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False Claims Act enforcement: Evolving policies from the DOJ

» The Department of Justice (DOJ) is fully committed to False Claims Act enforcement.
» The Brand and Granston Memos allow more control over meritless and burdensome cases.
» Dismissal of cases may temper development of "bad law" and reduce the burden on federal agencies.
» The evolving policies may have a potential positive impact on organizational compliance programs.
» DOJ policy and developing case law may potentially modify risk for healthcare organizations.

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The Department of Justice (DOJ) has been busy during 2017 and 2018 with policy pronouncements that purportedly will have an impact on enforcement of the False Claims Act (FCA). The first policy announcement occurred on November 16, 2017, when Attorney General Sessions issued a memo prohibiting the DOJ from issuing guidance documents designed to advise parties outside the federal Executive Branch about their legal rights and obligations.[1] The Sessions Memo prohibited the DOJ from using these documents to coerce parties into taking or refraining from action beyond the requirements of applicable law, and from otherwise evading required rulemaking processes by using these documents to create de facto regulations.

Imperato

The ensuing months brought about additional policy announcements for handling FCA cases (especially *qui tam* actions) from then Associate Attorney General Rachel Brand and the Director of the Commercial Litigation Branch, Fraud Section, Michael Granston.

The Brand Memo

The Brand Memo was issued on January 25, 2018, and specifically applied Sessions' sentiments to the FCA by stating that the DOJ may not use its enforcement authority to convert guidance documents into binding rules in FCA cases.[2] The Brand Memo further instructed that DOJ litigators may not use non-compliance with agency guidance documents as a basis for proving violations of applicable law in FCA cases. Federal administrative agencies typically release manual provisions or other instructions as guidance on agency norms and standards, and this has certainly been the case under federal health programs. Despite the fact that these guidance documents were not regulatory or binding law, the documents nevertheless have been cited by government lawyers, and especially relator's counsel, as the legal bases for FCA violations. The Brand Memo makes clear that agency guidance documents should not serve as the basis for imposing legal obligations beyond existing statute or regulations or otherwise from serving as a basis for proving violations of law in FCA cases.

The Brand Memo, nevertheless, stated that agency guidance documents may still be used for proper purposes, such as evidence that a

party reviewed or was aware of the guidance document as a basis to prove that the party had the requisite knowledge (i.e., scienter) under the FCA or was aware of the government's essentially non-binding interpretation of law and/or its views of the "materiality" of the requirement mentioned in the guidance documents. This new policy is intended to modify future FCA enforcement by limiting the grounds on which *qui tam* claims may be actionable, but it is unclear what, if any, practical impact this policy will have for case intervention and ultimate liability under the FCA. The Brand Memo, nevertheless, does illustrate a trend in DOJ shifting priorities, but it still has left much unanswered, and it will remain to be seen what true impact this policy will have on FCA litigation.

The Granston Memo

An additional policy document was issued on January 10, 2018, by the Director for the Commercial Litigation Branch, Fraud Section, Michael Granston.[3] This previously confidential memorandum to all DOJ attorneys recommended that DOJ seek dismissal of declined *qui tam* actions under certain circumstances, pursuant to section 3730(c)(2)(A) of the FCA, which historically, the DOJ has used sparingly. As a result, the Granston Memo was in stark contrast with traditional DOJ practice, which typically concluded *qui tam* investigations once the DOJ declined to intervene, but without seeking dismissal from the courts.

The Granston Memo appears to be driven by multiple factors that supplement the new directives espoused in the Brand and Session Memos. Focusing on the need to conserve limited government resources and avoid precedent adverse to the government, the Granston Memo lays out seven factors which support dismissal of *qui tam* actions. Notably, it recommends dismissal of *qui tam* actions which might lack merit, interfere with agency policies and programs, or threaten the DOJ's litigation prerogatives or priorities. These are not new bases for the DOJ to seek dismissal of a case, but it is noteworthy that the Granston Memo attempts to highlight and recommend dismissal in appropriate circumstances.

Typically, actions are meritless either because relator's legal theory is inherently defective, or the relator's factual allegations are frivolous or incapable of substantiation. Nonetheless, even where a complaint is not facially defective, the Granston Memo recommends DOJ attorneys evaluate every case for dismissal. As a result, *qui tam* actions that are found meritless following investigation are candidates for dismissal, provided the relator has failed to further develop the case by a specified date.

Meritless actions are perhaps the most costly to the DOJ and federal courts. In fact, the American Hospital Association and many FCA defense counsel have long pressed the DOJ to dismiss more *qui tams* that lack merit, rather than allowing unaccountable whistleblowers to impose massive litigation costs on defendants and courts with tenuous claims. The Granston Memo focuses heavily on the need to reduce *qui tam* actions that overburden the DOJ's resources, may require burdensome and unwarranted discovery for government agencies, jeopardize classified information and national security interests, frustrate the government's policies and procedures, and/or may lead to bad case law.

In tune with its policy to encourage evaluation of all *qui tam* claims, the memo also highlights alternative grounds for dismissal, such as the first-to-file bar, the tax bar, and failure to plead fraud with sufficient particularity under Federal Rule of Civil Procedure 9(b).

The new approach

Read together, the memoranda urge the DOJ not to use debilitating FCA litigation to

enforce de facto regulations found in guidance documents. Thus, when the basis for declining to intervene in a *qui tam* action relies on sub-regulatory guidance in violation of the Brand Memo, the Granston Memo provides a framework to argue that the DOJ should move to dismiss the *qui tam* action.

By seeking dismissal of cases that would engage in rulemaking through FCA enforcement, DOJ leadership hopes to lessen the burden on government agencies, the court system, and corporate entities by seeking outright dismissal more frequently instead of declining to pursue a *qui tam* suit and consequently leaving the door open for plaintiffs to pursue even frivolous claims in federal court.

Effect on healthcare compliance

The healthcare industry historically has expressed concerns that FCA cases brought by the DOJ have effectively played the role of policymaking, which compliance professionals argue should remain the exclusive role of CMS and state agencies. Furthermore, the FCA's *qui tam* provisions have enabled whistleblowers and plaintiff's attorneys to engage in the same activity.

The Granston Memo takes it a step further by encouraging the DOJ to seek dismissal of these meritless claims, rather than only declining to intervene.

But, the new directive disseminated by the DOJ instructs its attorneys to stop using FCA cases to write policy and, additionally, to consider in every case whether to move for dismissal of the claims of a whistleblower. In doing so, the policy memorandum effectively can reduce years of costly litigation for defendants and impose a higher burden on whistleblower claims.

To that effect, the Brand Memo established that DOJ attorneys should not allege that a claim was false simply because it failed to meet a standard found only in a guidance document; for example, a local coverage decision. The Granston Memo takes it a step further by encouraging the DOJ to seek dismissal of these meritless claims, rather than only declining to intervene.

By narrowing the scope of conduct eligible for FCA enforcement by the DOJ, and by concurrently widening the scope of cases in which DOJ attorneys should move for outright dismissal, the DOJ has created a more organization-friendly compliance environment. The potential effect may be to focus organization compliance professionals on real compliance issues instead of wasting resources chasing imagined, phantom, or manufactured allegations of fraud and non-compliant activity.

Deputy Attorney General Rod Rosenstein expressed this firm-focused mentality in a speech he delivered at Compliance Week's 2018 Annual Conference for Compliance and Risk Professionals: "The [FCPA Corporate Enforcement] Policy incentivizes companies to promptly report misconduct and fully cooperate, as well as to enact effective remedial measures."[4]

The new policy, announced in November of 2017, qualifies companies that make voluntary disclosures of misconduct for significant benefits. For example, if a company uncovers misconduct that occurred in spite of the existence of an effective compliance program, the new policy directs prosecutors to consider whether the company subsequently analyzed the underlying cause of the problem. This analysis will be highly subjective. Rosenstein remarked, "[c]ompliance is not

a one-size-fits-all proposition." Thus the adequacy of compliance programs will be examined on a case-by-case basis to determine whether it may serve as a mitigating factor in prosecution strategy for charging and/or sentencing.

Rosenstein also explained the new policy's efforts to eliminate "piling on," defined as disproportionate and duplicative penalties imposed by multiple authorities. By encouraging coordination among DOJ components and other enforcement agencies, the new policy aims to seek more equitable financial outcomes in joint and parallel investigations of misconduct.

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1. Office of the Attorney General: Memorandum for all Components: "Prohibition on Improper Guidance Documents" (The Sessions Memo). November 16, 2017. Available at https://bit.ly/2E2otkb
2. Office of the Associate Attorney General: Memorandum for Heads of Civil Litigating Components United States Attorneys: "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases" (The Brand Memo) January 25, 2018. Available at https://bit.ly/2u9k1cu
3. DOJ Civil Division: Memorandum to Attorneys, Commercial Litigation Branch, Fraud Section and Assistant United States Attorneys Handling False Claims Act cases in the Offices of the U.S. Attorneys: "Factors for Evaluating Dismissal pursuant to 31 U.S.C. 3730©(2)(A)" (The Granston Memo). January 10, 2018. Available at https://bit.ly/2BHOhRl
4. Department of Justice, news release: "Deputy Attorney General Rod Rosenstein Delivers Remarks at Compliance Week's 2018 Annual Conference for Compliance and Risk Professionals" May 21, 2018. Available at https://bit.ly/2IV1bjx