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Civil Division

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MEMORANDUM

TO: Attorneys
Commercial Litigation Branch, Fraud Section

Assistant U.S. Attorneys Handling False Claims Act Cases
Offices of the U.S. Attorneys

FROM: Michael D. Granston MDG
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SUBJECT: Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)

Introduction

Over the last several years, the Department has seen record increases in *qui tam* actions filed under the False Claims Act (FCA), 31 U.S.C. § 3729 et seq., with annual totals approaching or exceeding 600 new matters. Although the number of filings has increased substantially over time, the rate of intervention has remained relatively static. Even in non-intervened cases, the government expends significant resources in monitoring these cases and sometimes must produce discovery or otherwise participate. If the cases lack substantial merit, they can generate adverse decisions that affect the government's ability to enforce the FCA. Thus, when evaluating a recommendation to decline intervention in a *qui tam* action, attorneys should also consider whether the government's interests are served, in addition, by seeking dismissal pursuant to 31 U.S.C. § 3730(c)(2)(A).

Historically, the Department has utilized section 3730(c)(2)(A) sparingly, in large part because the statutory text makes clear that relators can proceed with certain *qui tam* actions following the government's declination. Moreover, a decision not to intervene in a particular case may be based on factors other than merit, particularly in light of the government's limited resources.

Accordingly, we have been circumspect with the use of this tool to avoid precluding relators from pursuing potentially worthwhile matters, and to ensure that dismissal is utilized only where truly warranted.

While it is important to be judicious in utilizing section 3730(c)(2)(A), it remains an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent. The Department plays an important gatekeeper role in protecting the False Claims Act, because in *qui tam* cases where we decline to intervene, the relators largely stand in the shoes of the Attorney General. That is why the FCA provides us with the authority to dismiss cases. This memo is intended to provide a general framework for evaluating when to seek dismissal under section 3730(c)(2)(A) and to ensure a consistent approach to this issue across the Department. We reviewed those cases in which the government moved to dismiss relators pursuant to this statutory provision since 1986, when this provision was added to the FCA. As discussed below, we identified approximately seven factors that the government has relied upon in seeking to dismiss a *qui tam* action pursuant to section 3730(c)(2)(A). To ensure consistency across the Department, these factors should serve as a basis for evaluating whether to seek to dismiss future matters, though they are not intended to constitute an exhaustive list, and there may be other reasons for concluding that the government's interests are best served by the dismissal of a *qui tam* action.[1]

Finally, as noted below, when the Department is considering dismissal, relators should be advised of this possibility since it will inform their judgment regarding whether to voluntarily dismiss their actions.

Discussion

The False Claims Act authorizes the Attorney General to dismiss a *qui tam* action over the relator's objection:

> The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the

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[1] In jointly handled and monitored cases, the prior approval of the Assistant Attorney General is required for a motion to dismiss a qui tam action, including under section 3730(c)(2)(A). In delegated cases, the authority for dismissing a *qui tam* complaint will generally be vested in the U.S. Attorney unless dismissal would present a novel issue of law or policy, or for any other reason raises issues that should receive the personal attention of the Assistant Attorney General. *See* Civil Division Directive 1-15, Subpart 1(e). In order to maintain consistency and evaluate the appropriateness of Assistant Attorney General approval, U.S. Attorneys' Offices should provide notice to the assigned Fraud Section attorney at least 10 days prior to filing any motion to dismiss in a delegated matter. In addition, for reporting purposes, the Department will collect information on an annual basis regarding the number of *qui tam* complaints dismissed upon motion by the United States. The Fraud Section will work with the Executive Office of United States Attorneys to formulate a reporting mechanism.

> motion and the court has provided the person with an opportunity for a hearing on the motion.

31 U.S.C. § 3730(c)(2)(A).[2] The FCA does not, however, provide a standard of review for evaluating such a request for dismissal. As a result, courts have developed two differing standards. *Compare United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (holding that the United States must identify a "valid government purpose" that is rationally related to dismissal) *with Swift v. United States,* 318 F.3d 250, 252 (D.C. Cir. 2003) (holding that the United States has an "unfettered right" to dismiss a *qui tam* action).

Moreover, the FCA does not set forth specific grounds for dismissal under section 3730(c)(2)(A). However, below is a non-exhaustive list of factors that the Department can use as a basis for dismissal, along with citations to cases where the government has previously sought dismissal based on these factors.

1. *Curbing Meritless Qui Tams*

The Department should consider moving to dismiss where a *qui tam* complaint is facially lacking in merit—either because relator's legal theory is inherently defective, or the relator's factual allegations are frivolous. Examples of inherent legal defects include *qui tam* actions where the relator failed to allege an actionable obligation to support a reverse false claim violation, *see, e.g., United States ex rel. Hoyte v. American National Red Cross*, 518 F.3d 61 (D.C. Cir. 2008); *United States ex rel. Wright*, No. 5:03-264 (E.D. Tex. Feb. 3, 2005), or to allege a non-federal defendant that is not covered by sovereign immunity. *See, e.g., United States ex rel. Carter v. Board of Governors of the Federal Reserve, et al.*, No. 12-0129-cv-W-HFS (W.D. Mo. May 1, 2013); *United States ex rel. Casey v. Blevins*, No. 4:02-CV-60 (E.D. Ark. July 5, 2002); *Braswell v. Unger*, No. 4:14-cv-02574-JAB (D. Az. August 11, 2015). Factually frivolous cases can take a number of forms. *See, e.g., United States ex rel. Roach v. Obama*, No. 14-0470 (D.D.C. December 18, 2014); *United States ex rel. May v. City of Dallas*, 2014 WL 5454819, at *5 (N.D. Tex. Oct. 27, 2014); *United States ex rel. Berg v. Obama*, 383 F. App'x 7 (D.C. Cir. 2010) (per curiam); *United States ex rel. Lachkovich v. Ashcroft, et al.*, No. 08-cv-00066-WYD-BNB (D. Colo. March 13, 2008).

In certain cases, even if the relator's allegations are not facially deficient, the government may conclude after completing its investigation of the relator's allegations that the case lacks merit. In such a case, the Department should consider dismissing the matter. *See United States ex rel. Nasuti v. Savage Farms, Inc.*, 2014 WL 1327015, at *11 (D. Mass. Mar. 27, 2014), aff'd, 2015

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[2] This is just one of several mechanisms contained in the FCA to ensure that the United States retains substantial control over lawsuits brought on its behalf. *See also* 31 U.S.C. § 3730(c)(1) (providing government with "the primary responsibility for prosecuting the action" when it intervenes); 31 U.S.C. § 3730(c)(2)(B) (allowing government to settle actions over relator's objections); 31 U.S.C. § 3730(c)(2)(C) (providing government with mechanism to restrict relator's participation in the case); 31 U.S.C. § 3730(b)(1) (requiring relator to obtain government consent prior to any dismissal of the action).

WL 9598315 (1st Cir. 2015) (dismissing *qui tam* claims that government concluded were "factually incorrect and without foundation."); *United States ex rel. Dreyfuse v. Farrell, et al.*, 3:16-cv-5273 (S.D. W.Va. March 28, 2017) (granting government's motion to dismiss claims that were submitted to state agency and which did not implicate any federal programs or funds); *United States ex rel. Stierli v. Shasta Services, Inc.*, 440 F. Supp. 2d 1108, 1113 (E.D. Cal. 2006) (granting government's motion to dismiss because, among other things, there was not any false or fraudulent claim paid or approved by the federal government); *United States v. Fiske*, 968 F. Supp. 1347, 1353 (E.D. Ark. 1997) (holding that relator's allegations, even if true, do not involve the submission of any false or fraudulent claim to the federal government). These cases may be rare, in part, because to maximize its resources the government typically will investigate a *qui tam* action only to the point where it concludes that a declination is warranted. This may not equate to a conclusion that no fraud occurred. If the Department is concerned that a case lacks any merit, but elects to afford the relator an opportunity to further develop the case, the Department attorney may consider advising the relator that dismissal will be considered if the relator is unable to obtain additional support for the relator's claims by a specified date.

2. *Preventing Parasitic or Opportunistic Qui Tam Actions*

The Department should consider moving to dismiss a *qui tam* action that duplicates a pre-existing government investigation and adds no useful information to the investigation. In these cases, the government should consider whether the relator would receive an unwarranted windfall at the expense of the public fisc because Congress intended for the relator share to incentivize and award the provision of meaningful information and assistance instead of merely providing duplicative information already known to the government. *See* 132 Cong. Rec. 29, 322 (1986) (citing S. Rep. No. 99-345, at 28 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5293) (discussing factors relevant to awarding a relator share, including "the significance of the information provided" and whether the government was already aware of the information prior to relator providing it). For example, in *United States ex rel. Amico, et al. v. Citi Group, Inc., et al.*, No. 14-cv-4370 (CS) (S.D.N.Y. August 7, 2015), relators filed a *qui tam* action against Citi Group and its subsidiaries alleging fraud in connection with the marketing and sale of residential mortgage backed securities; however, the Department of Justice had been investigating the same conduct for several years prior to the filing and had engaged in extensive settlement negotiations before relators filed their complaint. The government successfully moved to dismiss the action under section 3730(c)(2)(A) because, among other factors, relators' belated complaint provided no assistance to the government in its pre-existing investigation. *See also United States ex rel. Piacentile v. Amgen Inc.*, No. 04-cv-3983-SJ-RML, 2013 WL 5460640, at *4 (E.D.N.Y. Sept. 30, 2013) (granting government's motion to dismiss *qui tam* complaint filed by serial relator who filed one of ten *qui tams* alleging similar wrongdoing by the same defendant).

3. *Preventing Interference with Agency Policies and Programs*

Dismissal should be considered where an agency has determined that a *qui tam* action threatens to interfere with an agency's policies or the administration of its programs and has recommended dismissal to avoid these effects. For example, in *United States ex rel. Ridenour v. Kaiser-Hill Co., LLC*, 397 F.3d 925 (10th Cir. 2005), relator alleged that a security contractor submitted false claims to the Department of Energy for deficient security services at Rocky Flats, a