

DEPARTMENT OF JUSTICE (“DOJ”) ISSUES GUIDANCE ON FALSE CLAIMS ACT COOPERATION CREDIT

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The DOJ on May 7, 2019 issued new policy via the DOJ Manual pertaining to how it will award credit to defendants who cooperate during a False Claims Act (“FCA”) investigation. The new guidance stresses that credit that will be provided when entities or individuals voluntarily self-disclose misconduct, take other steps to cooperate with FCA investigations and settlements, or take adequate and effective remedial measures.

Disclosure, Cooperation, and Remedial Measures

Voluntary Disclosure. . Entities or individuals that make proactive, timely, and voluntary self-disclosure to the DOJ about misconduct will receive credit during the resolution of an FCA case. During the course of an internal investigation into the government’s concerns, moreover, entities may discover additional misconduct going beyond the scope of the known concerns, and the voluntary self-disclosure of such additional misconduct will qualify the entity for credit.

Other Forms of Cooperation. In addition to voluntarily self-disclosing misconduct, an individual or entity can earn credit by taking steps to cooperate with an ongoing government investigation. The following types of activities were identified as these types of cooperation

- 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 facts relevant to the government’s investigation 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;
- 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 the wrongdoing or relevant conduct; and

- x. Assisting in the determination or recovery of the losses caused by the organization's misconduct.

In considering the value of any voluntary disclosure or additional cooperation, DOJ counsel will consider the following 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; and (4) the significance and usefulness of the cooperation to the government.

Remedial Measures. DOJ will also consider whether an entity has taken appropriate remedial actions in response to the FCA violation. Such remedial actions may include:

- 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;¹
- 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; and
- 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

DOJ stresses that entities or individuals desiring maximum credit should make a timely self disclosure. However, even if an entity or individual does not qualify for maximum credit, they may receive partial credit if they have meaningfully assisted the government's investigation by engaging in conduct qualifying for cooperation credit. Where the conduct of the entity or individual warrants credit, the Department has discretion in FCA cases to reward such credit. Most often, this discretion will be exercised by reducing the penalties or damages multiple sought by the Department. The maximum credit that a defendant may earn may not exceed an amount that would result in the government receiving less than full compensation for the losses caused by the defendant's misconduct (including the government's damages, lost interest, costs of investigation, and relator share).

Cooperation credit may be awarded where an entity or individual meaningfully assists the government's investigation by, for example, disclosing additional relevant documents or information, or otherwise proactively aiding the government in understanding the context or significance of the documents or information produced. Cooperation also does not include the disclosure of information that is under an imminent threat of discovery or investigation.

The Department will not award any credit to an 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. Entities and individuals are entitled to assert their legal rights and, unless

required by law, do not have to cooperate with a government investigation. Nothing about the guidelines herein changes those rights. Entities and individuals remain free to reject these options and forgo any potential credit consistent with the law. Finally, eligibility for credit for voluntary disclosure or other forms of cooperation is not predicated on waiver of the attorney-client privilege or work product protection, and these guidelines do not require a waiver.

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