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Two Recent Justice Department Memoranda May Have Significant Consequences for Pending and Future False Claims Act Enforcement

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In recent weeks, the United States Department of Justice ("DOJ") issued two memoranda that might change the calculus of False Claims Act ("FCA") cases. The memoranda at a minimum provide organizations with new—or at least invigorated—defenses to *qui tam* actions and civil enforcement matters.

First, on January 10, Michael Granston, Director of DOJ's Civil Frauds section, issued a memorandum encouraging DOJ trial attorneys to consider dismissing unmeritorious *qui tam* cases (even over the objection of the relator). The DOJ's authority to dismiss FCA cases has long been built directly into the governing statute, 31 U.S.C. § 3730(c)(2)(A), which provides that:

> 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.

In practice, DOJ trial attorneys rarely uses this power, preferring to allow *qui tam* cases they declined to intervene in to continue being prosecuted by the relator. The Granston Memo encourages a shift in practice by suggesting that DOJ attorneys should dismiss *qui tam* cases that lack substantial merit. Meritless *qui tam* cases drain limited government resources and may "generate adverse decisions that may affect the government's ability to enforce the FCA." To aid in determining whether a DOJ attorney should seek dismissal of a declined *qui tam* action, the Granston Memo sets forth seven factors, including curbing parasitic *qui tams* and preserving government resources.

Second, on January 25, the Associate Attorney General ("AAG") issued a memorandum prohibiting reliance on government agency "guidance documents" as a basis for liability in DOJ affirmative civil enforcement matters—including FCA cases. Such "guidance documents" include all non-statutory or regulatory documents that purport to advise the

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public of legal rights or obligations, as are commonly issued by agencies like the US Environmental Protection Agency and the Department of Health and Human Services. The memo advises DOJ litigators that because "[g]uidance documents cannot create binding requirements that do not already exist by statute or regulation . . . [DOJ] litigators may not use noncompliance with guidance documents as a basis for proving violations of applicable law." The AAG's memo acknowledges that sub-regulatory guidance serves a valuable function, and does not likely presage a government-wide change in agency's use of such documents. But FCA matters—*qui tam* or otherwise—that are built on such sub-regulatory guidance are on shakier ground.

These memoranda create interesting implications for FCA cases. First, the AAG's memo narrows potential FCA liability by excluding a wide range of agency documents from being the basis of FCA violations. The AAG's memo also raises interesting questions about what agency materials might be evidence of "materiality," particularly after the Supreme Court's recent *Escobar* decision. Second, although the authority of the DOJ to dismiss *qui tam* actions has not changed, the government may be newly receptive to arguments for the dismissal of plainly deficient *qui tam* cases. The memo thus presents an opportunity for legal counsel to affirmatively seek dismissal of a weak FCA case—a move that could potentially save the accused violator the time and expense of otherwise defending against the case.

The two memoranda are available here and here.