

## POTENTIAL IMPACT OF NEW GUIDANCE ON FALSE CLAIMS ACT CASES

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Two new Department of Justice (“DOJ”) Memoranda could have a potential impact on Civil False Act Claims cases, as well as other civil enforcement cases. The two memos are:

- Memorandum from Michael D. Granston, Director, Commercial Litigation Branch, Fraud Section, “Factors for Evaluating Dismissal Pursuant to 31 U.S.C. § 3730(c)(2)(A),” issued Jan. 10, 2018 (apparently leaked from DOJ and now available on the internet); and
- Memorandum from Associate Attorney General Rachel Brand, “Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases,” issued Jan. 25, 2018.

### First Memorandum Effect on Qui Tam Actions in False Claims Act Cases

The first memo deals with factors that the DOJ will consider in determining whether or not to seek dismissal in qui tam suits where the DOJ has declined to intervene. As background, here is the U.S. Code section that can be used to seek such dismissal:

#### RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—

[ ]The Government may dismiss the action notwithstanding the objections of the [person](#) initiating the action if the [person](#) has been notified by the Government of the filing of the motion and the court has provided the [person](#) with an opportunity for a hearing on the motion.

31 U.S.C. § 3730(c)(2)(A)

The memorandum provides seven “non-exhaustive factors” that the Department can use as a basis for dismissal of qui tam actions using the above section. The factors are:

- (1) Curbing meritless Qui Tams: Consider moving to dismiss where a qui tam complaint is facially lacking in merit, either because the relator’s legal theory is inherently defective or the relator’s factual allegations are frivolous.
- (2) Preventing parasitic or opportunistic Qui Tam actions: Consider moving to dismiss a qui tam action that duplicates a pre-existing government investigation and adds no useful information to the investigation.
- (3) Preventing interference with agency policies and programs: Consider dismissal where an agency has determined that a qui tam action threatens to interfere with an agency’s policies or the administration of its programs and has recommended dismissal to avoid these effects.
- (4) Controlling litigation brought on behalf of the United States: Consider dismissing cases when necessary to protect the Department’s litigation prerogatives.

- (5) Safeguarding classified information and national security interests. Consider dismissal to safeguard classified information (e.g. intelligence agencies or military procurement contracts).
- (6) Preserving government resources: Consider dismissal when the government's expected costs are likely to exceed any expected gain.
- (7) Addressing egregious procedural errors: Seek dismissal based on problems with the relator's action that frustrate the government's efforts to conduct a proper investigation.

DOJ has only infrequently used the motion to dismiss, and the mere fact that the Commercial Litigation Branch is highlighting these seven factors could make it easier for companies to obtain dismissal of cases against them.

### **Second Memorandum Effect on Civil Cases**

The second memorandum deals with guidance documents issued by agencies that effectively bind the public without being formally issued as a rule. On Nov. 16, 2017, DOJ had issued a memorandum prohibiting its components from issuing such guidance documents, and now the DOJ has decided that the same principles should guide DOJ litigators in determining the legal relevance of other agencies' guidance documents in affirmative civil enforcement ("ACE"). The memo states that "guidance documents cannot create binding requirements that do not already exist by statute or regulation" and for ACE cases, the DOJ "may not use its enforcement authority to effectively convert agency guidance documents into binding rules [or] use noncompliance with guidance documents as a basis for proving violations of applicable law...."

A specific type of agency guidance might be Inspector General "fraud alert guidance" or "fraud alert recommendations."

The takeaway: The first DOJ memo may make it easier for companies to get a false claims act action dismissed, while the second memo could make defense against civil prosecution more readily available, where the civil action is based on "agency guidance" like fraud alerts or similar interpretations, rather than actual law or regulation.

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