

DOJ's Civil Division Issues Valuable Guidance on False Claims Act Self-Disclosure, Cooperation, and Remediation Credit

MAY 9, 2019

On May 7, 2019, the Civil Division of the Department of Justice ("DOJ") issued formal guidance to DOJ attorneys regarding factors to be considered in determining the nature and extent of cooperation credit to be awarded in connection with resolving False Claims Act ("FCA") matters. The issuance of this guidance, entitled "Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters" (the "FCA Guidance"), marks the first time that the DOJ has issued a formal policy on evaluating and awarding credit for self-disclosure and cooperation with FCA investigations and related remediation. According to the newly issued FCA Guidance, cooperation credit in FCA cases can be earned when "entities or individuals voluntarily self-disclose misconduct that could serve as the basis for [FCA] liability and/or administrative remedies, take other steps to cooperate with FCA investigations and settlements, or take adequate and effective remedial measures." The FCA Guidance explains that, when appropriate, the discretion to award cooperation credit typically "will be exercised by reducing the penalties or damages multiple sought by" the DOJ.

The FCA Guidance identifies three main ways in which cooperation credit in FCA matters may be earned: by voluntarily disclosing misconduct unknown to the government, by cooperating in an ongoing government investigation, or by implementing appropriate remedial measures in response to the FCA violation.

Voluntary self-Disclosure

Pursuant to the FCA Guidance, a company is eligible for cooperation credit if it makes a voluntary self-disclosure of information previously unknown to the government that could lead to FCA liability or administrative remedies. Notably, cooperation credit can be awarded when a company discovers and voluntarily self-discloses additional conduct, beyond the scope of the government's original concerns, discovered during the company's internal investigation.

Cooperating in Ongoing Government Investigation

The FCA Guidance explains that companies or individuals can receive cooperation credit, even where a voluntary self-disclosure was not made, by providing meaningful assistance to the DOJ in its ongoing investigation. The DOJ

acknowledged that it would be infeasible to provide a complete and exhaustive list of the various types of assistance that would be eligible for credit, because valuable cooperation could take many forms given the diverse factual and legal circumstances involved in FCA matters. Nevertheless, the FCA Guidance provides several examples of the types of assistance that may be considered for credit, and notes that a company or individual does not need to provide all of the listed assistance in order to obtain some cooperation credit. The following measures are identified in the FCA Guidance:

- Identifying the individuals involved in the misconduct;
- Identifying the individuals with relevant information;
- Disclosing facts and identifying opportunities for the DOJ to obtain evidence related to the investigation not in the control of the company;
- Going beyond business practices or legal requirements in preserving, collecting, or disclosing relevant documents;
- Making officers and employees available for interviews or depositions;
- Disclosing facts gathered during the internal investigation and attributing facts to specific sources and providing updates regarding the internal investigation, including rolling disclosures of information;
- Providing information relevant to potential third-party misconduct;
- Providing information in native format and facilitating the review of data that requires special technologies;
- Accepting responsibility for wrongdoing; and
- Assisting in determining the losses caused by the misconduct.

The FCA Guidance further provides that an assessment should be made of the value of the cooperation provided. The value should be determined based upon 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.” In no case will eligibility for cooperation credit be predicated on waiver of the attorney-client privilege or work product protection.

Undertaking Remedial Measures

The remedial actions that a company has taken in response to a violation of the FCA will also be considered in determining cooperation credit. The DOJ noted that such measures might include identifying the root cause of the misconduct, disciplining or replacing the individuals implicated in the misconduct, accepting responsibility for the violation, and creating or updating compliance programs to prevent future violations.

Potential Limitations on Availability of Cooperation Credit

The FCA Guidance specifies that DOJ attorneys retain discretion to consider all appropriate factors—not just those enumerated in the FCA Guidance’s discussion of disclosure, cooperation and remedial action—in determining whether and how to resolve an FCA matter. Some considerations may reduce the amount of cooperation credit available to an entity or individual or may even render the entity or individual ineligible for any credit. Examples of the additional factors that may be considered—and which could also limit the cooperation credit available—include “the nature and seriousness of the violation, the scope of the violation, the extent of any damages, the defendant’s history of recidivism, the harm or risk of harm from the violation, whether the United States’ interests will be adequately served by a compromise, the ability of a wrongdoer to satisfy an eventual judgment, and litigation risk presented if the matter proceeds to trial.”

Further, the FCA Guidance makes clear that the DOJ will not award credit to an entity or individual that conceals the involvement of members of senior management or the board of directors or otherwise lacks good faith in its dealings with the government during the investigation. Additionally, disclosure does not warrant cooperation credit where it is required by law or some other compulsory process, such as a civil investigative demand or subpoena, or when the information is under an imminent threat of discovery or investigation.

Practical Impact of Cooperation Credit

For companies under investigation for FCA violations, the cooperation credit could mean a reduction in the statutorily permitted treble damages multiplier or a reduction in civil penalties. According to the FCA Guidance, “[a]n entity or individual that seeks to earn maximum credit in a False Claims Act matter generally should 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.” Even if an individual or entity does not satisfy the requirements 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.” Under the FCA Guidance, maximum cooperation credit may not exceed an amount that would cause the government to receive less-than-full compensation for its losses caused by the misconduct. In addition, the FCA Guidance makes clear that the government will still seek to recover an amount greater than its single damages, as it specifies that the government must still recover its “damages, lost interest, costs of the investigation, and relator share.”

Where applicable, the DOJ may provide credit for cooperation other than by a reduction of the damages multiplier or penalties. For example, the DOJ can notify a relevant agency about the company’s cooperation so that the agency may take it into account when determining administrative remedies. The DOJ may also publicly acknowledge the company’s cooperation. Finally, the DOJ could assist in resolving *qui tam* litigation brought by relators.

The FCA Guidance clearly notes, however, that the various options that the DOJ has to credit self-disclosure, cooperation, and remediation are not entitlements. The value of the credit awarded to a company or individual will vary depending on the unique circumstances of each case.

KEY TAKEAWAYS

The FCA Guidance demonstrates the government’s heightened interest in enhancing its ability to recoup funds paid based on false claims and in “mak[ing] itself whole,” by encouraging and rewarding self-disclosure and cooperation with FCA investigations. Notably, companies do not have to voluntarily disclose potential FCA violations in order to receive partial credit. Companies and individuals can earn some cooperation credit by providing meaningful assistance to the government in connection with an investigation that is already ongoing. In view of the tremendous incentives for companies to self-disclose and cooperate with the government, companies must carefully consider and weigh the potential benefits of self-disclosure along with any related costs.

Even if self-disclosure is not possible, a company can obtain substantial advantages by conducting its own thorough internal investigation and disclosing its findings to the DOJ, as well as by engaging in effective remediation. Providing meaningful assistance to the DOJ and implementing remedial measures affords a valuable opportunity to secure leniency in the form of avoiding the steep treble damages and/or civil penalties otherwise available under the FCA. It may also allow for the mitigation of potential administrative action.

For companies facing investigation by the DOJ and concurrent *qui tam* litigation by relators, the FCA Guidance provides an additional incentive for cooperation. If the company cooperates with the DOJ’s investigation through the means discussed above, the FCA Guidance provides an opportunity to obtain assistance from the DOJ in resolving the *qui tam* litigation. Such assistance could represent significant savings—both in terms of time and costs—for companies facing prolonged litigation with *qui tam* relators.

6 Min Read

Authors

Suzanne Jaffe Bloom

Benjamin Sokoly

Cristina I. Calvar

Related Locations

New York

Related Topics

False Claims Act (FCA)

Department of Justice (DOJ)

Related Capabilities

Government Investigations, Enforcement & Compliance

Government Program Fraud, False Claims Act & Qui Tam Litigation

Litigation/Trials

Health Care

Related Regions

North America

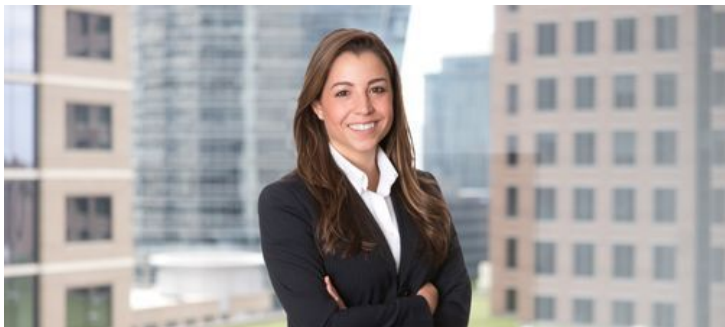
Related Professionals



Suzanne Jaffe Bloom



Benjamin Sokoly



Cristina I. Calvar

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.