

CLIENT ALERT

DOJ Memo Limits the Use of Agency Guidance in FCA Enforcement

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A recent memorandum issued by Associate Attorney General Rachel Brand (Brand Memo) prevents Department of Justice (DOJ) civil litigators from relying on agency guidance documents to demonstrate violations of the False Claims Act (FCA). Specifically, the Brand Memo prohibits using noncompliance with agency guidance documents to presumptively or conclusively establish violation of the underlying law or regulation. The Brand Memo references an earlier memorandum issued by Attorney General Jeff Sessions (Sessions Memo) that prohibits DOJ agencies from creating binding standards in guidance documents without engaging in notice-and-comment rulemaking. The Brand Memo reiterates the core premise of the Sessions Memo – that guidance documents cannot create legal obligations. It also expands on the Sessions Memo by directing DOJ litigators to apply that premise when interpreting other agencies' guidance documents in civil enforcement actions. While DOJ litigators may continue using agency guidance for "proper purposes," such as to establish that a party had the requisite knowledge of a legal mandate because the party was familiar with a guidance document that explained it, this new policy represents a distinct limitation on the use of agency guidance in FCA enforcement. For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Brian Tully McLaughlin

Partner – Washington, D.C.

Phone: +1 202.624.2628

Email: bmclaughlin@crowell.com

Payal Nanavati

Associate – Washington, D.C.

Phone: +1 202.624.2580

Email: pnanavati@crowell.com