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RECENT SPEECH PROVIDES INSIGHT INTO DEPARTMENT OF JUSTICE FALSE CLAIMS ACT ENFORCEMENT PRIORITIES

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A recent speech by Deputy Associate Attorney General Stephen Cox provided insight into four evolving aspects of False Claims Act (FCA) enforcement in the current U.S. Department of Justice (DOJ) .

1 - DOJ's Gatekeeping Role in Dismissing Whistleblower Suits (the Granston Memo)

Mr. Cox addressed significant new guidance as to when DOJ will move to dismiss False Claims Act *qui tam* suits, that is, cases initiated by whistleblowers (rather than by the Department). Over 70% of FCA recoveries, as measured by dollars, have come from *qui tam* whistleblower actions over the last three decades. Those cases may move forward with or without DOJ intervention. In addition, DOJ has the power to dismiss *qui tam* actions. Mr. Cox acknowledged that, historically, "this authority has been used sparingly." But last year, Michael Granston, the Director of DOJ's Civil Fraud Section, issued internal guidance directing DOJ attorneys to more rigorously consider dismissing meritless *qui tam* FCA cases.

Mr. Cox stated that the "Granston Memo is about [DOJ's] gatekeeping role," and he highlighted a few reasons why DOJ may dismiss whistleblower-initiated FCA actions. First, DOJ has an interest in screening out cases that "are non-meritorious or abusive, or contrary to the interests of justice." Those cases do not advance justice and "impose unnecessary costs on the Department, on the judiciary, and on defendants." Second, DOJ is a repeat player and has an institutional interest in developing good FCA precedent: "bad cases that result in bad case law inhibit [DOJ's] ability to enforce the False Claims Act in good and meritorious cases." Third, DOJ has limited resources, and "from a resource perspective, when the Department's resources are consumed for other things, [DOJ has] less time to fulfill [its] priorities."

Although Mr. Cox stated that the "Granston Memo is not really a change in the Department's historical position," he also noted that dismissals were becoming much more frequent: "in the past, in a given year, the Department might have dismissed a few cases—if it dismissed any at all—but since 2017, the Department has moved to dismiss about two dozen cases." Mr. Cox promised to "use this tool more consistently to preserve [DOJ] resources for cases that are in the United States' interests."

2 - The Impact of Subregulatory Guidance on FCA Cases (the Brand Memo)

Mr. Cox also addressed how DOJ views subregulatory guidance in FCA cases. Subregulatory guidance is guidance that agencies issue without formal rulemaking. In January 2018, then-Associate Attorney General Rachel Brand authored a memo prohibiting DOJ attorneys from using other agencies' sub-regulatory guidance to establish violations of law in affirmative civil enforcement actions. Mr. Cox reiterated that, as per the Brand Memo, "Guidance is not law. It's not binding. And it shouldn't be given the force or effect of law."

However, Mr. Cox explained that guidance may still play a part in an FCA case in several ways. First, guidance may be used to establish knowledge, "to show the defendant's awareness of an agency's interpretation of a particular requirement." Second, guidance may be relevant to materiality, an element in FCA cases. Third, "[t]he guidance document might be probative, even if it isn't binding." And, fourth, a "particular guidance document may also be relevant if it is expressly incorporated into a contract or a certification." These uses of guidance have been outlined in the updated Justice Manual, which is posted online (and which was previously called the U.S. Attorneys' Manual).

3 - DOJ's Discouragement of "Piling On" (the Rosenstein Memo)

Mr. Cox further addressed what is referred to as "piling on," or when multiple law enforcement or regulatory agencies punish a defendant for the same or substantially similar conduct. In an effort to avoid "piling on," Deputy Attorney General Rod Rosenstein circulated a memorandum in May 2018 requiring internal coordination and coordination with other agencies.

Mr. Cox clarified that DOJ's policy against "piling on" applies "across the board, including in False Claims Act cases." To illustrate his point, Mr. Cox stated that in a recent bid-rigging case, the Antitrust Division coordinated with the Fraud Section to reach global settlements that were "equitable and proportionate" and not "unnecessarily duplicative of each other."

4 - More Flexibility in Granting Cooperation Credit (the Yates Memo)

Finally, Mr. Cox discussed changes to how DOJ handles cooperation credit, or the credit given to defendants who voluntarily disclose wrongdoing, cooperate, and comply with DOJ in both civil and criminal cases. During the Obama administration, then-Deputy Attorney General Sally Yates issued a memorandum requiring that organizations provide DOJ with "all relevant facts about the individuals involved in corporate misconduct" to receive any credit, at all, for cooperation. That was viewed by many as a severe approach to rewarding cooperation.

Deputy Attorney General Rod Rosenstein softened that approach last fall, announcing in a November 2018 speech that DOJ would no longer follow an "all-or-nothing" approach towards cooperation credit in civil cases. A company that cooperates with a civil investigation can now receive some cooperation credit even if they do not, for example, identify each individual who was substantially involved or responsible for misconduct. Mr. Cox made clear that FCA investigations are covered by this new policy, which is reflected in the Justice Manual. Consequently, an organization may earn cooperation credit in FCA cases through a range of actions, such as voluntary disclosures, sharing information learned in internal investigations, making witnesses available, and having strong internal compliance programs. An organization no longer has "to boil the ocean in an effort to identify every employee who played any role in the conduct in order to receive any credit for cooperating," as Mr. Cox put it.

Conclusions

Significant FCA policies are in flux at DOJ. Mr. Cox's speech provides insight into a handful of important areas of change at the Department. If you would like our assistance with a False Claims Act question, or if you have any questions about this LEGALcurrents, please contact a member of our Government and Internal Investigations practice group at 585.232.6500 or 716.853.1616 or visit www.hselaw.com.

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