

Insights

DOJ OVERHAULS JUSTICE MANUAL ON SUB-REGULATORY GUIDANCE AND QUI TAM DISMISSALS

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On September 18, 2026, the Department of Justice (DOJ) announced two significant revisions to the Justice Manual reshaping how the government pursues False Claims Act (FCA) enforcement. The first restricts DOJ's ability to premise enforcement on sub-regulatory guidance rather than binding statutory or regulatory requirements. The second directs DOJ attorneys to evaluate every declined qui tam case for potential dismissal. These changes offer additional FCA defense arguments to consider in your matters going forward.

Revision one: sub-regulatory guidance cannot create liability

DOJ revised Justice Manual Sections 1-19.100, retitling it from "Principles for Issuance and Use of Guidance Documents" to "Limitations on Issuance and Use of Guidance Documents." The revision reinstates and builds upon DOJ's 2017 Sessions Memo and 2018 Brand Memo policy that sub-regulatory guidance cannot impose legal obligations beyond those established by statute or regulation. Associate Attorney General Stanley E. Woodward, Jr. framed the change directly: "The Department of Justice should enforce the law, not make law through enforcement... These updates reflect the Department's commitment to fair notice, transparent enforcement, and the rule of law."

The revised manual adopts a narrower framework for using guidance in litigation. Where the prior version allowed DOJ attorneys to rely on guidance documents entitled to deference or persuasive weight, the new version states plainly that civil and criminal enforcement actions must be based on violations of applicable legal requirements, not mere noncompliance with guidance. DOJ may no longer bring actions based solely on allegations that a party failed to comply with a guidance document. The revised manual does preserve certain permissible uses of guidance in litigation, including to help establish scienter or knowledge, to show compliance with industry standards tied to actual legal requirements, to establish a duty or custom, or to provide background context.

Practical implications: FCA defendants now have a stronger textual basis to argue that liability premised on noncompliance with agency guidance, sub-regulatory manuals, or informal interpretive letters, rather than a statute, regulation, or contract term, cannot support a false claim, false statement, or materiality theory. Companies facing investigations or qui tam suits grounded

in departures from agency guidance should revisit those theories and consider raising this shift early in motion practice.

Revision two: mandatory dismissal review for declined qui tams

DOJ also revised Justice Manual Section 4-4.111, governing its authority under 31 U.S.C. section 3730(c)(2)(A) to seek dismissal of qui tam actions. Assistant Attorney General Brett A. Shumate explained that "the Civil Division will continue to focus on cases that advance the interests of the United States," and that "evaluating qui tam cases for potential dismissal ensures our enforcement efforts remain aligned with those interests and promotes the efficient use of government resources."

The prior manual language was permissive, stating only that attorneys "should also consider" dismissal when recommending declination. The revised version is mandatory: DOJ attorneys "will in each case assess whether the government's interests are served by seeking dismissal" whenever the government declines to intervene, and may revisit that assessment later if dismissal becomes appropriate as litigation progresses.

DOJ also broadened one dismissal factor. The prior manual referenced "curbing meritless qui tams that facially lack merit (either because the relator's legal theory is inherently defective, or the relator's factual allegations are frivolous)." The revised manual now more broadly instructs DOJ to consider "curbing meritless qui tams," dropping the facial-defect qualifier. DOJ also added a new internal step: U.S. Attorneys' Offices must give the assigned Fraud Section attorney at least ten days' notice before filing a motion to dismiss in a delegated matter, reflecting increased Civil Division oversight.

Practical implications: Defendants and relators alike should expect more active use of the government's dismissal authority in declined cases, including cases that have been pending for some time. Defendants facing a declined qui tam with a weak factual or legal theory now have a clearer policy hook to request DOJ exercise its dismissal authority. Relators' counsel should factor the more assertive dismissal posture into case selection and litigation strategy, particularly in marginal cases.

Key takeaways

1. Sub-regulatory guidance alone cannot establish FCA liability; theories must be tied to binding statutory, regulatory, or contractual obligations.
2. Early on in the defense of a matter (Civil Investigative Demand, subpoena stage) defendants should require the government to identify the specific statute, regulation or contract clause which imposes the obligation at issue.

3. DOJ will now assess dismissal in every declined qui tam case, not only where a case is facially meritless, giving defendants a stronger avenue to seek dismissal of weak claims.
 4. Companies under investigation or facing pending qui tam litigation should reassess strategy in light of both revisions, particularly where liability theories rest on agency guidance or a case remains pending after declination.
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BCLP is closely monitoring implementation of these Justice Manual revisions and our team is available to discuss how they may affect pending matters or investigations.

Related capabilities

- False Claims Act

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