlement Agreement).

than they are denied by defendants, the meaningful threat of litigation as a backdrop would mean increased transparency, allowing observers to see the full details of the government's allegations and the evidence supporting those charges. Regardless of whether the case proceeds to trial and regardless even of whether the government prevails in the end, the public—and particularly the health care industry and the defense bar—would see in those details and that evidence a sound basis for DOJ's decision to bring the case and have increased confidence that DOJ is seeking to do justice.

C. Potential Benefits of a Targeted Approach to Admissions

To the extent DOJ is settling cases it believes would succeed through litigation and trial, it is a change that could be made with substantial benefit but likely minimal cost, as demonstrated by the individual U.S. Attorney's Offices that have already been requiring admissions. If DOJ prefers to instead dip its toe into the admissions water, as the SEC's current approach demonstrates, DOJ need not make a stark choice between seeking admissions in all cases or admissions in none. Instead, DOJ can identify cases where admissions are particularly important—those cases involving the largest dollar amounts, harm beyond that to government funds, conduct that is particularly egregious, or which are otherwise likely to receive increased attention from the general public or the health care industry—and forgo seeking admissions in all other cases.

Such an approach would arguably be advisable not only from a resource-allocation perspective but with a view towards maximizing the moral credibility of DOJ's FCA enforcement system. Professor Paul H. Robinson has examined arguments for strengthening or blurring the distinction between criminal and civil law, concluding that it is necessary to maintain the distinction in order to preserve the criminal law's moral credibility.¹⁹⁰ Robinson's focus was on the need for criminal law to convey condemnation and impose punishment in order to fulfill society's desire to see truly condemnable conduct treated as such.¹⁹¹ Notably, Robinson was referring to the distinction (or lack of distinction) between criminal law and the civil tort system, and did not address the placement of civil enforcement by government prosecutors.¹⁹² As discussed above, the FCA is the government's primary enforcement tool in the area of

190. See Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201 (1996).

191. *Id.* at 211.

192. *Id.* The article was part of a Boston University Law Review symposium on The Intersection of Tort and Criminal Law.

health care fraud by corporate entities—the line between criminal and civil is already blurred both by government’s role in the action and by DOJ’s use of the FCA to handle misconduct it explicitly views as condemnable.¹⁹³

Whether DOJ should revisit the primary role of the FCA in its health care fraud enforcement efforts is a broader topic for future discussion. Two things in this regard are worth noting: DOJ has seemingly sought to increase the use of criminal enforcement of corporate health care fraud, reinforcing parallel proceedings policies, which purportedly lead to all qui tam complaints being reviewed by criminal prosecutors for potential criminal investigation and prosecution; and making a change in this area would be incredibly difficult given the outsized role of a qui tam system reliant on whistleblowers and their counsel to trust that DOJ’s primary concern in considering their allegations will be financial recovery under the FCA.¹⁹⁴

As long as the FCA continues in its current role leading health care fraud enforcement, Robinson’s concerns are seemingly applicable. Krause and others have criticized DOJ for using the FCA to sweep in not only “straightforward fraud,” but also “a proliferation of new theories that seek to style regulatory noncompliance as a false claim”—a criticism consistent with Robinson’s lament that “criminal law has been expanded to include what were traditionally civil violations.”¹⁹⁵ DOJ’s FCA settlements regularly cover that full spectrum, ranging from allegations of blatant bribery in violation of the Anti-Kickback Statute (violations of which are presumably also criminal) to the more technical violations

193. See *supra* section I.A. Robinson’s attempts at drawing distinctions would similarly lead to difficulty placing the FCA clearly into the criminal or civil camp. Robinson noted differences between the criminal and civil systems—“the public versus private nature of the plaintiffs, the public versus private recipients of a fine or award, the availability of the consent and de minimis defenses, the prohibition of insurance against criminal penalties, and the need for greater procedural safeguards for criminal liability”—the first three of which would put the FCA in the criminal camp while the latter two would seemingly put the FCA in the civil camp. Robinson, *supra* note 190, at 208; see also Winship & Robbennolt, *supra* note 7, at 1095 (noting that the debate over whether civil enforcement should require admissions “reflects competing norms . . . [between] civil settlements between private parties, in which admissions of liability would seem oddly out of place . . . [and] criminal prosecutions, in which admissions (or adjudications) of wrongdoing are almost always required” (footnote omitted)).

194. U.S. Dep’t of Just., Just. Manual: Org. & Functions Manual § 27 (2012); Leslie R. Caldwell, Assistant U.S. Att’y Gen. for the Crim. Div., Off. of Pub. Affs., U.S. Dep’t of Just., Remarks at the Taxpayers Against Fraud Education Fund Conference (Sept. 17, 2014), <https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-taxpayers-against> [<https://perma.cc/N7S2-VKVG>] (announcing that all new qui tam complaints would be shared by the Civil Division with the Criminal Division “as soon as the cases are filed . . . to determine whether to open a parallel criminal investigation”).

195. Krause, *supra* note 141, at 144; Robinson, *supra* note 190, at 210.

Krause warned against. And the FCA's intent requirement also sweeps in a spectrum of misconduct ranging from the clearly condemnable willful fraud to the more civil-seeming action "in reckless disregard of the truth or falsity of . . . information."¹⁹⁶ Robinson argued that criminal law can increase compliance by "facilitating and communicating consensus on what is and is not condemnable," so long as it has maintained its "moral credibility."¹⁹⁷ The same is presumably true of DOJ's enforcement under the FCA—if a requirement of admissions is used selectively in the cases most worthy of condemnation, DOJ can potentially not only nurture its moral credibility but also signal what conduct is condemnable and improve its efforts to build norms and promote compliance.¹⁹⁸

If DOJ is to take this more measured approach, it must at minimum insist on "no denial" language in those settlements without admissions and end the current practice of defendants casting aspersions on the system's legitimacy at the moment when DOJ is seeking to obtain deterrence through announcing a settlement.

CONCLUSION

With increased focus on DOJ's FCA practices due to recent policy changes, and additional attention anticipated as DOJ uses the FCA to address high-profile COVID-19 fraud, the FCA system is at risk of seeing its already fragile credibility crumble further. Whether the lack of admissions in DOJ's FCA settlements is a reflection of DOJ using its power to coerce settlements in cases that would not succeed at trial or of a well-intentioned desire to preserve resources and ensure recoveries, the result is the same—a system with few trials but many denials, with the government never doing more than alleging, and defendants claiming to be victims of a DOJ shakedown.

DOJ's current efforts at short-term preservation of resources and quicker recoveries in individual cases have a negative impact on DOJ's acknowledged goals—maximizing deterrence through the prospect of enforcement with accountability, encouraging the corporate cooperation necessary to prosecute individual bad actors, and cultivating a culture of compliance throughout the health care industry. Because of a statutory

196. 31 U.S.C. § 3729(b)(1)(A)(iii).

197. Robinson, *supra* note 190, at 212–13.

198. Robinson writes of both condemnation and punishment. While condemnation can be addressed through requiring admissions, punishment could presumably be addressed, if DOJ so desires, through an adjustment to the FCA multiplier based on the nature of the misconduct. At present, there is no discernable DOJ policy—either in statements by DOJ or in the CSA's reviewed for this Article—of adjusting FCA multipliers based on the degree of wrongfulness of the defendant's misconduct.

and procedural system providing virtually no opportunity for the judicial push that spurred change to the SEC's practices, change must come from a recognition by DOJ that its current approach of not requiring admissions is short-sided. By increasing both accountability and transparency, DOJ can further its enforcement goals and send a clear message that its practices are consistent with its mission to do justice.

**Appendix 1:
Health Care FCA Settlements**

	All	Mean Multiplier	Involved CLB	Qui Tam
Total	195	1.73	69 (35.4%) ¹⁹⁹	131 (67.2%) ²⁰⁰
Admissions	16 (8.2%)	1.90	2 (2.9%) ²⁰¹	12 (9.2%) ²⁰²
Denials ²⁰³	72 (36.9%)	1.64	34 (49.3%) ²⁰⁴	56 (42.7%) ²⁰⁵

199. Percentage refers to the percentage of Total CSAs that involved the Commercial Litigation Branch.

200. Percentage refers to the percentage of Total CSAs that involved qui tams.

201. Percentage refers to the percentage of CSAs involving the Commercial Litigation Branch that contained admissions.

202. Percentage refers to the percentage of CSAs involving qui tams that contained admissions.

203. In Appendix 1, the “Denials” category includes both CSAs containing an explicit denial within the CSA and CSAs where defendants issued statements denying wrongdoing at the time of the announcement of the CSA.

204. Percentage refers to the percentage of CSAs involving the Commercial Litigation Branch that involved denials.

205. Percentage refers to the percentage of CSAs involving qui tams that involved denials.

**Appendix 2:
Health Care FCA Settlements CSA Language**

	Number of CSAs
Total	195
Explicit Denial ²⁰⁶	50 (25.6%)
“Not an admission” language ²⁰⁷	150 (76.9%)
“To avoid the delay, etc.” language ²⁰⁸	162 (83.1%)

206. In Appendix 2, the “Explicit Denial” category includes only CSAs containing an explicit denial within the CSA. If a defendant publicly denied wrongdoing at the time of the announcement of the CSA, but the denial was not included within the CSA, it is not counted in this category.

207. “This Agreement is neither an admission of liability by [defendant] nor a concession by the United States that its claims are not well-founded,” or its functional equivalent.

208. “To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above conduct, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows,” or its functional equivalent.

