

Dismissals and Settlements of FCA Cases: Significance of the 2018 Granston Memo and the 2017 Tax Act (Pub. L. No. 115-97)

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Overview

- DOJ Dismissal Authority Under 31 U.S.C. 3730(c)(2)(A)
 - The Granston Memo – Overview
 - The Granston Memo – Factor-by-Factor
 - The Granston Memo – Practical Considerations
- The 2017 Tax Act (Pub. L. 115-97)
 - Background
 - Restitution and Compliance Payments
 - Government Agency IRS Reporting Requirements
 - Government Investigation and Litigation Costs
 - Practical Considerations

DOJ's Statutory Dismissal Authority

- The FCA gives the Government statutory authority to dismiss *qui tam* actions over relators' objections:

"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 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).

- The statute does not set forth any specific grounds for dismissal or limit DOJ's authority to specific circumstances.

Standard of Review for DOJ Motions to Dismiss

- Courts differ on the standard of review for DOJ motions to dismiss under 31 U.S.C. 3730(c)(2)(A):

– D.C. Circuit: DOJ has "unfettered right" to dismiss *qui tam* suits. *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003)

– Ninth Circuit: DOJ must identify a "valid government purpose" that is rationally related to dismissal. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998).

- Under either approach, the standard is highly deferential to DOJ.

The Granston Memo - Overview

- On January 10, 2018, Michael D. Granston, Director of the Commercial Litigation Branch, Fraud Section, of the Department of Justice, issued a memorandum concerning DOJ's statutory dismissal authority in FCA cases.
 - “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.”
 - The Granston Memo “provide[s] a general framework for evaluating when to seek dismissal under section 3730(c)(2)(A),” and sets forth a “non-exhaustive” list of factors that “should serve as a basis for evaluating whether to seek to dismiss” a *qui tam* action.

Factor 1: Curbing Meritless *Qui Tam* Actions

- “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.” Granston Memo at 3.
- “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.” *Id.*

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