

New DOJ Guidance Aims to Incentivize Corporate Cooperation in False Claim Act Matters

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On May 7, 2019, the Department of Justice issued important guidance on the type of cooperation that is eligible for credit in False Claim Act (FCA) investigations. The guidance, formally codified in the Justice Manual Section 4-4.112, seeks to incentivize entities and individuals to voluntarily self-disclose misconduct that could serve as the basis for FCA liability and/or administrative remedies, to cooperate with FCA investigations, and to take remedial actions. With the issuance of this policy and a clearer understanding of the DOJ's position on cooperation credit, entities will be better positioned to obtain more favorable outcomes in FCA matters.

Forms of Cooperation

The policy guidelines identify the proactive, timely, and voluntary self-disclosures of misconduct, unknown false claims, and fraud as the most valuable forms of cooperation. Disclosure significantly furthers the government's ability to gather and preserve evidence as well as make itself whole. The DOJ identified ten additional forms of cooperation that may qualify an entity for credit. Among these measures are identifying and making available for meetings, interviews, and examinations those individuals who possess relevant information; providing facts relevant to potential misconduct by third-party entities and third-party individuals; and assisting in the determination or recovery of the losses caused by the organization's misconduct, among other factors.

The new policy emphasizes that the cooperation examples set forth in the Justice Manual are merely illustrative of the types of activities by entities under investigation that will be taken into account. It is not a fully comprehensive list and entities are not required to satisfy all of the measures to qualify for cooperation credit. The DOJ maintains discretion to consider all appropriate actions that it deems necessary and will award credit as it sees fit.

Test for Assessing Value of Cooperation

In determining whether an entity or individual's cooperation merits credit, the government will

consider four factors: (1) the timeliness and voluntariness of the assistance; (2) the truthfulness, completeness, and reliability of any provided information or testimony; (3) the nature and extent of the assistance; and (4) the significance and usefulness of the cooperation to the government.

Additionally, the government will take into account whether the entity has taken remedial action, such as identifying and addressing the root cause of the underlying misconduct; implementing an effective compliance program designed to prevent reoccurrence of the misconduct; appropriately disciplining or replacing the individuals who are identified by the entity as responsible for the misconduct; as well as other steps demonstrating an entity's recognition of the gravity of its misconduct, acceptance of responsibility, and willingness to implement measures to reduce future risk of misconduct.

Importantly, although the new DOJ policy provides broad guidance, the ability to obtain cooperation credit is not without limits. The guidelines are explicit that cooperation "does not include disclosure of information required by law, or merely responding to a subpoena, investigative demand, or other compulsory process for information."

Type of Credit Received for Cooperation

Of course, entities evaluating how best to cooperate with an FCA investigation will want to know the type of credit they would receive. In a DOJ press release issued the same day as the Justice Manual updates, the government announced cooperation credit will most often "take the form of a reduction in the damages multiplier and civil penalties." The government may also exercise its discretion by notifying the relevant agency about an entity's voluntary disclosure, cooperation, and remediation, so that the agency can consider those actions when it applies administrative remedies, and by publicly acknowledging the company's cooperation.

With the expansion of the DOJ's rules on cooperation in FCA investigations, entities may wish to reevaluate their compliance programs. The key to obtaining maximum cooperation credit is for the entity to discover and subsequently disclose any misconduct that may implicate an FCA claim before the DOJ or any third party does, which will likely produce a more favorable outcome with fewer penalties and damages. However, our experience has been that entities that choose to cooperate at any level receive generally more lenient treatment by the DOJ.

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