Alert
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White Collar Defense & Investigations Alert
COZEN O'CONNOR

Two New Department of Justice Memoranda Strengthen False Claims Act Qui Tam Action Defenses

The Department of Justice (DOJ) has recently issued two new memoranda that reflect a sea change in DOJ's intervention in and enforcement of False Claims Act (FCA) claims.

- On January 25, 2018, the Associate Attorney General issued a memorandum (the January 25 memo) to the heads of all DOJ civil litigating components and all U.S. Attorneys affirming that: (1) agencies' guidance documents do not create binding legal obligations that do not already exist in statutes or regulations; and (2) DOJ cannot use noncompliance with agencies' guidance documents as a basis for proving violations in civil enforcement actions.[1] The January 25 memo is expressly intended to prevent government attorneys from evading required rulemaking processes, such as those set forth in the Administrative Procedures Act (APA), to create de facto regulations. In its accompanying press release, DOJ acknowledges that previously DOJ and other agencies "had blurred the distinction between regulations and guidance documents."[2]
- On January 10, 2018, DOJ issued an internal memorandum encouraging all U.S. Attorneys' offices to exercise their authority to take control of and dismiss frivolous or otherwise problematic FCA *qui tam* lawsuits.[3] This memorandum (the January 10 memo) sets forth a non-exhaustive list of seven factors (discussed in greater detail below) for government attorneys to consider in deciding whether to dismiss a *qui tam* lawsuit. These factors include an assessment of whether the *qui tam* action is frivolous, parasitic, or opportunistic. The January 10 memo is expressly intended to alter DOJ's historic reluctance to exercise its authority to step in and dismiss such claims.

These two DOJ memoranda reflect a shift to a more statutory/regulatory text-based approach in DOJ's assessment of potential government claims, including FCA *qui tam* claims brought on the government's behalf. Taken together, these memoranda also suggest that DOJ is now willing to step in and dismiss FCA *qui tam* claims that are based solely on violations of non-statutory or regulatory agency guidance.

The January 25 Memo Rejecting Claims Based Solely on Agency Guidance Documents

The January 25 memo affirms that agency guidance documents "cannot create binding requirements that do not already exist by statute or regulation."[4] As such, DOJ litigators "may not use noncompliance with guidance documents as a basis for proving violations of applicable law in … civil lawsuits on behalf of the United States to recover government money lost to fraud or other misconduct or to impose penalties for violations of Federal health, safety, civil rights, or environmental laws."[5] The January 25 memo also expressly applies to enforcement of the FCA, including "for example" FCA claims "alleging that a party knowingly submitted a false claim for payment by falsely certifying compliance with material statutory or regulatory requirements."[6] This memorandum reflects a substantial change in DOJ policy, as DOJ has by its own admission previously "blurred the distinction between regulations and guidance documents" in pursuing claims (including FCA claims) where defendants have run afoul of agency-issued guidance, notwithstanding that such guidance was not tied directly to language in statutes or regulations properly promulgated under the APA.[7]

The January 25 memo states that DOJ "should not treat a party's noncompliance with an agency guidance document as presumptively or conclusively establishing that the party violated the applicable statute or regulation" and that "agency guidance documents cannot create any

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additional legal obligations."[8] The January 25 memo applies to all future DOJ civil enforcement actions, "as well as (wherever practicable) those matters pending as of" January 25, 2018.[9]

The January 10 Memo Regarding Use of Authority to Dismiss FCA *Qui Tam* Actions

The January 10 memo explains that the FCA expressly authorizes the Attorney General "to dismiss a *qui tam* action over the relator's objection" pursuant to 31 U.S.C. § 3730(c)(2)(a).[10] DOJ acknowledges that "historically" it has used this provision "sparingly" to "ensure that dismissal is only utilized where truly warranted."[11] DOJ explains, however, that there have been "record increases in qui tam actions filed" in the last several years, requiring the government to expend "significant resources" monitoring, producing discovery, or otherwise having to participate in FCA *qui tam* cases.[12] Noting DOJ's "important gatekeeper role in protecting the False Claims Act," DOJ issued the January 10 memo "to provide a general framework for evaluating when to seek dismissal under section 3730(c)(2)(A) and to ensure a consistent approach to this issue across the Department."[13]

Based on DOJ's review of FCA *qui tam* cases since 1986 in which the government moved to dismiss under its section 3730(c)(2)(A) authority, DOJ identified a non-exhaustive list of seven factors to "serve as a basis for evaluating whether to seek to dismiss future matters."[14] The following is a brief description of the stated bases for dismissal of *qui tam* actions:

1. **Curbing meritless *qui tam* actions** – The January 10 memo instructs that dismissal should be considered where a "relator's legal theory is inherently defective, or relator's factual allegations are frivolous," or where the government "conclude[s] after completing its investigation of relator's allegations that the case lacks merit."[15] The January 10 memo also instructs that "[i]f the Department is concerned that a case lacks any merit, but elects to afford the relator an opportunity to further develop the case, the Department attorney may consider advising the relator that dismissal will be considered if the relator is unable to obtain additional support for the relator's claims by a specified date."[16]
2. **Preventing parasitic or opportunistic *qui tam* actions** – The January 10 memo instructs that dismissal should be considered where a *qui tam* action "duplicates a pre-existing government investigation and adds no useful information to the investigation" in order to prevent relators from "receiv[ing] an unwarranted windfall at the expense of the public fisc."[17]
3. **Preventing interference with agency policies and programs** – To illustrate this basis for dismissal, the January 10 memo describes a case in which dismissal of a *qui tam* action was appropriate because ongoing litigation would delay clean-up and closure of a radiologically contaminated government facility.
4. **Protecting DOJ's litigation prerogatives and ensure DOL control of litigation brought on behalf of the United States** – To illustrate this basis for dismissal, the January 10 memo describes cases in which dismissal of *qui tam* actions was appropriate to avoid risks of unfavorable precedent or conflicts with similar claims in parallel litigation already being pursued by the government.
5. **Preventing disclosure of classified information and protect national security interests** – To illustrate this basis for dismissal, the January 10 memo describes cases in which dismissal of *qui tam* actions was appropriate where the adjudication of the claims posed a risk that classified information might be disclosed.
6. **Preserving government resources** – The January 10 memo instructs that dismissal should be considered "when the government's expected costs are likely to exceed any expected gain."[18]
7. **Addressing egregious procedural errors** – The January 10 memo instructs that dismissal should be considered where procedural problems with the relator's action "frustrate the government's efforts to conduct a proper investigation."[19]

The January 10 memo also instructs that where government attorneys intend to recommend declination or dismissal of a *qui tam* action on the basis of the above-delineated factors or for any other reason, they "should, to the extent possible, consider advising relators of perceived deficiencies in their cases as well as the prospect of dismissal" because "[i]n many cases, relators

may choose to voluntarily dismiss their actions … if the government has advised the relator that it is considering seeking dismissal under section 3730(c)(2)(A)."[20]

The above-discussed DOJ memoranda provide FCA *qui tam* defendants with important avenues to seek dismissal of the claims against them. The January 25 memo reflects DOJ's determination that claims (including FCA claims) that are based solely on violations of non-statutory or non-regulatory agency guidance are improper and should not be pursued. FCA *qui tam* claims based on violations of agency guidance alone are thus, by definition, meritless and frivolous.

The January 10 memo reflects that DOJ is now, more than ever before, willing to exercise its authority to step in and dismiss frivolous or otherwise problematic *qui tam* actions. This contrasts with DOJ's historic approach of merely declining to intervene in such actions, thereby allowing *qui tam* plaintiffs to proceed with costly discovery and litigation on meritless claims, often with the purpose of inducing a defendant to settle merely to avoid such costs. The January 10 memo also delineates multiple specific bases *qui tam* defendants can present to government attorneys as a basis to consider dismissing *qui tam* actions.

Taking the two DOJ memoranda together, FCA *qui tam* defendants facing such claims now have a clearly delineated basis to request that the government step in to dismiss the *qui tam* action.

Cozen O'Connor's White Collar Defense & Investigations attorneys are available to provide counsel and guidance on the issues discussed in this Alert.

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[1] January 25 Memo available here.

[2] January 25, 2018 DOJ Press Release accompanying January 25 Memo available here.

[3] January 10 Memo available here.

[4] January 25 Memo at 2.

[5] January 25 Memo at 2; 2-3, n.1.

[6] January 25 Memo at 3, n.1.

[7] January 25, 2018 DOJ Press Release accompanying January 25 Memo.

[8] January 25 Memo at 2.

[9] January 25 Memo at 2.

[10] January 10 Memo at 2.

[11] January 10 Memo at 1-2.

[12] January 10 Memo at 1.

[13] January 10 Memo at 2.

[14] January 10 Memo at 2.

[15] January 10 Memo at 3.

[16] January 10 Memo at 4.

[17] January 10 Memo at 4.

[18] January 10 Memo at 6.

[19] January 10 Memo at 7.

[20] January 10 Memo at 8.