

Resources

The Tale of Two DOJ Memos and the False Claims Act

February 2, 2018

The Department of Justice's ("DOJ") Commercial Litigation Branch recently issued a January 10, 2018, internal memo ("Granston Memo") discussing the need for dismissal of "meritless" *qui tam* False Claims Act (FCA) cases.

The memo acknowledges that, historically, this authority has been used sparingly, largely because the FCA allows some *qui tam* relators to proceed with the case, even when the Government declines to intervene.

The Granston Memo lists seven factors that a DOJ attorney should consider regarding dismissal of all, or part, of a FCA *qui tam* suit under 31 U.S.C. § 3730. These factors are:

1. **Curbing meritless *qui tams*.** DOJ attorneys should consider a motion to dismiss where a *qui tam* complaint is facially lacking in merit, such as "if the relator's legal theory is inherently defective, or the factual allegations are frivolous."
2. **Preventing parasitic or opportunistic *qui tam* actions and controlling litigation.** A motion to dismiss should be considered when the complaint duplicates a pre-existing government investigation and does not provide new information.
3. **Preventing interference with agency policies and programs.** DOJ attorneys should consider a motion to dismiss when an agency determines that the case could interfere with the agency's existing policies or the administration of the agency's programs.
4. **Controlling Litigation Brought on Behalf of the United States.** Motions to dismiss are also appropriate to protect the government's prerogatives in pending litigation, such as avoid interference with similar claims in which the government has intervened.
5. **Safeguarding Classified Information and National Security Interests.** DOJ attorneys should seek to dismiss certain cases that may compromise classified information or national security interests, such as cases involving the procurement contracts of intelligence agencies or the military.
6. **Preserving Government Resources.** DOJ attorneys should consider whether the government's cost will exceed any expected gain. Such costs could include monitoring or participating in the litigation, including responding to discovery requests.
7. **Addressing Egregious Procedural Errors.** DOJ attorneys should consider a motion to dismiss whenever the relator's actions may frustrate the government's efforts to conduct a proper investigation.

The Granston Memo acknowledges that dismissal is not the government's only option. Rather, it can seek dismissal under the "first to file" bar, public disclosure bar, enforcement of Rule 9(b) and the materiality requirement.

In addition, Associate Attorney General Rachel Brand issued a two page January 25, 2018, memo to DOJ civil litigation components, including U.S. Attorneys ("Brand Memo"). AAG Brand emphasized the DOJ's November 27, 2017, Guidance Policy from Attorney General Sessions that prohibits the DOJ using "noncompliance with guidance documents as a basis for proving violations." This directive would apply, for example, to Medicare or OIG guidance. In a footnote, the Brand Memo expressly states that its directive applies to FCA enforcement lawsuits.

The factors in the Granston Memo are not surprising and are not a change to DOJ policy; they may be a response to certain relator losses involving *Escobar* principles. It is the first time, however, that these factors have been put in writing and that the DOJ has expressed an affirmative approach to dismissal. Similarly, the Brand Memo reiterates established principles that agency guidance is not binding law without the formal notice-and-comment rulemaking process.

What is new is that the message from these two DOJ memos may point toward a more restrictive FCA enforcement attitude. An increased DOJ willingness to dismiss meritless cases is definitely needed, but what the actual impact these memos will

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have on FCA cases brought by the DOJ or relators will be of great interest to defense and relator counsel.

If you have any questions about the information in this alert, please contact Jonathan Feld (312-627-5680 or jfeld@dykema.com), Butch Hulse (210-554-5280 or whulse@dykema.com), Gerald Aben (734-214-7648 or gaben@dykema.com), or your Dykema relationship attorney.

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