

DOJ Rolls Out Incentive Structure for Self-Reporting Civil FCA Violations

Earlier this week, the Department of Justice issued “Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters” (the FCA Guidelines),¹ intended to incentivize self-disclosure, cooperation and remediation in civil FCA investigations. This is the latest in a string of recent updates to DOJ policies which have potentially significant consequences on corporate enforcement. These include: (1) the November 2018 revision to the Individual Accountability for Corporate Wrongdoing Policy;² (2) the March 2019 update to the FCPA Corporate Enforcement Policy;³ and (3) the April 2019 update to the Evaluation of Corporate Compliance Programs.⁴ The FCA Guidelines, like the majority of policy changes announced over the last 1-2 years, have been formalized and memorialized in the Justice Manual, here found at the newly added Section 4-4.112. The stated purpose of the new section is to clarify “the manner in which the Department of Justice awards credit to defendants who cooperate with the Department during a False Claims Act Investigation,”⁵ although it is equally clear that the DOJ’s goal in issuing such guidance is to encourage the threshold step of disclosing misconduct. Although only applicable to civil enforcement, like the criminal FCPA Corporate Enforcement Policy (CEP)—upon which this latest guidance clearly is modeled—the FCA Guidelines set forth the factors that DOJ attorneys will consider in deciding whether or not to accord credit for assisting in a civil FCA investigation and those ways in which an entity or individual can claim full or partial credit.

I. Factors for Consideration

The three hallmarks of credit in the civil FCA context, discussed in more detail below, are consistent with those that criminal prosecutors in the FCPA space and beyond have been touting in recent years: voluntary self-disclosure, cooperation, and remedial action. The FCA Guidelines also make clear that DOJ attorneys analyzing an FCA matter will look at the timeliness of any information provided, the truthfulness, completeness, and reliability of the information, as well as the nature and significance of the assistance provided by an entity or individual seeking credit.

1) *Voluntary self-disclosure of misconduct and information uncovered during an internal investigation relating to or expounding on that misconduct will be considered for credit.*

The Justice Department has deemed self-disclosure as “the most valuable form of cooperation.”⁶

¹ JM § 4-4.112, Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters, <https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.112>.

² See JM §§ 9-28.210 Focus on Individual Wrongdoers, 9-28.300 Factors to Be Considered, 9-28.700 The Value of Cooperation, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations?utm_medium=email&utm_source=govdelivery#9-28.300.

³ See JM § 9-47.120(4), FCPA Corporate Enforcement Policy, <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977>.

⁴ See U.S. Department of Justice Criminal Division Fraud Section, Evaluation of Corporate Compliance Programs (Apr. 30, 2019), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

⁵ Press Release, U.S. Department of Justice Civil Division, Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual (May 7, 2019), <https://www.justice.gov/opa/pr/department-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual>.

⁶ Press Release, U.S. Department of Justice Civil Division, Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual (May 7, 2019), <https://www.justice.gov/opa/pr/department-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual>.

As the FCA Guidelines now expressly state, such disclosure “benefits the government by revealing, and enabling the government to make itself whole from previously unknown false claims and fraud, and may also enable the government to preserve and gather evidence that may have otherwise been lost.” Voluntary self-disclosure can include disclosing misconduct wholly unknown to the government as well as misconduct outside the scope of an investigation the government is already engaged in. Unsurprisingly, actions taken by an entity or individual such as disclosing information required by law or disclosing information that the DOJ will imminently discover will not earn credit in an FCA investigation. Of course, the FCA Guidelines make clear that credit for self-disclosure is predicated on any disclosure being proactive and timely, and those terms are often subject to debate when applied to live controversies. For a company considering such voluntary self-disclosure, the issue of when is critical.

2) *Cooperating in an ongoing investigation will also get an entity or individual credit in an FCA investigation.*

The DOJ’s non-comprehensive list of cooperative activities includes: identifying individuals involved in, responsible for, or aware of relevant information related to the misconduct; disclosing relevant facts; identifying opportunities for the government to obtain relevant evidence not in the entity or individual’s possession; preserving and disclosing relevant documents beyond existing business practices; making officers or employees with relevant information available; disclosing facts gathered during any internal investigations, attributing those facts to specific sources, and providing timely/rolling updates; providing facts relevant to misconduct by third parties; providing information in native format and facilitating review; admitting liability or accepting responsibility for any misconduct; and assisting in the determination of recovery of losses.

Some of this language in the new civil FCA Guidelines, including that requiring “identifying individuals substantially involved in or responsible for the misconduct,” tracks the language used in the March 2019 update to the DOJ’s FCPA CEP. In this respect, both the Guidelines and the CEP now reflect the revised “Individual Accountability for Corporate Wrongdoing” (also known as the Yates Memo) policy then-Deputy Attorney General Rosenstein discussed in a November 29, 2018 speech at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act.⁷ The former Deputy Attorney General’s comments acknowledged that there can exist a meaningful difference between criminal and civil cases, and therefore DOJ attorneys tend to need more flexibility to reach settlements in civil cases. As such, the FCA Guidelines does not purport to set forth an exhaustive list of activities an entity or individual can undertake to get credit for cooperation but, rather, an illustrative one.

3) *Remedial actions meant to prevent or detect similar future wrongdoing will also get an entity or individual credit from DOJ attorneys.*

Where a company has violated the False Claims Act, the government will consider actions that company takes to correct their violation, and prevent future violations, in determining whether to award them credit. Remedial actions that the government will consider include: analyzing and addressing the root cause of the underlying misconduct; improving the entity’s compliance program or implementing one where it did not already exist; disciplining or replacing individuals responsible for the misconduct; and taking steps to demonstrate that the entity recognizes the seriousness of the misconduct, accepts responsibility for it, and will work to prevent reoccurrence.

⁷ Deputy Attorney General Rod J. Rosenstein, Remarks at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), <https://www.justice.gov/opa/speech/deputyattorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.

The government’s use of “may” to introduce the remedial actions suggests that, similar to the cooperative activities an entity or individual could undertake for credit, this is not a comprehensive list of remedial actions. Like the other sections of the new guidelines, this language closely tracks the language of the FCPA CEP. The only major difference between the two is the CEP’s enumeration of criteria a company can use to implement or expand their compliance program.⁸ Both the CEP and the FCA Guidelines seem to focus on ways a company can reassure the government that it will not see similar FCA violations from the same company. Supporting this is the FCA Guidelines’ caution that the government will look at a defendant’s history of recidivism in addition to all of the above-mentioned factors in determining how to best resolve a FCA investigation.

II. Credit for Assisting in Civil FCA Investigations

Credit in a civil FCA investigation will most often result in reduced penalties for the misconduct or a reduced damages multiplier, although the FCA Guidelines make clear that the maximum credit accorded cannot undercut the government’s entitlement to receive full compensation for the losses caused by a defendant’s misconduct and that includes not only damages, but lost interest, costs of investigation and relator share. To earn maximum credit, of course the DOJ encourages entities and individuals to self-disclose misconduct in a timely and ongoing manner, fully cooperate with the DOJ in their investigation, and take remedial actions to prevent reoccurrence of the misconduct. Critically, the DOJ will still consider awarding partial credits where an entity or individual otherwise meaningfully assists in the investigation by engaging in conduct that qualifies for cooperation credit. In addition, the DOJ may notify other government agencies of an entity or individuals’ participation in the FCA investigation allowing that agency to consider those factors in their own investigation, publicly acknowledge the entity’s cooperation, and/or assist the entity or individual in resolving qui tam litigation. The DOJ will not award credit to any entity or individual that conceals information about the misconduct or demonstrates a lack of good faith.⁹

III. What Might Be Next for Criminal FCA Cases

Given the substantial similarities between the new civil FCA Guidelines and the criminal FCPA Corporate Enforcement Policy, companies should be on the lookout for an even broader application of the principles underlying both policies—incentivizing and rewarding companies who voluntarily self-disclose, fully cooperate and remediate—in criminal matters, including FCA matters in the healthcare space and beyond. Although issuance of a declination by the DOJ in a criminal case (the pinnacle of credit a company can receive under the CEP) does not insulate a company from financial implications, there now exists a path where a company can work with both criminal and civil sides of the DOJ house to avoid the most serious of those penalties, including treble damages, and potentially avoid prosecution altogether.

⁸ See JM § 9-47.120(4), FCPA Corporate Enforcement Policy, <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977>.

⁹ Department of Justice Manual, § 4-3.100(3), <https://www.justice.gov/jm/jm-4-3000-compromising-and-closing>.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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