

DOJ Continues Defense-Friendly Trend: Failure to Follow Agency Guidance Is No Longer Evidence of a False Claims Act Violation

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Government Contracts Issue Update

The Department of Justice (DOJ) has announced a change in the way it approaches False Claims Act (FCA) cases, stepping back from the aggressive practice of using noncompliance with agency guidance as evidence that a defendant violated the law. On January 25, 2018, in a memo from Associate Attorney General Rachel Brand, the DOJ Civil Division made clear that it would not use its enforcement authority to “effectively convert” agency guidance into binding rules. The policy change extends Attorney General Jeff Sessions’ November 16, 2017 announcement that prohibited DOJ from using its *own* guidance documents to create *de facto* obligations, standards, or rights. The Brand memo expands this prohibition to cases where DOJ treats noncompliance with another agency’s guidance as a legal violation in affirmative civil enforcement cases.

The Brand memo broadly defines a “guidance document” as “any agency statement of general applicability and future effect, whether styled as ‘guidance’ or otherwise, that is designed to advise parties outside the federal Executive Branch about legal rights and obligations.” It clearly delineates improper use of agency guidance documents in affirmative civil enforcement. The Brand memo bars DOJ from relying on noncompliance with agency guidance to prove violations of the law. “That a party fails to comply with agency guidance expanding upon statutory or regulatory requirements does not mean that the party violated those underlying legal requirements; agency guidance documents cannot create any additional legal obligations.”

Authors

Mark B. Sweet
Partner
202.719.4649
msweet@wiley.law

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This new policy will have significant implications in FCA cases, which often turn on whether the defendant knowingly failed to comply with a regulation or contract provision. Where regulations or contract provisions are not clear or do not reach the particular conduct at issue, the Government and relators have used non-binding agency guidance to bolster their position that a defendant's certification of compliance was false.

Agency guidance will still have some relevance to FCA cases. Even under the new policy, DOJ can use evidence that a defendant read agency guidance to show intent. In FCA cases, the intent element requires the person to have submitted, or caused the submission of, the false claim with actual knowledge of the falsity or with reckless disregard or deliberate ignorance of the truth or falsity of what was submitted. DOJ has previously argued that if an agency guidance "warned" a defendant away from the defendant's incorrect interpretation of a requirement, that could satisfy the knowledge element of an FCA case. *See, e.g., United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 290 (D.C. Cir. 2015). Conversely, courts have relied on the lack of any agency guidance "warning" a defendant away from its interpretation to undercut the knowledge element. *See, e.g., United States ex rel. Donegan v. Anesthesia Assoc. of Kansas City, PC*, 833 F.3d 874, 878-79 (8th Cir. 2016); *United States ex rel. Johnson v. Golden Gate Nat'l Senior Care, L.L.C.*, 223 F. Supp. 3d 882, 891 (D. Minn. 2016) ("[I]f a regulation is ambiguous, a defendant may escape liability if its interpretation of the regulation was reasonable in light of available official guidance[.]").

This policy change is effective immediately, applying to all future affirmative civil enforcement actions and pending matters "wherever practicable."

In sum, this policy shift provides defendants with new arguments to narrow False Claims Act liability. The memo also constitutes the second significant policy shift DOJ has announced in 2018. On January 10, the Department issued a new internal memo directing DOJ attorneys to consider the merits of seeking dismissal of *qui tam* actions when the Government declines to intervene. More on this FCA policy change is available [here](#).