Defending False Claims Act Cases: Two New Tools Under the Trump Administration

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Earlier this year, the Department of Justice, Civil Division, issued two policy memos that will directly affect its civil enforcement priorities, particularly with regard to healthcare and life sciences companies. The first memo, issued January 10, 2018, and publicly leaked several weeks later, details factors that the DOJ will consider when moving to dismiss a False Claims Act complaint over the objection of a plaintiff/relator. On January 25, 2018, in a second memo, the DOJ announced that it would no longer use noncompliance with guidance documents to prove violations of applicable law in civil enforcement cases. Both policy changes are favorable for companies facing False Claims Act investigations.

The Granston Memo

The memo regarding False Claims Act dismissals was issued by Michael Granston, the Director of the DOJ's Commercial Litigation Branch, Fraud Section (the "Granston Memo"). When a relator files a new False Claims Act complaint, it remains sealed while the DOJ determines whether it will intervene. If the DOJ declines to intervene, it typically permits the relator to move forward and litigate the case. However, the DOJ has authority under the False Claims Act to dismiss the complaint over the relator's objection. Up until now, it has rarely exercised this power.

False Claims Act filings have increased annually and burden the DOJ with more cases than it can possibly pursue and corporate defendants with substantial costs to defend sometimes meritless claims. While the Granston Memo does not explicitly provide that the DOJ will more aggressively pursue dismissals, it sets forth criteria by which the DOJ will consider dismissal in appropriate cases. These criteria include whether a claim: (1) is legally or factually meritless; (2) duplicates a pre-existing complaint or government investigation; (3) interferes with government priorities or programs; (4) threatens to create bad precedent for the government; (5) threatens national security; (6) would cost more to litigate than the government is likely to recover; or (7) threatens the government's ability to conduct a proper investigation.

It remains to be seen whether the Granston Memo reflects a substantial change in policy, but any company that is the subject of a False Claims Act investigation or subpoena should closely follow how the DOJ proceeds in future cases. At a minimum, the Granston Memo provides a roadmap by which defense counsel can argue that the DOJ should pursue dismissal in appropriate cases. At the same time, the relators' bar may be less likely to pursue questionable cases with a looming threat of dismissal.

Brand Memo on Guidance Policy

The DOJ's move to limit the wide-ranging use of guidance documents in government enforcement efforts started in November 16, 2017 when Attorney General Sessions issued a memo titled, "Prohibition on Improper Guidance Documents." In the memo now known as the "Guidance Policy," Sessions directed the entire Justice Department that guidance documents, which by definition have not been subject to notice and rule-making, should not effectively bind private parties. In other words, to the extent guidance documents broaden or expand upon regulatory and statutory obligations, the guidance should have no binding effect. Sessions identified principles that should be followed when a guidance document is issued in order to avoid confusing guidance with documents setting out binding obligations. For instance, guidance documents should identify themselves as guidance and state that they are not final agency actions.

Building on the Guidance Policy, on January 25, 2018, former Associate Attorney General Rachel Brand issued a memo stating that the principles in the Guidance Policy also apply to the government's civil litigators. Under the Brand Memo, for Affirmative Civil Enforcement

cases including civil False Claims Act cases, litigators may not "use noncompliance with guidance documents as a basis for proving violations of applicable law." Brand further explained that if a private party fails to comply with guidance where guidance expands upon legal requirements, then noncompliance of the guidance does not equate to violation of the underlying statute or regulation.

Based on this policy directive, DOJ attorneys should no longer be able to rely on someone's non-compliance with a guidance document as the sole evidence that the private party intended not to comply with the underlying regulatory or statutory obligation. Defense attorneys now have an open door to argue that the conduct recommended in the guidance goes beyond what the law requires.

Both policies taken together suggest that the Trump administration may be trying to level the playing ground for companies facing costly False Claims Act investigations.

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