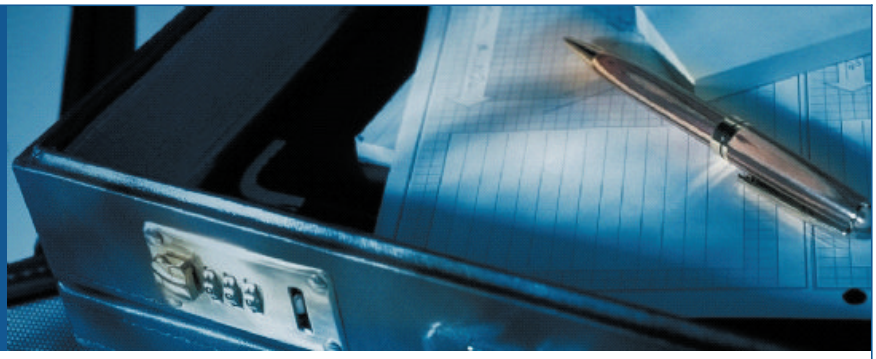

ALERT

JANUARY 2018

New DOJ Guidance May Signal Greater Willingness to Dismiss *Qui Tam* Cases

Although historically reluctant to seek dismissal of *qui tam* actions filed under the False Claims Act ("FCA"), the Department of Justice ("DOJ") recently issued an eight-page memorandum providing guidance to DOJ attorneys regarding when to consider doing so. On January 10, 2018, Michael D. Granston, Director of the DOJ Civil Division Commercial Litigation Branch's Fraud Section, issued a memorandum to all DOJ attorneys handling FCA cases nationwide. Noting the increase in recent *qui tam* filings, the significant resources that DOJ expends in monitoring even declined cases, and the risk of relators making harmful case law, the memo establishes a framework for DOJ attorneys to apply to evaluate the appropriateness of seeking *qui tam* dismissals under 31 U.S.C. §3730(c)(2)(A), which allows DOJ to dismiss cases even over the relator's objection.

Under the memo, DOJ attorneys "should consider moving to dismiss" where: (i) the case lacks merit, either because the legal theory is inherently defective or the factual allegations are frivolous; (ii) the case is redundant of an ongoing government investigation; (iii) DOJ's client agency has recommended dismissal because the case threatens to interfere with its policies or program administration; (iv) dismissal is "necessary to protect the Department's litigation prerogatives," such as avoiding interference with ongoing litigation or the risk of unfavorable precedent; (v) the case may risk disclosure of classified information; (vi) the costs to the government are expected to outweigh any potential recovery; and/or (vii) the relator "frustrate[s] the government's efforts to conduct a proper investigation" of the allegations.

The memo also expresses the expectation that when DOJ attorneys forewarn relators that they are considering dismissal, relators may voluntarily dismiss these cases. This, of course, could benefit defendants even more than it benefits DOJ.

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