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ALERT

# Acting Associate Attorney General Provides DOJ Perspective on Current and Future Civil FCA Enforcement

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**WHAT:** Acting Associate Attorney General Jesse Panuccio provided insights into DOJ's current perspective on the False Claims Act, including enforcement trends, priorities, and policy initiatives.

**WHEN:** Mr. Panuccio delivered his remarks on June 14, 2018. The speech addressed present and future Department initiatives.

**BACKGROUND:** The False Claims Act (FCA) is the Department of Justice's tool of choice for combatting fraud against the Government. The Department of Justice (DOJ) collected over $3.7 billion in judgments and settlements from civil FCA cases in fiscal year 2017 alone. In his recent speech to the American Bar Association's National Institute on Civil False Claims Act and Qui Tam Enforcement, Mr. Panuccio – the third in command at DOJ – provided a detailed overview of the Department's FCA enforcement priorities and policies under the current administration. Many of the Department's new initiatives aim to penalize FCA violations while rewarding companies that cooperate with the Government and promote a culture of strict compliance.

**WHAT DOES IT MEAN FOR INDUSTRY:** Although DOJ will continue to rigorously enforce the FCA, the statute is not exempt from this Administration's inclination to protect cooperative companies with strong compliance policies from unjust suits and back-breaking damages. Mr. Panuccio made this abundantly clear in his remarks. While his message should not be a surprise to those who have been following this Administration's policy pronouncements, it should be a clear reminder for companies that contract with the Government or

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operate in heavily-regulated industries – like health care – that while this DOJ will not relax FCA enforcement, it may be willing to listen to and work with companies facing unjust strike suits or those that have a strong record of compliance and cooperation. At the same time, many of these "new polices" are articulations of pre-existing statutory options that have not been frequently used by prior administrations. It remains to be seen whether this administration will actually utilize those statutes, or is content to simply remind companies of their existence.

*Rigorous FCA Enforcement*

Addressing current trends in FCA enforcement, Mr. Panuccio emphasized DOJ's efforts to combat healthcare fraud. He highlighted several recent high-dollar settlements with pharmaceutical companies, as well as a compounding pharmacy and an electronic health records vendor. Beyond the healthcare space, and consistent with the Administration's interest in creating a conducive environment for commerce, Mr. Panuccio characterized the FCA as tool for ensuring fair competition in the marketplace. Specifically, he noted that DOJ will continue to use the FCA to protect good corporate citizens by targeting companies that flout small business requirements or evade import duties.

Mr. Panuccio also outlined DOJ's intent to use the FCA to achieve affirmative enforcement priorities. The Department's major priorities include combatting the opioid crisis and protecting elderly citizens from fraud and abuse. In addition to noting the Department's recent intervention in several actions against opioid manufacturers, Mr. Panuccio stressed that DOJ will use its full civil and criminal authority to stop unlawful conduct by "any entities involved in the opioid distribution chain . . . from pharmaceutical manufacturers and distributors, to pharmacies, to pain management clinics and physicians." He also singled out nursing home, rehabilitation, and hospice care companies that exploit Medicare and Medicaid as prime targets for FCA enforcement.

Although DOJ "is committed to pursuing vigorous" enforcement of the FCA, the Department also expressed an interest in working to protect companies with robust compliance programs from overenforcement. Mr. Panuccio explained that DOJ's current policy initiatives include plans to dismiss meritless *qui tam* actions, clarify its cooperation guidelines, reward companies that cooperate and implement compliance initiatives, and prevent agencies from using their power to pile on unnecessary punitive measures.

*Qui Tam Dismissals*

Back in January, DOJ announced in a leaked memorandum (the "Granston Memo") that it would begin moving to dismiss meritless *qui tam* cases. Over 600 *qui tam* actions are filed each year. Although DOJ often declines to intervene, the Department has rarely used its discretion under the FCA to request dismissal of frivolous or unprovable *qui tam* claims. As Mr. Panuccio pointed out, even when it declines to intervene DOJ must still monitor, and sometimes participate in, these actions. Under the new policy, outlined here, DOJ will consider moving to dismiss *qui tam* actions in which it declines to intervene. This policy stems from a seldom-used statutory provision allowing for such dismissals. If DOJ follows through with this policy, it could save the Department, the judiciary, and defendants from wasting limited resources on meritless litigation. Although we

have yet to see DOJ actively implement this policy, it does provide companies facing *qui tam* complaints an opportunity to argue that the Government should not only decline intervention but seek dismissal of the entire matter.

*Agency Guidance*

According to Mr. Panuccio, DOJ is also working to clarify its policies and internal guidance to make compliance and cooperation easier for companies with good corporate governance. As announced last fall, and memorialized in the "Brand Memo," DOJ will no longer publish binding guidance. Further, Mr. Panuccio stressed that "agency guidance should educate, not regulate." Department guidance thus will not be used to "expand upon statutory or regulatory requirements." Still, in the FCA context it remains "fully consistent with Department policy to use a party's receipt of a guidance document as probative evidence of knowledge of the law that the document explains." Companies should understand that, while violation of agency guidance cannot underlie an alleged false claim, knowledge of that guidance can create the necessary scienter for false claim liability.

*Cooperation and Voluntary Disclosure*

Likewise, DOJ is collecting, distilling, and formalizing its policies on cooperation. The Department wants to encourage cooperation and has significant discretion to do so by offering reduced settlement sums in exchange for helpful assistance. Specifically, Mr. Panuccio called on companies to disclose violations voluntarily, share information, and help identify individual wrongdoers. Doing so could lead to "material discount[s]" for cooperating entities. The FCA already contains a provision reducing the damages multiplier from treble to double under certain, limited circumstances. That provision is so narrow, however, that it rarely applies. This new policy may provide companies facing false claim allegations an expanded vehicle for working with the Government to minimize their exposure.

*Corporate Compliance*

In addition to cooperation, Mr. Panuccio underscored the importance of corporate compliance. When something goes wrong, he said, "the greatest consideration should be given to companies that do not just adopt compliance programs on paper, but incorporate them into the corporate culture." He also noted that effective compliance counsel plays a crucial role in both preventing fraud and rectifying it when it occurs. Designing and implementing substantive compliance initiatives thus continues to be a key factor in persuading the Department to decline intervention or reduce its proposed damages.

*Piling On*

Finally, Mr. Panuccio acknowledged the burden entities face when several agencies target them for the same conduct. Although maintaining that it is appropriate for the Government to take all actions necessary to compensate fraud victims for their losses, he conceded that repeated punishment for the same behavior can be unnecessary and undermine the spirit of the law. The Department has thus created a new policy, announced by Deputy Attorney General Rod Rosenstein in May, "designed to avoid piling on by promoting

coordination within the Department and with other regulators to apportion penalties and fines where appropriate." The policy also instructs DOJ attorneys not to use the threat of criminal enforcement for purposes other than the investigation and prosecution of crime. The new policy will be added to the U.S. Attorneys' Manual. Under the policy, companies should be prepared to push back should DOJ try to use its criminal authority to extract larger civil settlements. Defendants facing FCA liability may also be able to use this policy to prevent piling on and encourage DOJ to cooperate internally and externally in assessing penalties and crafting settlements.

*Conclusion*

For companies that either contract with the Government or operate in heavily-regulated environments, there are two clear takeaways: establish a compliance program and work closely with counsel for all potential FCA allegations. *First*, it's hardly breaking news to those in industry that it is important to have a compliance program that breeds a culture of compliance. Every administration in recent memory has preached as much. However, given these pronouncements on the possible mitigating role compliance could have in the event of an FCA allegation, it is more important than ever to adopt and embrace a robust compliance program. Establishing a culture of compliance today could prevent tomorrow's FCA allegation—and, given these policy pronouncements, could soften damages related to a rouge employee's actions.

*Second*, it is essential to have counsel with FCA experience involved as soon as an allegation comes in the door. Counsel can direct a privileged investigation and help a company make an informed decision about disclosure—something that has now explicitly been called out as an action that could help alleviate damages. On the other side of the coin, in cases where dismissal may be warranted, counsel can advocate directly to DOJ and arm the Department with key information to facilitate a "Granston Memo" declination motion. Counsel can also help navigate the sometimes-choppy waters of cooperation, helping to secure a quick, global disposition that includes all possible credit.

It remains to be seen whether these policy pronouncements will result in tangible change in FCA enforcement patterns and practices. Given the long fuse nature of FCA cases, it may take a while for industry to see solid evidence of these policies in action. Companies, however, should not wait to take the important steps necessary to put themselves in the best position possible should an FCA allegation come down the pike.