Justice Department Clarifies Softer Stance on False Claims Act Enforcement

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The U.S. Department of Justice ("DOJ") recently clarified two prior memos that suggested less enforcement of False Claims Act ("FCA")1 cases. One memo (commonly known as the "Granston" memo)2 encouraged federal prosecutors to actively oppose FCA cases brought by whistleblowers that the government views as weak. The FCA allows private individuals to sue hospitals, physicians and other providers for false claims on the government's behalf, even if the government investigates and chooses not to litigate. The Granston memo urged prosecutors to employ a rarely-used provision of the FCA that authorizes the DOJ to file a motion to dismiss whistleblower cases that lack merit.3 In a recent speech at the Federal Bar Association, Deputy Assistant Attorney General, Stephen Cox, clarified that qui tam (or whistleblower) cases will continue play an important role in FCA enforcement.4 Although the government only chooses to participate (or intervene) in 1 of 5 whistleblower cases, it will not actively oppose whistleblower cases unless "the underlying factual or legal theories clearly lack merit." Mr. Cox stated that investigating and "monitoring meritless cases is not a good use of Department resources; litigating these cases is not a good use of judicial resources; and forcing defendants to defend these cases is not in the interests of justice..." He added that dismissal may be appropriate even if a claim is false but did not materially harm or impact government payments. In the same speech, Mr. Cox clarified the DOJ's position concerning another memo, known as the "Brand" memo.5 The Brand memo instructed federal prosecutors not to use "agency guidance" as a basis for proving a violation of law. The memo explained that agency guidance, such as guidance issued by the Centers for Medicare and Medicaid ("CMS") or the Office of Inspector General ("OIG"), does not have the force of law and does not create legal obligations that exceed the requirements of the underlying statute or regulation. In his speech, Mr. Cox expanded on this stating that while the regulatory process is slow and cumbersome, "sometimes agencies have used guidance as a short-cut to effectively make new rules" without following the proper rulemaking procedures. He added that although agency guidance may serve to educate the public concerning certain regulatory requirements, it is not legally binding unless formally adopted as law or regulation. While some have interpreted the Granston and Brand memos as a sign that the DOJ is taking a softer stance on FCA enforcement, the Department has clarified that these memos represent a tightening of litigation standards rather than signaling less enforcement activity. Indeed, Mr. Cox reported that for the prior fiscal year, the federal government has recovered more than $3.4 billion from False Claims Act enforcement. Of this amount, $2.4 billion was recovered in actions against healthcare providers, representing the eighth consecutive year that healthcare fraud recoveries exceeded $2 billion. Therefore, while these DOJ memos may signal a shift in enforcement policy, healthcare providers still must guard against meritless whistleblower cases and other FCA enforcement actions.

131 U.S.C. 3729 et seq.2U.S. Dept. of Justice, Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A), Director of Commerical Litigation Branch of Fraud Section, Michael Granston, January 10, 2018.3 31 U.S.C. 3730(c)(2)(A).4Justice News, Deputy Associate Attorney General Stephen Cox Delivers Remarks at the Federal Bar Association Qui Tam Conference, available at https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-delivers-remarks-federal-bar-association5U.S. Dept. of Justice, Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases, Associate Attorney General, Rachel Brand, January 25, 2018.

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