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ALERT

The Granston Doctrine?: Memorandum Indicates New Emphasis on Proactive Dismissals of Meritless False Claims Act Cases

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The Department of Justice (DOJ) has issued a new internal memorandum directing attorneys to examine several factors and consider the merits of filing a motion to dismiss *qui tam* actions when the Government declines to intervene. False Claims Act (FCA) cases have increasingly been vexing for companies operating in regulated industries like health care, Government contracting, and communications due to recent rulings expanding non-traditional theories of liability like implied certification. By all indications, this initiative is rooted in DOJ's desire to limit opportunities for adverse rulings and avoid expending its limited resources on monitoring, and responding to discovery requests in, meritless cases. While we will have to wait and see the practical implications of the memo, its issuance could mark a radical swing in DOJ policy and provide new opportunities for proactive defendants across all industries. At minimum, the memorandum provides meaningful guidance on the arguments and justifications DOJ attorneys should include in motions to dismiss.

Rumors of a policy shift first surfaced on October 30, 2017, when certain publications reported that Michael Granston, Director of the Commercial Litigation Branch of DOJ's Fraud Section, announced that the Government would move to dismiss *qui tam* actions when it determines a case has no merit. At the time, DOJ affirmatively denied such a policy change. DOJ typically declines, but does not actively seek dismissal of, cases it does not believe merit intervention. Indeed, by some reports, DOJ has proactively moved to dismiss less than 1% of *qui tam* actions filed in the last 10 years.

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Despite the prior denial of a policy change, as first reported by the National Law Journal, on January 10, 2018, DOJ issued a memo that may amount to a substantial change in the Department's position on proactively seeking dismissal of meritless relator cases. The entirety of the memo is available here.

Per the memo, Government attorneys evaluating a recommendation to decline intervention in a *qui tam* action should also consider seeking dismissal pursuant to 31 U.S.C. section 3730(c)(2)(A) if such a dismissal would advance the Government's interests, preserve limited resources, and avoid opportunities for adverse precedent. It goes on to provide DOJ attorneys with a general framework for evaluating when it may be appropriate to seek a dismissal, emphasizing careful analysis of seven key questions:

1. Is the complaint facially lacking in merit, either because the underlying legal theory is defective or the factual allegations are frivolous, or has the Government concluded after investigating that the case lacks merit?
2. Does the complaint duplicate a pre-existing Government investigation (without adding useful information) thus enabling the relator to receive an unwarranted windfall at the expense of the public fisc?
3. Has the relevant agency determined that the action threatens to interfere with that agency's policies or the administration of that agency's programs? Included in this analysis is an assessment of whether the action both lacks merit and raises the risk of significant economic harm that could cause a critical supplier to exit a Government program or the industry.
4. Is dismissal necessary to protect DOJ's litigation prerogatives?
5. Does the litigation pose an unacceptable risk to national security interests, potentially via exposure of classified information?
6. Do the Government's expected costs (monitoring the litigation and responding to discovery requests) exceed any possible recovery?
7. Did the relator take actions, or make procedural errors, that sufficiently frustrated the Government's efforts to conduct a proper investigation?

These factors are not intended to be mutually exclusive, nor are they exhaustive. As was the case in the Department's limited history of proactively seeking dismissals, DOJ expects that it will identify multiple grounds when seeking dismissals. Additionally, the memo clearly states that attorneys can cite factors in addition to the seven explicitly listed when assessing the propriety of a proactive dismissal.

The memo also provides some logistical guidance for its attorneys. Attorneys are advised to "consult closely with the affected agency as to whether dismissal is warranted," and to seek the agency's recommendation before filing a request to dismiss. Further, in situations where the agency opposes proactive dismissal, there may be other ways the Department can address the deficiency while honoring the agency's desire to forego seeking dismissal. For example, if the agency views the alleged falsity as immaterial, a declaration to that affect could be provided.

DOJ's new internal policy encouraging attorneys to seek dismissal of non-intervened *qui tam* actions may amount to a significant policy change, but only time will tell. In the interim, the memo provides companies facing FCA allegations a new angle for declination presentations. Armed with the seven factors on which the Government will focus, defendants can present strong reasons for DOJ to not only decline intervention, but seek dismissal and, potentially, avoid an FCA case altogether.

Finally, while a DOJ motion to dismiss has a strong likelihood of success, dismissal is not necessarily automatic. As the memo notes, while some courts have concluded that DOJ has an "unfettered right" to dismissal, other courts have required DOJ to identify a "valid government purpose" that is rationally related to the dismissal. The memo certainly outlines such factors, and should provide a nice roadmap for DOJ filings in jurisdictions requiring justification.