

# PUBLICATION

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## A New Year, a New, Firmer DOJ: Recently-Released Parameters for DOJ in False Claims Act Litigation

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**The U.S. Department of Justice (DOJ) kicked off the new year with two new resolutions to help clarify some enforcement and litigations policies, both of which are directly relevant to claims brought under the False Claims Act. The DOJ issued two internal memoranda in January 2018 that offer valuable insight into how the DOJ intends to prosecute, or opt to dismiss, pending and future civil enforcement actions.**

On January 25, the DOJ issued a [brief memorandum](#) limiting the use of agency guidance documents in civil enforcement cases, where the government seeks to impose penalties or to recover money lost to fraud or misconduct, including False Claims Act cases, which often arise from government contracts in health care, construction, and defense services. The memorandum builds on a position statement issued by the DOJ in November 2017, in which the Attorney General announced that the DOJ was prohibited from enforcing as law any agency guidance documents that have the effect of changing the law or creating additional standards. The earlier statement makes clear that agency guidance – which is intended to provide advice illustrating the agency's application or interpretation of the law – *does not* create binding legal obligations or requirements, and cannot be treated as law by the DOJ.

The January 25 memorandum expands the restriction on the DOJ's use of its *own* guidance to also restrict its use of *other agencies'* guidance, clearly stating that the DOJ "may not use its enforcement authority to effectively convert agency guidance documents into binding rules." Consistent with this policy, it instructs that the DOJ may no longer rely on a defendant's failure to comply with *guidance documents* as a way to prove that the defendant violated the *statutes or regulations* discussed in those guidance documents. However, it draws a practical distinction: the DOJ remains free to use a defendant's acknowledgment of guidance documents to show that the defendant had *knowledge* of the applicable law.

Although this policy will shape the DOJ's prosecution in all civil enforcement cases, it is specifically noted that it applies in False Claims Act cases in which the DOJ alleges that a defendant knowingly committed fraud where it certified, falsely or incorrectly, its compliance with material statutory or regulatory requirements. This likely references the U.S. Supreme Court's June 2016 decision in *Universal Health Services, Inc. v. United States ex rel. Escobar et al.*, which recognized an implied false certification theory as a basis for False Claims Act liability and has since been the subject of significant attention in courts across the country.

The January 25 memorandum comes on the heels of another internal communication from the DOJ Civil Division's Fraud Section on January 10, which sheds new light on the DOJ's decision-making process in asking courts to dismiss qui tam False Claims Act cases that, for any number of reasons, should be dismissed without further investigation or litigation.

Prompted by the record number of qui tam actions filed in recent years that have strained the limited government resources, the [January 10 memorandum](#) emphasizes the DOJ's "important gatekeeper role" in preserving resources, protecting government interests, and avoiding unfavorable precedent caused by weak cases. While the False Claims Act contains a dismissal provision that explicitly gives the DOJ the power to

seek to dismiss a case over the objection of a relator (who stands to gain financially if their lawsuit leads the government to recover money), the DOJ historically has been hesitant to do so. This memorandum, however, encourages DOJ attorneys to consider not only their power to seek dismissal, but also their *responsibility* to do so.

With that directive in mind, the memorandum offers practical guidance on how the DOJ anticipates analyzing cases. Although the dismissal provision does not set forth a standard of review, most courts have adopted one of two standards, both offering considerable deference to the DOJ's decision; one grants it an "unfettered right" to seek dismissal, while the other requires a "valid government purpose" for dismissal. As the dismissal provision is also silent as to any specific grounds for dismissal, the memorandum next presents a list of seven reasons that the DOJ has cited in seeking dismissals over the last three decades:

**1. Curbing Meritless Qui Tams**

Though rarely cited (often because the DOJ's investigation is not exhaustive enough to declare the case completely frivolous), a case's lack of legal or factual merit is appropriate grounds for dismissal – even if the DOJ extends the relator a grace period to come up with a stronger case.

**2. Preventing Parasitic or Opportunistic Qui Tams**

The dismissal power may weed out qui tam cases that provide no new information or duplicate an existing investigation. This will prevent the relator from receiving a windfall recovery that would otherwise come out of the government's (the public's) share.

**3. Preventing Interference with Agency Policies and Programs**

Seeking dismissal is appropriate where a qui tam delays or interferes with a program or policy that the government wishes to promote or pursue, particularly where the alleged FCA violation was based on a program the government intends to modify or reform.

**4. Controlling Litigation Brought on Behalf of the United States**

Dismissal may prevent a weak qui tam case from prejudicing the DOJ's efforts in other cases as a result of adverse precedents, contradictory rulings, or complicated settlements.

**5. Safeguarding Classified Information and National Security Interests**

The *mere potential for or risk of inadvertent* disclosure of classified information is considered sound reason to seek dismissal from the court.

**6. Preserving Government Resources**

Dismissal may be based on the fact that the government's expected recovery is less than its expected costs – including the opportunity costs of not pursuing a better case.

**7. Addressing Egregious Procedural Errors**

Where the relator has fumbled fundamental procedural requirements in a way that prejudices the government's enforcement efforts, the DOJ should consider seeking dismissal.

The memorandum offers other advice regarding how to responsibly exercise the dismissal provision, including reiterating that the seven reasons listed are not exhaustive or exclusive grounds; in fact, the DOJ urges its attorneys to assert multiple and alternative legal grounds for dismissal. Its final recommendation is to proactively warn relators with defective or problematic cases about the probability of declination or dismissal because voluntarily dismissal by the relator is the common resolution after declination.

For more information on these policies or related questions, please contact [Tom Barnard](#), [Marisa Dorough](#), or a member of Baker Donelson's [Government Enforcement and Investigations Group](#).