

DOJ Announces New FCA Policy

May 9, 2019

Key Points:

- The Department of Justice (DOJ) has adopted a policy to incentivize companies and individuals to voluntarily disclose civil False Claims Act (FCA) violations, cooperate with government investigators and undertake effective remediation by crediting companies that take those steps when resolving FCA investigations and enforcement actions.
- The maximum credit would be no penalties and no damages multiplier. The company or individual would still have to compensate the government for its actual damages, lost interest, investigation costs and the relator's share. Companies and individuals who do not qualify for the maximum credit could still receive partial credit in the form of reduced penalties and damages multiplier.
- The new DOJ policy also seeks to reward companies that had effective compliance programs in place at the time the alleged FCA violations occurred.
- The credits available under the new policy are not guaranteed, and resolution of any FCA action remains within the discretion of the DOJ attorneys involved.

On May 6, 2019, Assistant Attorney General (Civil) Joseph Hunt announced a new DOJ policy for incentivizing companies and individuals to voluntarily disclose false claims to the government, to cooperate in other ways with the government's investigation of such misconduct and to take appropriate remedial actions in response to FCA violations. The DOJ's incentives take the form of credits, primarily reduction of the penalties and/or damages sought by the DOJ, and other incentives. The new policy offers a maximum credit of no penalties and no damages multiplier (i.e., only the government's actual damages, including lost interest and costs of investigation, and relator's share) for corporations or individuals who fully meet the policy's disclosure, cooperation and remediation requirements. In addition, the DOJ will take a company's pre-existing compliance program into account in determining the company's FCA liability, including in deciding whether any violation was committed "knowingly." Guidance for implementing the new policy, including the requirements for earning partial or full credit for disclosure, cooperation and remediation, was added to the DOJ's Justice Manual on May 7, 2019.

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Voluntary Disclosure Credit

The first factor in the DOJ's new guidance is voluntary disclosure. As the guidance itself notes: "Voluntary self-disclosure of such misconduct benefits the government by revealing, and enabling the government to make itself whole from, previously unknown false claims and fraud, and may also enable the government to preserve and gather evidence that would otherwise be lost." To that end, the new guidance unequivocally provides: "Entities or individuals that make proactive, timely, and voluntary self-disclosure to the Department about misconduct will receive credit during the resolution of a FCA case" (emphasis added). Moreover, if during its internal investigation, an entity discovers "additional misconduct going beyond the scope of the known concerns," the disclosure of such additional misconduct will also qualify the entity for credit.

Receiving credit for voluntary disclosure is not without its limits, however. To determine the value of a voluntary disclosure, the DOJ will consider the timeliness of the disclosure, its truthfulness, completeness and reliability, and the significance and utility of the disclosure to the government. Moreover, the guidance states that "cooperation does not include disclosure of information required by law," and cites the Federal Acquisition Regulation's Mandatory Disclosure Rule as an example of a legally-imposed obligation "requir[ing] contractors to self-disclose credible evidence of certain violations of law and significant overpayments in connection with the award or performance of a federal contract or subcontract." The guidance does not refer to the HHS OIG's Self Disclosure Protocol or the Stark Law disclosure procedures, except to state that "[n]othing in these guidelines changes any preexisting obligation an entity or individual has under the law to report to or cooperate with the federal government." This creates a potential risk that the DOJ will not deem a company's self-disclosure to be "voluntary" if it were arguably required by the FAR Mandatory Disclosure Rule, the HHS OIG Self-Disclosure Protocol, the Stark Law, or some other statutory or regulatory requirement. This risk may be mitigated somewhat by the guidance's statement that "cooperation credit may be awarded where an entity or individual meaningfully assist 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," but companies must exercise judgment in making disclosures in light of this and other associated risks. See Salcido, *False Claims Act & The Health Care Industry: Counseling & Litigation* (AHLA 3d Ed.), pp. 963-976.

Other Forms of Cooperation Credit

While the exact scope of meaningful cooperation will vary from case to case, the second factor in the DOJ's new guidance identifies other forms of cooperation for which the DOJ will consider offering cooperation credit. Many of these steps reflect already common practices in both civil and criminal cases before the DOJ, and none is specifically required to receive credit. The nonexhaustive list of the potential steps identified in the DOJ guidance include:

1. Identifying individuals substantially involved in or responsible for the misconduct.

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2. 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.
3. Preserving, collecting and disclosing relevant documents and information relating to their provenance beyond existing business practices or legal requirements.
4. Identifying individuals who are aware of relevant information or conduct, including an entity's operations, policies and procedures.
5. Making available for meetings, interviews, examinations, or depositions an entity's officers and employees who possess relevant information.
6. 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.
7. (7) Providing facts relevant to potential misconduct by third-party entities and third-party individuals.
8. 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.
9. (9) Admitting liability or accepting responsibility for the wrongdoing or relevant conduct.
10. Assisting in the determination or recovery of the losses caused by the organization's misconduct.

As with voluntary disclosures, when weighing how much credit to provide the company for any of the above steps, the DOJ will consider the nature and extent of the cooperation, including timeliness and voluntariness, its truthfulness, completeness and reliability, and the significance and usefulness of the cooperation.

Remediation Credit

Third, the DOJ's new guidance describes the remediation efforts the DOJ expects companies to take following an alleged violation of the FCA. In determining credit for remediation efforts, the DOJ will consider "whether an entity has taken appropriate remedial actions in response to the FCA violation." Consistent with its new guidance regarding the other forms of cooperation credit available to entities and individuals, the policy does not include a comprehensive set of circumstances or goals for when remediation credit is warranted. Nonetheless, the DOJ provides several examples of remedial actions that may qualify, including:

1. "[T]horoughly analyzing the cause of the misconduct" and, "where appropriate, remediation to address the root cause."
2. "[I]mplementing or improving an effective compliance program designed to ensure the misconduct or similar problem does not occur again."
3. [A]ppropriately disciplining or replacing" those responsible for the misconduct and "those with supervisory authority over the area where the misconduct occurred."

4. “[A]ny 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.”

The last example of remediation, in particular, clearly recognizes the myriad ways entities and individuals may remediate misconduct that led to an FCA violation. The new guidance provides considerable flexibility to DOJ in crediting entities and individuals for remediation actions that are suited to their own unique circumstances.

Calculation of Credit

The guidance states that, in order to earn maximum credit, an entity or individual generally should (1) undertake a timely self-disclosure that includes identifying all individuals substantially involved in or responsible for the misconduct, (2) provide full cooperation with the government’s investigation and (3) take remedial steps designed to prevent and detect similar wrongdoing in the future. The guidance identifies the maximum credit as elimination of penalties and limitation of damages to “an amount that would result in the government receiving . . . full compensation for the losses caused by the defendant’s misconduct (including the government’s damages, lost interest, costs of investigation, and relator share).” Even if a company or individual does not qualify for the maximum credit, it may receive partial credit in the form of reduced penalties or damages multiplier if it has “meaningfully assisted the government’s investigation by engaging in conduct qualifying for cooperation credit” as defined in the DOJ’s Foreign Corrupt Practices Act Enforcement Policy, JM § 4-3.100(3). Finally, the DOJ may consider “additional avenues” of credit such as:

- Notifying a relevant agency about the entity’s disclosure, other cooperation or remediation so that the agency could consider such factors in evaluating administrative actions such as suspension, debarment, exclusion or civil monetary penalties.
- Publicly acknowledging the entity’s disclosure, other cooperation or remediation.
- Assisting the entity in resolving qui tam litigation with the relator or relators.

Pre-Existing Compliance Programs

In addition to crediting a company’s decision to implement or improve a compliance program after an alleged violation, the new guidance creates an incentive for a company to implement a compliance program before the alleged violation occurs. The guidance states that the DOJ may take the pre-existing compliance program into account in evaluating a defendant’s FCA liability. For example, the DOJ may consider “the nature and effectiveness” of such a program in evaluating whether any violation was committed “knowingly,” i.e., whether the scienter requirement for FCA liability has been met. The guidance states that the criteria DOJ will consider in evaluating the effectiveness of a pre-existing compliance program “may include those set forth in [JM] § 9-28.800,” which were recently updated by Assistant Attorney General Brian Benczkowski on April 30, 2019.

Other Considerations

The guidance makes clear that the credits offered are not guaranteed, and that the DOJ attorneys retain discretion to consider all appropriate factors in determining

whether and how to resolve an FCA matter. Such factors include the nature and seriousness of the violation, the defendant's history of recidivism, the harm or risk of harm from the violation, the litigation risks if the matter proceeds to trial and the ability of the alleged wrongdoer to satisfy an eventual judgment. Some of these considerations may reduce the credit that would otherwise be available to an entity or individual under the guidance, or in egregious circumstances, may render the entity or individual ineligible for any credit. The guidance also states that the DOJ "will not award any credit to an entity or individual that conceals misconduct by members of senior management or the board of directors, or to an entity that otherwise demonstrates a lack of good faith to the government during the course of its investigation. See [JM] § 4-3.100(3)."

Conclusion

Since Congress' 1986 FCA amendments, which incorporated voluntary disclosure provisions into the FCA, a number of government agencies have adopted various voluntary disclosure programs. Ultimately, these programs have not been widely utilized—except when disclosure is otherwise legally compelled—because of the perception that the DOJ did not furnish sufficient credit coupled with the known risks to making any disclosure, for example, that a sealed qui tam covering the same subject matter may exist (which may negate any disclosure), that the government will use the disclosure against the entity in a hostile fashion, or that the disclosure will be discoverable and used against the company in other litigation.

If the purpose of the DOJ's program is to incentivize companies to disclose conduct that they are not otherwise legally compelled to disclose, then the DOJ must fully and liberally apply the credits that its new FCA policy describes. If not, its new initiative, like the initiatives of other government agencies, will not succeed in encouraging additional disclosures.