

CLIENT ALERT

Department of Justice Releases Long-Awaited Guidance on FCA Cooperation Credit

May 10, 2019

On May 6, 2019, the Department of Justice (DOJ) announced the release of formal guidelines for cooperation credit in False Claims Act (FCA) cases. While the guidelines do not quantify the credit that companies can receive, they do identify steps that companies can take to earn credit.

The guidelines identify remedial measures and forms of cooperation that have long been recognized as best practices by FCA practitioners, and bear some resemblance to DOJ's guidance in other areas of white collar enforcement. Ultimately, the guidelines will be applied subjectively according to the discretion of DOJ attorneys handling a particular case. Nonetheless, by setting forth concrete examples of what DOJ values, the guidelines should be a helpful tool for companies facing FCA investigations.

Background

DOJ previewed much of the policy on cooperation credit over the last year in speeches discussing the various FCA reform initiatives underway (discussed [here](#) and [here](#)). On May 6, 2019, DOJ formalized the guidance in [Section 4-4.112](#) of the Justice Manual.

Emphasis on Voluntary Disclosure

In a press release announcing the issuance of the new guidelines, Assistant Attorney General Jody Hunt noted that voluntary self-disclosure is the "most valuable form of cooperation." Companies that make proactive, timely, and voluntary self-disclosures about misconduct will receive cooperation credit from DOJ during the resolution of FCA cases. A company responding to a government inquiry can qualify for cooperation credit if it discovers and discloses additional misconduct beyond the scope of the government's known concerns, further incentivizing companies to come forward with information uncovered during the course of an internal investigation.

Notably, the guidelines explicitly state that cooperation does not include the disclosure of information required by law, which calls into question the amount of credit a company would receive for disclosing to DOJ information that the company is required by statute or regulation to disclose to another agency.

Steps to Receive Cooperation Credit

Beyond self-disclosure, the new guidelines set forth actions companies can take to earn cooperation credit in an ongoing FCA investigation. These include:

- i. Identifying individuals substantially involved in or responsible for the misconduct.

- ii. Disclosing relevant facts and identifying opportunities for the government to obtain evidence relevant to the government's investigation that is not in the possession of the entity or individual or not otherwise known to the government.
- iii. Preserving, collecting, and disclosing relevant documents and information relating to their provenance beyond existing business practices or legal requirements.
- iv. Identifying individuals who are aware of relevant information or conduct, including an entity's operations, policies, and procedures.
- v. Making available for meetings, interviews, examinations, or depositions an entity's officers and employees who possess relevant information.
- vi. Disclosing non-privileged information relevant to the government's investigation gathered during the entity's independent investigation, including the identification of specific sources of information (as opposed to a general narrative), and providing timely updates on the organization's internal investigation into the government's concerns, including rolling disclosures of relevant information.
- vii. Providing facts relevant to potential misconduct by third-party entities and third-party individuals.
- viii. Providing information in native format, and facilitating review and evaluation of that information if it requires special or proprietary technologies so that the information can be evaluated.
- ix. Admitting liability or accepting responsibility for wrongdoing or relevant conduct.
- x. Assisting in the determination or recovery of losses caused by the organization's misconduct.

The new guidelines also underscore the importance of remedial measures taken in response to FCA violations, including:

- i. Demonstrating a thorough analysis of the cause of the underlying conduct and, where appropriate, remediation to address the root cause.
- ii. Implementing or improving an effective compliance program designed to ensure the misconduct or similar problem does not occur again.
- iii. Appropriately disciplining or replacing those identified by the entity as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area where the misconduct occurred.
- iv. Any additional steps demonstrating recognition of the seriousness of the entity's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

Credit for Disclosure, Cooperation, and Remediation

According to the guidelines, DOJ attorneys are to determine the amount of cooperation credit based on four factors:

1. The timeliness and voluntariness of the assistance.
2. The truthfulness, completeness, and reliability of any information or testimony provided.
3. The nature and extent of the assistance.
4. The significance and usefulness of the cooperation to the government.

Consistent with the policy articulated in DOJ's November 2018 announcement on corporate-cooperation credit in civil and criminal cases (previously discussed [here](#)), the new guidelines make cooperation credit available on a sliding scale, with maximum credit available to companies that identify all individuals substantially responsible for wrongdoing, provide full cooperation with the government's investigation, and take remedial steps designed to prevent and detect similar wrongdoing in the future. A company that does not qualify for maximum credit may still receive partial credit if it meaningfully assists the government's investigation by engaging in conduct qualifying for cooperation credit. See § 4-3.100(3). Conversely, DOJ will not award any credit to a corporation that conceals misconduct by members of senior management or the board of directors.

When a company's conduct warrants cooperation credit, DOJ attorneys have discretion to reduce the damages multiplier and the penalties to be assessed (which currently range from \$11,181 to \$22,363 per claim). A company's maximum cooperation credit may not exceed an amount that would result in the government receiving less than full compensation for its losses, including the government's damages, lost interest, costs of investigation, and the relator's share of the recovery. Accordingly, even if a company receives maximum credit, DOJ will not settle for less than single damages. Given the FCA's lengthy statute of limitations and the long duration of many investigations, the lost interest and investigation costs can be significant. The guidelines indicate that a company that receives maximum cooperation credit may avoid treble or double damages and fines, but would still be required to pay actual damages and costs.

The guidelines also indicate that cooperation credit can have an impact beyond a reduction in penalties and damages. For example, DOJ has the ability to notify a relevant agency (*e.g.*, a suspension and debarment official or Health and Human Services Office of Inspector General) so that the agency may consider the defendant's cooperation when evaluating its administrative options. DOJ may also publicly acknowledge the entity's cooperation or assist in resolving pending *qui tam* litigation with the relator.

Focus on Compliance Programs

A key takeaway from the new guidelines is the importance of compliance programs, not just as a prophylactic measure to prevent the submission of false claims, but also as potential evidence that a false claim was not knowingly submitted to the government.

Since 1986, the statute has defined "knowingly" as acting with actual knowledge, deliberate ignorance, or reckless disregard of the truth or falsity of the information. Reckless disregard has long been considered the lowest bar for proving knowledge under the FCA, and courts have equated the standard to a form of gross negligence. Notably, footnote 1 of the guidelines states that DOJ may take into account the nature and effectiveness of a compliance program in evaluating whether any violation of law was committed knowingly. In other words, having the appropriate internal controls may help establish that false claims were presented to the government by mistake or in error and not as the result of reckless disregard.

In light of the newly released guidelines, having a robust compliance program may be even more valuable—both in an effort to prevent the submission of false claims in the first instance and also as evidence to defeat allegations that any potential false claim was knowingly submitted.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.