

DOJ Announces New Guidelines for False Claims Act Settlement Credit for Disclosures, Cooperation, and Remediation

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WHAT: The U.S. Department of Justice announced new guidelines for giving credit to companies and individuals looking to resolve False Claims Act cases when they voluntarily self-disclose misconduct that is unknown to the government, cooperate in an ongoing investigation, or undertake internal remedial measures in response to a violation. The credit will most often take the form of a reduction in the damages multiplier and civil penalties, and could include a public acknowledgment of the cooperation.

WHEN: The formal guidance is effective immediately and could favorably affect the resolution of any ongoing or future investigation.

WHAT DOES IT MEAN FOR INDUSTRY: For the first time, the Department of Justice (DOJ) Civil Division has identified specific actions that a company or individual can take to reduce potential exposure under the False Claims Act after misconduct has occurred. The guidance provides a financial incentive: if a company discloses misconduct, cooperates with an investigation, and takes internal corrective actions, it could be in line for a significant reduction in the damages multiplier or civil penalties. The guidance, however, provides wide discretion to DOJ trial attorneys to assess whether a company or individual has qualified for “maximum credit,” and it therefore remains to be seen whether this new guidance will result in more reasonable settlement offers and faster investigations.

The announcement identified voluntary disclosures as the “most valuable form of cooperation.” Entities that make “proactive, timely, and voluntary self-disclosure” of misconduct not already known by the

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government can receive credit during the resolution of an FCA case. Even if a government investigation is already underway, voluntary self-disclosure of additional misconduct that goes beyond the government's known concerns can qualify for the credit. The disclosure must be made to the Department of Justice - not just to the Office of Inspector General or Contracting Officer.

Beyond disclosures, the guidance outlines other forms of cooperation that can earn credit, including:

- Identifying individuals substantially involved or responsible for the misconduct;
- Disclosing relevant facts and identifying opportunities for the government to obtain relevant evidence from third parties;
- Preserving, collecting, and disclosing relevant documents and information beyond existing business practices or legal requirements;
- Identifying individuals who are aware of relevant information or conduct, including a company's operations, policies, and procedures;
- Making available for interviews or depositions officers and employees with relevant information;
- Disclosing non-privileged facts gathered during an internal investigation, including attribution of facts to specific sources rather than a general narrative of facts, and providing timely updates and rolling disclosures from the internal investigation;
- Providing facts relevant to potential misconduct by third parties;
- Providing information in native format and facilitating review and evaluation of that information if it requires special or proprietary technologies;
- Admitting liability or accepting responsibility for the wrongdoing or relevant conduct; and
- Assisting in the determination or recovery of the losses caused by the misconduct.

Another way to receive credit is to take remedial measures in response to an FCA violation. The DOJ identified the following types of remedial actions that could warrant credit:

- Demonstrating a thorough analysis of the root cause of the misconduct and a remediation of that root cause;
- Implementing or improving a compliance program to ensure similar misconduct does not occur again;
- Disciplining or replacing individuals responsible for the misconduct, including individuals who directly participated in the misconduct, failed in oversight, or had supervisory authority over the area where the misconduct occurred; and
- Any additional steps demonstrating recognition of the seriousness of the 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.

For maximum credit, a company or individual must do all three: make a timely self-disclosure, provide full cooperation with the government's investigation, and take remedial steps. If maximum credit is awarded, the recipient may be able to resolve the FCA claim for the amount of the government's damages, lost interest, investigation costs, and relator share. The government may also notify a relevant contracting agency of the cooperation for consideration in suspension, debarment, or exclusion decisions. The government may even publicly acknowledge the disclosure, cooperation, or remediation and assist a defendant in resolving any qui tam litigation with a relator.

The guidance makes clear, however, that disclosure of information required by law, in response to a subpoena, or under imminent threat of discovery or investigation does not constitute cooperation. However, the government may award cooperation credit for meaningful assistance to an investigation by, for example, disclosing additional relevant documents or information or otherwise proactively helping the government understand the context or significance of the documents or information produced.

On the surface, the guidance appears to be a positive for companies or individuals who are facing potential FCA liability after discovering misconduct by their employees. The guidance provides a roadmap for proactive responses to misconduct and, if followed, leverage for settlement negotiations.

At the same time, the guidance could become a negative if the government interprets it as a floor for settlement negotiations—refusing to settle for less than single damages even where the DOJ faces significant litigation risk or other policy reasons for not pursuing a case. Similarly, DOJ trial attorneys could use the guidance as a license to demand equitable relief—such as employee discipline, corporate compliance changes, and other forms of “cooperation”—that go beyond the monetary damages and penalties authorized by the False Claims Act. In other words, it remains to be seen whether the new cooperation guidance will be a shield for responsible corporate actors or a sword for the government.