

Client Alert

May 2019

DOJ Announces New Guidelines for Awarding Cooperation Credit in the Resolution of False Claims Act Cases

What Happened: On May 7, 2019, the Department of Justice (DOJ) [announced](#) an amendment to the Justice Manual (previously the US Attorney’s Manual or USAM) adding a new section entitled “Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters.” The new guidelines are incorporated at [Section 4-4.112](#) and include a statement that entities that make a “proactive, timely, and voluntary self-disclosure ... will receive credit during the resolution of a FCA case.” The guidelines list the specific cooperation activities and remedial measures that the government may consider to award credit to an entity or individual making a disclosure. The credit to be provided is a reduction in penalties and damages multipliers, with the “maximum credit” authorized being not less than full compensation of the government’s losses.

The Bottom Line: While the identified actions for achieving maximum credit for cooperation and remedial efforts are not new, the formal application to civil FCA cases in the Justice Manual is new guidance and helpful in achieving global resolutions with the government. Notably, the only limitation on the amount of credit an entity or individual may receive for such efforts is the minimum threshold of “full compensation” for the losses to the government. This is in contrast to the HHS-OIG Self-Disclosure Protocol that contemplates a minimum damages multiplier of 1.5x even after a timely and complete disclosure is made.

The Full Story

The new guidelines include multiple caveats to emphasize that prosecutors retain complete discretion over FCA resolutions and may decline to extend credit based on factors unrelated to the disclosure itself, including the nature and seriousness of the offense. In addition, the guidelines make clear that taking the actions listed as cooperation and remediation never creates an “entitlement” to credit from the government, and FCA resolutions will be made based on the facts and circumstances of each case.

With respect to the disclosure itself, it must be made voluntarily and in a timely manner to receive credit. Disclosures made when an investigation is underway or imminent may receive less credit. The following is a high-level summary of the key elements to warrant favorable consideration from the government as to cooperation and remediation, respectively:

COOPERATION	REMEDATION
<ul style="list-style-type: none"> ▪ Identifying individuals substantially involved 	<ul style="list-style-type: none"> ▪ Thoroughly analyzing and remediating root cause of misconduct
<ul style="list-style-type: none"> ▪ Disclosing relevant facts and evidence in the custody of a third party 	<ul style="list-style-type: none"> ▪ Implementing an effective compliance program or improving existing program to prevent reoccurrence
<ul style="list-style-type: none"> ▪ Preserving and producing relevant documents 	<ul style="list-style-type: none"> ▪ Disciplining responsible individuals, including supervisors
<ul style="list-style-type: none"> ▪ Identifying individuals with relevant 	<ul style="list-style-type: none"> ▪ Demonstrating recognition of seriousness of

COOPERATION	REMEDIATION
information and making them available for interviews	misconduct
<ul style="list-style-type: none"> Disclosing facts uncovered during entity’s internal investigation with source attribution and providing timely investigative updates 	<ul style="list-style-type: none"> Accepting responsibility
<ul style="list-style-type: none"> Providing facts relevant to third-party misconduct 	<ul style="list-style-type: none"> Implementing measures to identify and reduce risk of future misconduct
<ul style="list-style-type: none"> Providing electronic information in native form and assisting with technology 	
<ul style="list-style-type: none"> Admitting liability or accepting responsibility 	
<ul style="list-style-type: none"> Assisting in determination and recovery of government’s losses 	

The new guidelines also contemplate other forms of cooperation for which the government may extend credit, including communication and cooperation with regulators regarding the disclosure; public acknowledgement of the disclosure and remediation; and assistance in resolving claims filed by *qui tam* relators. Consistent with other DOJ guidance, the guidelines make clear that a waiver of privilege is not required in order to be eligible for cooperation credit.

Key Takeaways:

On the plus side, the new guidelines create a more tangible goalpost for achieving maximum cooperation credit from DOJ separate and apart from similar agency guidance on disclosures under the civil FCA. In addition, the new guidance offers prosecutors greater flexibility to resolve FCA matters on a case-by-case basis. For example, the HHS-OIG Self-Disclosure Protocol requires a minimum damages multiplier, whereas the new DOJ guidance contemplates FCA resolutions with “full compensation” of the damages to the government. Companies should take note that some of the encouraged actions for cooperation credit go beyond prior guidance, particularly disclosing aspects of a company’s internal investigation with attribution and assisting in the government’s review of electronic evidence. There is no guarantee that offering greater transparency will result in a better outcome for the company. For entities doing business with the government, this guidance should be incorporated into senior management and board-level training to underscore the implications of and avenues for self-reporting (often an affirmative legal duty), and the importance of maintaining internal controls to detect and prevent compliance failures in the first place.

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