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DOJ Issues Guidance on Earning Credit to Reduce False Claims Act Liability

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On May 7, 2019, the Department of Justice released [new mandatory guidance](#) on credit that companies and individuals can receive in False Claims Act (FCA) cases for self-disclosure, cooperation, and remediation. The new guidance specifies several factors government attorneys should consider when deciding whether a company or individual can become eligible for monetary and non-monetary credit. But the decision to ultimately award credit remains in the DOJ's "discretion." The new guidance is similar to the [DOJ Criminal Division's Corporate Enforcement Policy](#) under which companies can receive reduced fines and sanctions for self-disclosure, cooperation, and remediation of Foreign Corrupt Practices Act violations.

Companies and individuals can earn credit in three ways:

- **Disclosure.** Credit can be awarded for "proactive, timely, and voluntary self-disclosure" of potential misconduct. Notably, cooperation credit can be earned even after the government starts investigating if the company or individual self-discloses "additional misconduct beyond the scope" of what the government already knows. This incentivizes companies to conduct thorough internal investigations. No waiver of attorney-client privilege or work product protection is required. No credit is earned for merely responding to a civil investigative demand or subpoena.
- **Cooperation.** The new guidance provides a non-exhaustive list of ways to earn cooperation credit, for example by: (1) identifying individuals or third parties responsible for the conduct or who have relevant information; (2) preserving documents and information "beyond existing business practices or legal requirements"; (3) making officers and employees available for meetings, interviews, or depositions; (4) disclosing non-privileged information learned during internal investigations; (5) helping the government access information that "requires special or proprietary technologies" to be accessed; (6) admitting liability or accepting wrongdoing; or (7) helping the government recover its losses.

- **Remediation.** Companies and individuals can also qualify for credit by taking “appropriate remedial actions in response to the FCA violation.” This could include: (1) undertaking a “thorough” root cause analysis and taking remedial steps; (2) instituting an effective compliance program; (3) disciplining employees and supervisors; or (4) taking other steps to “reduce the risk of repetition of such misconduct.” Companies taking remedial action should consider the [DOJ Criminal Division’s recently updated guidance](#) on evaluating the effectiveness of corporate compliance programs.

Under the new guidance, the DOJ retains discretion to award credit (or not) when these factors are present. The value of the credit will “vary depending on the facts and circumstances of each case.” The guidance states that credit will most often be provided by reducing FCA penalties or the damages multiplier. But even when credit is awarded, the government must receive “full compensation,” which includes damages, lost interest, investigation costs, and the relator’s share. Companies and individuals can also earn non-monetary credit, including (1) notification to the relevant agency (e.g., Health and Human Services) so that it can consider the disclosure, cooperation, or remediation when determining whether to impose administrative sanctions; (2) publicly acknowledging the disclosure, cooperation, or remediation; or (3) working with the relator to resolve any qui tam litigation.

In sum, the new DOJ guidance provides a helpful roadmap for what companies and individuals can do to mitigate potential FCA liability even after the government starts investigating. Although there is little downside in taking appropriate remedial measures (which now earns companies credit), companies and individuals should carefully consider the risks and benefits of self-disclosure and “cooperation.” Even when a company earns full credit, it still faces substantial potential liability beyond single damages (e.g., interest, investigation costs, and relator’s share and attorneys’ fees). And given the government’s discretion retained in deciding what credit to award, the decision to self-disclose or cooperate is not “one size fits all” and will depend on the specific facts and circumstances involved in the investigation.

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