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## Justice Department Issues Memo Limiting Use of Agency Guidance in Affirmative Civil Enforcement Suits

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On January 25, Associate Attorney General Rachel Brand issued a memorandum to all components of the Department of Justice with civil litigating authority limiting the use of agency guidance documents in affirmative civil enforcement cases.<sup>1</sup> The Brand Memo is a follow-on to a memo issued by Attorney General Jeff Sessions on November 16, 2017, “prohibiting Department components from issuing guidance documents that effectively bind the public without undergoing the notice-and-comment rulemaking process.”<sup>2</sup> Both memos are part of the Trump Administration’s broader regulatory reform effort aimed at “alleviat[ing] unnecessary regulatory burdens” through “regulatory reform task forces” established throughout the Executive Branch.<sup>3</sup> While the practical significance of the Brand Memo in different contexts remains uncertain, defendants in civil enforcement actions brought by the government should consider whether it may be of use in defending against claims or in negotiating with the government concerning settlement of matters.

### Scope of the Memo

The Brand Memo applies to all future or currently pending affirmative civil enforcement (ACE) suits brought by the Justice Department, which the memo defines as “civil lawsuits on behalf of the United States to recover government money lost to fraud or other misconduct or to impose penalties for violations of Federal health, safety, civil rights or environmental laws.”<sup>4</sup> It broadly defines “guidance document” as including any “agency statement of general applicability and future effect, whether styled as ‘guidance’ or otherwise, that is designed to advise parties outside of the federal Executive Branch about legal rights and obligations.”<sup>5</sup> The Memo instructs that the Justice Department “may not use its enforcement authority to effectively convert agency guidance documents into binding rules.”<sup>6</sup> Thus, Department litigators “may not use noncompliance with guidance documents as a basis for proving violations of applicable law in ACE cases.”<sup>7</sup> The Memo, however, expressly reserves the authority of the Department to use guidance documents for “proper purposes,” including relying on “evidence that a party read” a guidance document that “simply explain[s] or paraphrase[s] legal mandates from existing statutes or regulations” to “help prove that the party had the requisite knowledge of the mandate.”<sup>8</sup>

## Implications

Because agency guidance documents should have no binding legal effect on private parties, the precise effects of the Brand Memo in different situations remain to be seen.<sup>9</sup> But defendants in civil enforcement actions brought by the government (or *qui tam* relators on the government's behalf) should consider whether it may be of use in defending against claims or negotiating with the government concerning settlement of matters.

For example, the Memo provides a strengthened basis to argue that the Department should not initiate a suit (or in the context of the False Claims Act, should decline to intervene or move to dismiss a suit) to the extent the claims turn on alleged non-compliance with guidance documents.<sup>10</sup> It could also provide a basis to challenge in litigation various legal theories advanced by the government or *qui tam* relators on its behalf. For example, in a footnote, the Brand Memo states that it “applies when the Department is enforcing the False Claims Act, alleging that a party knowingly submitted a false claim for payment by falsely certifying compliance with material statutory or regulatory requirements.”

The Memo may also call into question the Department's reliance on *Auer* deference, the doctrine that courts should defer to an agency's interpretation of its own regulations, when the agency interpretation is set forth in guidance documents.<sup>11</sup>

Finally, the Memo limits its applicability to Justice Department employees; it does not purport to (nor could it) deprive private litigants of the ability to rely on agency guidance when engaged in litigation with the Department or otherwise.

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<sup>1</sup> Memorandum for Heads of Civil Litigating Components, United States Attorneys, from Associate Attorney General Rachel Brand, Re: Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (Jan. 25, 2018) (“Brand Memo”), available at <https://www.justice.gov/file/1028756/download>.

<sup>2</sup> *Id.* at 1; see Memorandum for All Components, from Attorney General Jeff Sessions, Re: Prohibition on Improper Guidance Documents (Nov. 16, 2017), available at <https://www.justice.gov/opa/press-release/file/1012271/download>.

<sup>3</sup> Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017).

<sup>4</sup> Brand Memo 1 n.1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014).

<sup>10</sup> In at least one False Claims Act suit, the Assistant U.S. Attorneys handling the matter have refused the defendant companies' demand, based on the Brand Memo, that they strike references to agency guidance from the complaint. See Eric Topor, *Latest DOJ Memo Seen as Defense Tool in Health Fraud Cases*, Bloomberg BNA (Jan. 31, 2018) (discussing attempted use of the Memo to persuade prosecutors in a False Claims Act suit to "revise the civil complaint to remove references to informal guidance").

<sup>11</sup> See *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

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