

June 20, 2018

ACTING ASSOCIATE AG PANUCCIO HIGHLIGHTS DOJ'S FALSE CLAIMS ACT ENFORCEMENT REFORM EFFORTS

To Our Clients and Friends:

On June 14, 2018, Acting Associate Attorney General Jesse Panuccio gave remarks highlighting recent enforcement activity and policy initiatives by the Department of Justice ("DOJ"). The remarks, delivered at the American Bar Association's 12th National Institute on the Civil False Claims Act and Qui Tam Enforcement, included extensive commentary about DOJ's ongoing efforts to introduce reforms to promote a more fair and consistent application of the False Claims Act ("FCA"). While the impact of these policy initiatives remains to be seen, DOJ's continued focus on these efforts, led by officials at the highest levels within DOJ, suggests that FCA enforcement reform is a priority for the Department.

After giving an overview of several FCA settlements from the last eighteen months—apparently designed to demonstrate that this DOJ recognizes the importance of the FCA in a breadth of traditional enforcement areas—Mr. Panuccio discussed two particular priorities: the opioid epidemic and the nation's elderly population. He emphasized that DOJ would "actively employ" the FCA against *any* entity in the opioid distribution chain that engages in fraudulent conduct. He then highlighted the crucial role of the FCA in protecting the nation's elderly from fraud and abuse, citing examples of enforcement against a nursing home management company, hospices, and skilled rehabilitation facilities.

The majority of Mr. Panuccio's remarks focused, however, on policy initiatives DOJ is undertaking to ensure that enforcement "is fair and consistent with the rule of law." Mr. Panuccio alluded to general reform initiatives by the department, such as the ban on certain third-party payments in settlement agreements, before expanding on reforms specific to the FCA. Mr. Panuccio highlighted that the recent FCA reform efforts have been spearheaded by Deputy Associate Attorney General Stephen Cox; Mr. Cox had delivered remarks at the Federal Bar Association Qui Tam Conference in February of this year that had provided insight into the positions articulated in the Brand and Granston memoranda. In his speech, Mr. Panuccio described five policy initiatives being undertaken by DOJ to reform FCA enforcement: (i) qui tam dismissal criteria; (ii) the use of guidance in FCA cases; (iii) cooperation credit; (iv) compliance program credit; and (v) preventing "piling on."

Qui tam dismissals

Mr. Panuccio acknowledged the tremendous increase in the number qui tam cases that are filed each year, which includes cases that are not in the public interest. Recognizing that DOJ expends significant resources to monitor cases even when it declines to intervene, Mr. Panuccio noted that DOJ attorneys have been instructed to consider whether moving to dismiss the action would be an appropriate use of prosecutorial discretion under the FCA. While DOJ previously exercised this authority only rarely,

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consistent with the Granston memo, Mr. Panuccio suggested that, going forward, DOJ may use that authority more frequently in order to free up DOJ's resources for matters in the public interest.

Although defendants generally may not yet be experiencing significant differences regarding the possibility of dismissal at the DOJ line level, the continued public discussion of the potential use of DOJ's dismissal authority by high-level officials suggests that DOJ appreciates the problems caused by frivolous qui tams and may ultimately be more receptive to dismissal of actions lacking merit.

Guidance

As stated in the Brand Memorandum, DOJ will no longer use noncompliance with agency guidance that expands upon statutory or regulatory requirements as the basis for an FCA violation. Mr. Panuccio explained that, in an FCA case, evidence that a party received a guidance document would be relevant in proving that the party had knowledge of the law explained in that guidance. However, DOJ attorneys have been instructed "not to use [DOJ's] enforcement authority to convert sub-regulatory guidance into rules that have the force or effect of law."

Cooperation

With respect to cooperation credit, Mr. Panuccio indicated that DOJ is working on formalizing its practices and that modifications to prior practices should be expected. That notwithstanding, Mr. Panuccio provided assurances that DOJ will continue to "expect and recognize genuine cooperation" in both civil and criminal matters. He also noted that the extent of the discount provided when negotiating a settlement would depend on the nature of the cooperation, how helpful it was, and whether it helped identify individual wrongdoers.

Though DOJ's new policies on cooperation credit are still forthcoming, Mr. Panuccio's remarks suggest that formal cooperation credit might be expanded to cover situations outside of those in which the defendant makes a self-disclosure.

Compliance

In recognition of the challenges of running large organizations, DOJ will "reward companies that invest in strong compliance measures." How this may differ, if at all, from current ad hoc considerations remains to be seen.

Piling On

Mr. Panuccio acknowledged that, when multiple regulatory bodies pursue a defendant for the same or substantially the same conduct, "unwarranted and disproportionate penalties" can result. In order to avoid this "piling on," DOJ attorneys will promote coordination within the agency and other regulatory bodies to ensure that defendants are subject to fair punishment and receive the benefit of finality that should accompany a settlement. Moreover, Mr. Panuccio remarked that DOJ attorneys should not "invoke the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case," which really is simply a restatement of every attorney's existing ethical duty. Whether DOJ leadership's

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interest here will result in significant practical developments is uncertain. Such developments, though perhaps unlikely, could include eliminating the cross-designation of Assistant U.S. Attorneys as both Civil and Criminal; limiting the ability of Civil Division attorneys to invite Criminal Division lawyers to participate in meetings without the request or consent of defendants; or perhaps even somehow inhibiting the Civil Division from using the FCA, with its mandatory treble damages and per-claim penalties, following criminal fines and restitution.

We will continue to monitor and report on these important developments.



The following Gibson Dunn lawyers assisted in preparing this client update: Stephen Payne, Jonathan Phillips and Claudia Kraft.

Gibson Dunn's lawyers have handled hundreds of FCA investigations and have a long track record of litigation success. Among other significant victories, Gibson Dunn successfully argued the landmark Allison Engine case in the Supreme Court, a unanimous decision that prompted Congressional action. See Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123 (2008). Our win rate and immersion in FCA issues gives us the ability to frame strategies to quickly dispose of FCA cases. The firm has more than 30 attorneys with substantive FCA expertise and more than 30 former Assistant U.S. Attorneys and DOJ attorneys. For more information, please feel free to contact the Gibson Dunn attorney with whom you work or the following attorneys.

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