

Compliance Today – November 2018 False Claims Act enforcement: Evolving policies from the DOJ

by Gabriel L. Imperato, Esq., CHC

Gabriel L. Imperato (gabriel.imperato@nelsonmullins.com) is Managing Partner of the Fort Lauderdale office of Nelson Mullins Broad and Cassel.

The Department of Justice (DOJ) has been busy during 2017 and 2018 with policy pronouncements that purportedly will have an impact on enforcement of the False Claims Act (FCA). The first policy announcement occurred on November 16, 2017, when Attorney General Sessions issued a memo prohibiting the DOJ from issuing guidance documents designed to advise parties outside the federal Executive Branch about their legal rights and obligations.^[1] The Sessions Memo prohibited the DOJ from using these documents to coerce parties into taking or refraining from action beyond the requirements of applicable law, and from otherwise evading required rulemaking processes by using these documents to create de facto regulations.

The ensuing months brought about additional policy announcements for handling FCA cases (especially qui tam actions) from then Associate Attorney General Rachel Brand and the Director of the Commercial Litigation Branch, Fraud Section, Michael Granston.

The Brand Memo

The Brand Memo was issued on January 25, 2018, and specifically applied Sessions' sentiments to the FCA by stating that the DOJ may not use its enforcement authority to convert guidance documents into binding rules in FCA cases.^[2] The Brand Memo further instructed that DOJ litigators may not use non-compliance with agency guidance documents as a basis for proving violations of applicable law in FCA cases. Federal administrative agencies typically release manual provisions or other instructions as guidance on agency norms and standards, and this has certainly been the case under federal health programs. Despite the fact that these guidance documents were not regulatory or binding law, the documents nevertheless have been cited by government lawyers, and especially relator's counsel, as the legal bases for FCA violations. The Brand Memo makes clear that agency guidance documents should not serve as the basis for imposing legal obligations beyond existing statute or regulations or otherwise from serving as a basis for proving violations of law in FCA cases.

The Brand Memo, nevertheless, stated that agency guidance documents may still be used for proper purposes, such as evidence that a party reviewed or was aware of the guidance document as a basis to prove that the party had the requisite knowledge (i.e., scienter) under the FCA or was aware of the government's essentially non-binding interpretation of law and/or its views of the "materiality" of the requirement mentioned in the guidance documents. This new policy is intended to modify future FCA enforcement by limiting the grounds on which qui tam claims may be actionable, but it is unclear what, if any, practical impact this policy will have for case intervention and ultimate liability under the FCA. The Brand Memo, nevertheless, does illustrate a trend in DOJ shifting priorities, but it still has left much unanswered, and it will remain to be seen what true impact this policy will have on FCA litigation.

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