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Government Contracts**



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## **DOJ Issues Cooperation Guidance for False Claims Act Matters**

On May 7, 2019, the United States Department of Justice (DOJ) issued formal guidance regarding its award of credit to companies and individuals who cooperate in DOJ False Claims Act (FCA) investigations. In conjunction with the announcement, DOJ included a new section in its Justice Manual to reflect the guidance. *See* Justice Manual § 4-4.112. This guidance explains how companies and individuals can receive credit – in the civil context – for disclosing, cooperating, and remediating matters involving FCA allegations. Assistant Attorney General Jody Hunt explained, “The Department of Justice has taken important steps to incentivize companies to voluntarily disclose misconduct and cooperate with our investigations; enforcement of the False Claims Act is no exception.” *See* Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual, U.S. Dep’t of Justice (May 7, 2019), available [here](#).

The guidance identifies three distinct ways entities or individuals may receive partial or full cooperation credit. The first – **voluntary disclosure** – is the primary focus and allows an entity or individual to receive credit if it discloses “previously unknown false claims and fraud,” including additional misconduct discovered during an internal investigation.

The second involves **cooperating** with the government’s investigation. The new guidance provides a non-exhaustive list of 10 typical categories of cooperation, such as identifying individuals involved in or responsible for the misconduct, disclosing relevant facts, identifying other opportunities for the government to obtain evidence, and making a company’s officers and employees available for interviews,

meetings, and/or depositions. The full list is available [here](#). The new guidance emphasizes that the listed measures are not mandatory, and an entity does not have to satisfy all of them to qualify for cooperation credit. Ultimately, when considering whether to provide credit, DOJ will focus on: “(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; and (4) the significance and usefulness of the cooperation to the government.” Justice Manual § 4-4.112.

The final way to receive credit is to **remediate** the FCA violation. Some remedial actions identified in the guidance include:

1. Demonstrating a thorough analysis and remediation of the root cause of the underlying conduct;
2. Implementing or improving an effective compliance program designed to ensure the misconduct or similar problem does not occur again;
3. Appropriately disciplining or replacing those responsible for the misconduct, as well as those with supervisory authority over the area where the misconduct occurred; and
4. Taking additional steps that recognize and demonstrate acceptance of the seriousness of the entity’s misconduct, including measures to identify future risks.

To receive maximum credit, DOJ urges entities to “undertake a timely self-disclosure that includes identifying all individuals substantially involved in or responsible for the misconduct, provide full cooperation with the government’s investigation, and take remedial steps designed to prevent and detect similar wrongdoing in the future.” DOJ will consider partial credit for undertaking any of these activities to assist the government.

Most often, DOJ will award credit by reducing penalties or damages sought. The new guidance does not provide any further clarity on these reductions, i.e., the guidance does not say how much credit will be given for the cooperation activities listed. It only explains that a defendant cannot receive an amount of credit that would result in the government failing to receive full compensation for the losses caused by the defendant’s misconduct. The new guidance does note, however, that DOJ will consider other credit, such as:

1. Notifying another relevant agency about an entity’s actions so that the agency in its discretion may consider such factors in evaluating its administrative options, such as suspension, debarment, exclusion, or civil monetary penalty decisions;
2. Publicly acknowledging the entity’s disclosure, other cooperation, or remediation; and
3. Assisting the entity in resolving *qui tam* litigation with a relator or relators.

This new section in the Justice Manual provides DOJ’s Civil Division litigators with metrics to assess cooperation in an FCA matter. It also provides tangible factors to use when engaging the government about reduced penalties and damages. While this guidance is helpful in identifying and acknowledging factors important to DOJ during civil FCA investigations, it remains to be seen how the new guidance will alter investigations and resolutions in the FCA space.

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