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NEWSLETTER

Granston Memo: DOJ's New Internal Policy on Dismissing FCA Cases

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Government Contracts Issue Update

DOJ issued an internal memo in January 2018 that may lead to dismissal of more *qui tam* complaints filed under the FCA. The memo outlined seven issues for DOJ attorneys to consider when deciding whether to seek dismissal of a *qui tam* action. A more proactive approach by DOJ may result in more cases being dismissed because courts are highly deferential to the Government's motions in *qui tam* suits and because relators' counsel may voluntarily dismiss cases to avoid the Government's motion. At a minimum, the policy provides FCA defendants with additional ammunition to press DOJ to decline intervention and seek dismissal in *qui tam* cases.

DOJ's New Policy

Michael Granston, the Director of the Civil Fraud Section of the Commercial Litigation Branch of DOJ, issued an internal memorandum directing attorneys to evaluate the dismissal in *qui tam* actions under various factors. As the memo notes, DOJ's dismissal power is an "important tool to advance the Government's interests, preserve limited resources and avoid adverse precedent." While the Government has always had the authority to move for dismissal, it currently files motions to dismiss in less than 1% of relator cases.

The memo outlined seven issues for government attorneys to consider when deciding whether to seek dismissal of current and future *qui tam* actions:

1. Curbing Meritless *Qui Tams*

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Practice Areas

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4. Controlling Litigation Brought on Behalf of the United States
5. Safeguarding Classified Information and National Security Interests
6. Preserving Government Resources
7. Addressing Egregious Procedural Errors

These issues generally fall into three categories affecting DOJ's interests in *qui tam* litigation: the merit of the claim, the Government's interest, and the burden of litigation.

DOJ's focus on the merits of a case comes against a sharp increase in the number of *qui tam* complaints filed in recent years. In 2017 alone, there were approximately 600 such filings. But despite this increase, the rate of DOJ interventions has remained relatively static, suggesting that many new FCA cases lack merit. The memo instructed attorneys to meet this issue head-on, and consider moving to dismiss where DOJ determines a *qui tam* complaint lacks legal or factual merit (No. 1). DOJ explained that a complaint may be facially meritless when it is filed, or may be revealed to be meritless after the Government conducts its investigation. Regardless, DOJ instructed attorneys to consider moving for dismissal, in addition to declining intervention, if the attorney concludes that no fraud occurred. The memo also instructed attorneys to consider advising a relator's counsel when a dismissal request may be forthcoming absent further evidence in support of the *qui tam* complaint, which may increase the rate of voluntary dismissals.

DOJ's focus on parasitic or opportunistic *qui tam* actions (No. 2) also implicates the merits of a relator's claim, separate from the accuracy of any allegations. The memo instructed government attorneys to consider moving for dismissal if the *qui tam* action "adds no useful information" to a pre-existing government investigation, thereby preventing a windfall for an unhelpful relator. This instruction is consistent with congressional intent for the FCA to reward relators that identify otherwise undetected or unreported fraud.

The second broad category of factors focuses on the Government's interests and the impact of ongoing litigation where the Government declines to intervene but the *qui tam* relator continues litigating in the name of the United States. The memo enumerated several instances where the Government's interest may support motions for dismissal, including preventing interference with agency policies and programs (No. 3), controlling litigation brought on behalf of the United States (No. 4), and safeguarding classified information and national security issues (No. 5).

The memo advised government attorneys to consider the interests of the parties affected by the litigation, including DOJ and the relevant agency. The memo instructs government attorneys to consider moving for dismissal where an agency concludes that a *qui tam* action threatens to interfere with an agency's policies (No. 3). In FCA cases, DOJ or the relevant U.S. Attorney's Office litigates the case for a client agency. DOJ should consider the agency's policies or administrative imperatives when litigating a *qui tam* action. This may include operational issues, such as the "risk of significant economic harm" to contractors that are critical partners for the Government.

The memo also instructed the Government to protect its "litigation prerogative" by considering steps to rein in cases that lack a legal or factual basis (No. 4) and may interfere with the Government's ability to litigate other intervened claims, or may lead to unfavorable precedent from the Government's perspective. Likewise, the memo's instruction to consider dismissal in relator cases that may lead to the disclosure of classified information or national security secrets (No. 5) highlights the Government's interest in broader or collateral interests that may outweigh a single FCA case.

Finally, the third category of factors focuses on the expense and burden of litigation and directed government attorneys to consider moving to dismiss when that burden is unreasonably high. The memo encouraged attorneys to conduct a cost-benefit analysis to ensure that the Government's recovery justifies the expense of litigation (No. 6). Indeed, under this factor, the memo provided an example where dismissal was appropriate "even if the allegations could be proven" because the "amount of money involved did not justify the expense of litigation." The memo also allowed government attorneys to consider moving to dismiss when the relator's actions, or lack thereof, increases the Government's litigation burden, including frustrating its investigative efforts (No. 7).

The memo emphasized that the foregoing enumerated considerations are not exhaustive and encouraged DOJ attorneys to evaluate additional grounds for seeking dismissal. These grounds could include the first to file bar, the public disclosure bar, and failure to plead fraud with particularity under Federal Rule of Civil Procedure 9(b), among others. This policy statement, alone, is remarkable because these are defenses that typically are not affirmatively raised by DOJ.

Will the New Policy Have an Impact on FCA Cases?

It is too early to tell whether DOJ will robustly implement the new policy, or how the impact will be measured if it does. While the memo indicates that DOJ will internally track the number of cases where DOJ has moved to dismiss, that statistic may be incomplete. Prior to filing a motion to dismiss, the memo encourages communication between government attorneys and relator's counsel. The Government's notification to relator's counsel of a potential motion to dismiss may lead to more voluntary dismissals before DOJ pursues its own dismissal motion.

When the Government does move to dismiss, however, it generally should be successful because courts defer to the Government's views in this area. The exact level of deference is subject to a circuit split. Some courts hold that the United States has an "unfettered right" to dismiss a *qui tam* action, *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003), while other courts hold that the Government must identify a "valid government purpose" that is rationally related to dismissal. *United States ex. rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998).

Even in circuits that require the Government to demonstrate a "valid government purpose," the memo articulates a range of government interests that may warrant dismissal, even if the underlying *qui tam* complaint is facially viable. Going forward, those courts holding the Government to a higher standard for dismissal could test DOJ's proffered justification or attempt to weigh the respective interests, but that would

seem inconsistent with the general deference the Government receives in this area.

Prospective Impact of the Policy Change

It remains to be seen how DOJ will implement the memo's policy and thus, whether the policy will lead to dismissal of more relator cases. At a minimum, the policy provides companies facing FCA allegations a new angle for declination presentations to DOJ. Armed with the seven factors on which the Government will focus, defendants can present compelling reasons for DOJ to not only decline intervention, but seek dismissal to avoid FCA litigation altogether.