

DOJ Issues Consolidated Guidance for False Claims Act Cooperation Credit

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The United States Department of Justice this month released a revised and consolidated set of guidelines for determining cooperation credit for organizations facing exposure under the False Claims Act. The consolidated guidelines identify the main factors that the DOJ will consider when assessing the maximum “credit” parties will get for (1) voluntarily self-disclosing misconduct; (2) proactively cooperating with FCA investigations; and (3) taking effective remedial measures. The guidelines define “credit” as, typically, “reducing the penalties or damages multiple sought by the Department.” The guidance aims to consolidate and add uniformity to how these issues will be addressed—something that historically could vary considerably. And while much of the guidance is common knowledge among experienced FCA practitioners, it is nonetheless DOJ’s most concise statement of how cooperation credit plays out in the specific context of the False Claims Act.

1. Voluntary Self Disclosure

DOJ continues to focus on the importance of voluntary disclosures. Companies and individuals that discover false claims and make a “proactive, timely, and voluntary self-disclosure” to the DOJ will receive credit. Such parties will also qualify for credit for disclosing “additional misconduct going beyond the scope of the known concerns” uncovered during an internal investigation. Partial credit is available to defendants who “meaningfully assist” the DOJ’s investigations after failing to self-disclose the underlying conduct. And the DOJ will not give credit to any entity or individual that “conceals involvement in the misconduct by members of senior management or the board of directors, or to an entity or individual that otherwise demonstrates a lack of good faith to the government during the course of its investigation.”

Voluntary disclosure, the DOJ guidelines caution, does not include disclosure of information required by law or in responding to a subpoena, investigative demand, or other compulsory process. Nor does it include the disclosure of information under an imminent threat of discovery or investigation.

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2. Proactive Cooperation

Individuals and entities under investigation can also receive credit for taking steps to cooperate with the DOJ. Steps that would qualify for credit include:

- identifying individuals substantially involved in or responsible for the misconduct;
- disclosing relevant facts and identifying opportunities for the DOJ to obtain evidence not in the possession of the entity or individual or not otherwise known to the government;
- preserving, collecting, and disclosing relevant documents and information beyond existing business practices or legal requirements;
- identifying individuals who are aware of relevant information or conduct, including an entity's operations, policies, and procedures;
- making company employees with relevant information available for meetings, interviews, examinations, or depositions;
- disclosing relevant facts gathered during the entity's independent investigation (not to include information subject to attorney-client privilege or work product protection), including attribution of facts to specific sources rather than a general narrative of facts, and providing timely updates on the organization's internal investigation into the government's concerns, including rolling disclosures of relevant information;
- providing facts relevant to potential misconduct by third-parties;
- providing technological expertise and assistance to the government in their review of relevant information;
- admitting liability or accepting responsibility for the wrongdoing or relevant conduct; and
- assisting in the determination or recovery of the losses caused by the organization's misconduct.

DOJ will determine the value of any self-disclosure and cooperation by considering the following factors:

- the timeliness and voluntariness of the assistance;
- the trustfulness, completeness and reliability of information provided;
- the nature and extent of the assistance; and
- the significance and usefulness of the cooperation.

3. Effective Remedial Measures

Remedial actions taken by an entity in response to an FCA violation that would receive credit include:

- analyzing the root cause of the underlying misconduct and how to address it;
- implementing or improving an effective compliance program designed to ensure the misconduct does not reoccur;
- disciplining or replacing those responsible for the misconduct (including supervisors) either through direct participation or failure in oversight; and
- any additional steps that demonstrate that the entity recognizes how serious the misconduct is, accepts responsibility for it, and will implement preventative measures to make sure it doesn't reoccur.

Although the guidelines do not significantly alter existing DOJ policy, they provide a

clearer and concise set of guidelines to the AUSAs and Civil Frauds trial attorneys who will evaluate an organization's cooperation and self-disclosure. For organizations seeking to understand their own obligations and potential options, understanding the Government's playbook has never been more important.