Department of Justice Leadership Previews Reforms to False Claims Act Enforcement: Significant Incentives for Cooperation and Strong Compliance

By William S.W. Chang, Laura M. Kidd Cordova, Jason M. Crawford, Mana Elihu Lombardo, and M. Yuan Zhou*

Acting Associate Attorney General Jesse Panuccio has announced various "reform projects" concerning how the Department of Justice will pursue cases under the False Claims Act. The authors of this article discuss the reform projects.

In an address at the American Bar Association's 12th National Institute on the Civil False Claims Act and Qui Tam Enforcement, Acting Associate Attorney General Jesse Panuccio announced various "reform projects" concerning how the Department of Justice ("DOJ") will pursue cases under the False Claims Act ("FCA"). The associate attorney general is the third in command after the attorney general and deputy attorney general. And the associate attorney general oversees all of the DOJ's affirmative-civil-enforcement litigation, including FCA actions.

COOPERATION

Three of the "reform projects" address how cooperation, compliance measures, and multiple-agency actions can impact FCA damages and penalties. Under the FCA, the government can recover up to three times the amount that had been paid under the alleged false claims in addition to statutory penalties between $11,181 and $22,363 per claim. The statute provides that full and timely cooperation may reduce treble damages to double damages.

Mr. Panuccio made "perfectly clear" that those who fully cooperate can expect even greater "incentives." In exchange for "genuine cooperation," DOJ will exercise its "tremendous enforcement discretion with respect to structuring settlements while also providing a material discount."

Mr. Panuccio identified key features of such cooperation, including:

(1) voluntary disclosure, which he stressed was the "most valuable form

* William S.W. Chang (wchang@crowell.com) and Laura M. Kidd Cordova (lcordova@crowell.com) are partners at Crowell & Moring LLP. Jason M. Crawford (jcrawford@crowell.com) and Mana Elihu Lombardo (melombardo@crowell.com) are counsel and M. Yuan Zhou (yzhou@crowell.com) is an associate at the firm.

of cooperation";

(2) sharing information from an internal investigation;

(3) making witnesses available; and

(4) assistance with identifying culpable individuals, which re-emphasizes the *Yates* Memorandum's commitment to seeking accountability for individual wrongdoing.

COMPLIANCE

On compliance, Mr. Panuccio echoed recent remarks by Deputy Attorney General Rod Rosenstein noting, "Things go wrong in every organization," even those with strong compliance measures. Mr. Panuccio assured companies that when fraud occurs, the DOJ will give the "greatest consideration" to companies that have incorporated compliance into "the corporate culture."

MULTIPLE-AGENCY ACTIONS

Consistent with the anti-piling-on policy recently added to the United States Attorneys' Manual, Mr. Panuccio explained that DOJ FCA attorneys will coordinate with DOJ's criminal prosecutors as well as other regulators to "apportion penalties and fines where appropriate, to ensure that defendants are subject to the appropriate, not just the highest, level of punishment that is available."

POTENTIAL REWARDS FOR COOPERATION AND COMPLIANCE

Those DOJ "reform projects" have the potential to significantly reshape FCA enforcement by increasing the rewards for cooperation and compliance. While Mr. Panuccio did not elaborate on what those rewards would entail, under current DOJ policies and practices for parallel criminal-fraud cases, the "greatest consideration" can include (1) declining to bring an action against the company, and instead charging culpable individuals only; (2) a 50 percent reduction from the low end of the fine range for the company, and (3) no independent corporate monitor.

If applied to the FCA context, those principles can translate to a lower (below double) multiplier or no multiplier to damages, a significant reduction from the low end of the FCA per-claim penalties calculation, and a recommendation of no Corporate Integrity Agreement. Together with the anti-piling-on policy, companies with strong compliance measures may face even less exposure in exchange for full and timely cooperation.

GUIDANCE

According to Mr. Panuccio, the DOJ is in the process of formalizing those reform policies. In the meantime, companies can find detailed guidance in

several DOJ policies that govern the same considerations in the criminal context as well as recent announcements by Mr. Rosenstein, Acting Assistant Attorney General of the Criminal Division John Cronan, and officials of the Criminal Division's Fraud Section. Given the significant parallels and several overlapping considerations in FCA and criminal-fraud prosecutions, it is expected that the DOJ's formalized reform policies for FCA enforcement will borrow heavily from those sources.

Two of the other reform projects involve *qui tam* dismissals and the impermissible use of sub-regulatory guidance, which have been the subject of the Granston and Brand Memoranda respectively.

QUI TAM DISMISSALS

With respect to *qui tam* dismissals, Mr. Panuccio acknowledged that the DOJ has "rarely" used that authority in the past, but the DOJ has "now instructed [its] attorneys" to carefully consider whether such dismissal is appropriate in each case where the DOJ declines to intervene. Those statements—together with similar statements by Deputy Associate Attorney General Stephen Cox[1] and Director of Civil Frauds Michael Granston—strongly signal the DOJ's appreciation for the need to exercise its dismissal authority more frequently.

SUB-REGULATORY GUIDANCE

As for the Brand Memorandum, Mr. Panuccio reiterated that DOJ attorneys pursuing affirmative-civil-enforcement actions may not rely on sub-regulatory guidance "that expands upon statutory or regulatory requirements" as the "basis for contending that legal violations have occurred." Importantly, Mr. Panuccio added that the DOJ "hope[s] that other agencies will follow this example," because that "policy keeps government restrained and promotes the rule of law, fair notice, and due process." The attorney general had expressed similar views in his November 2017 Memorandum regarding the Prohibition on Improper Guidance Documents.[2]

DOJ's top leadership has now essentially communicated to *all* federal agencies that using sub-regulatory guidance to expand statutory and regulatory requirements is *inconsistent* with promoting the rule of law, fair notice, and due process. That carries significant weight. The DOJ is often the litigating counsel for federal agencies—including the U.S. Department of Health and Human

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[1] https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-delivers-remarks-federal-bar-association.

[2] https://www.justice.gov/opa/press-release/file/1012271/download.

Services, which oversees the laws, regulations, and sub-regulatory guidance that are often at issue in the majority of FCA actions. And several of President Trump's appointments to the federal bench have espoused similar views, including Associate Justice Neil Gorsuch.[3]

Also, the Office of Legal Counsel ("OLC") resides in the Department of Justice. That office's legal interpretations bind all federal agencies. Therefore, the DOJ's "hope," which has gained traction in the federal courts and could result in an OLC opinion, may carry even more force when dealing with federal agencies under the Trump administration.

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[3] https://www.ca10.uscourts.gov/opinions/14/14-3243.pdf.