



False Claims Act Update: DOJ Releases Guidelines for Cooperation Credit and Reduced Penalties

The U.S. Department of Justice seeks to use the potential for a reduced penalty amount and damages to encourage self-disclosure of misconduct and cooperation during False Claims Act investigations.

On May 7, 2019, the U.S. Department of Justice ("DOJ") released [guidelines](#) that outline certain factors DOJ will consider when potentially providing credit to individuals and companies for cooperation and transparency during civil False Claims Act ("FCA") investigations. In both the guidelines and accompanying press release, DOJ expressed its intent to further incentivize companies to self-disclose possible false claims or misconduct to enable the government "to make itself whole from" previously unknown losses and preserve relevant evidence.

The guidelines list various factors that DOJ has previously considered (and recognized in the Foreign Corrupt Practices Act enforcement guidelines), but it is helpful to see them formally recognized in the FCA context. For instance, to obtain "maximum credit" in an FCA matter, the policy suggests a prompt self-disclosure (prior to an "imminent threat of discovery or investigation"), identification of individuals that were substantially involved, full cooperation with the government, and effective remedial action. A company may also qualify for credit by self-disclosing misconduct outside the scope of an existing investigation.

While DOJ will not give credit for taking actions required by law, such as responding to a subpoena, the policy sets forth other methods for cooperation DOJ would consider meaningful, including: (i) preserving relevant documents beyond existing practices or legal requirements; (ii) attributing facts to specific sources and providing rolling updates with relevant context to the government; and (iii) assisting in the determination or recovery of the losses caused by misconduct. Remedial measures could include conducting a root cause analysis, taking disciplinary action against responsible individuals, and implementing measures to reduce the risk of future misconduct.

The policy does not explicitly delineate how credit will be calculated. It does indicate, however, that in exchange for cooperation, DOJ may exercise its discretion to reduce the penalties or damages multiplier sought by the government for FCA violations. As a result, an FCA defendant may be able to resolve a matter for a "single damages" figure, avoiding multiplication of that figure and additional civil penalties provided by the statute. DOJ may also notify a relevant agency about a company or health care provider's cooperation, which could be pertinent for entities facing the risk of exclusion or a Corporate Integrity Agreement from the Office of the Inspector General. Notably, a limitation is imposed on the credit, in that it may not prevent the government from 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)."

This policy highlights [DOJ's recent focus](#) on the importance of an effective compliance program that proactively identifies and remediates issues. It also reflects DOJ's attempt to further

incentivize cooperation and self-disclosures. Whether this will result in tangible benefits for FCA investigation targets remains to be seen.



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