

DOJ Issues New Guidance on False Claims Act Investigation Cooperation Credit

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The Department of Justice Civil Division this week issued a long-awaited policy regarding the circumstances under which companies and individuals can receive cooperation credit in False Claims Act investigations. The new policy is now included in Department of Justice Manual Section 4.112. This follows the DOJ issuing a similar policy with regard to the Foreign Corrupt Practices Act earlier this year, and marks a concerted effort by the DOJ to encourage cooperation by the potential targets of its investigations.

The False Claims Act policy makes clear that the most important form of cooperation is to voluntarily disclose misconduct to the government, including the disclosure of additional misconduct that goes beyond the scope of known concerns during a pending investigation. In order to receive such credit, the misconduct must be self-disclosed before a whistleblower brings it to the government's attention or the government otherwise discovers it.

Short of self-disclosure of misconduct, the policy describes several other types of cooperation that will qualify for credit. While the government declined to provide an exhaustive list, the illustrative list of examples includes:

1. Identifying individuals involved in or responsible for the misconduct;
2. Disclosing facts and identifying opportunities for the government to obtain evidence that is not in the possession of the entity or individual;
3. Making officers and employees with relevant information available for meetings, interviews, examinations or depositions;
4. Disclosing facts relevant to the investigations gathered during the entity's independent investigation, including attribution of facts to specific sources rather than a general factual narrative, and providing timely updates on the organization's internal investigation;
5. Providing facts relevant to potential misconduct by third parties;
6. Admitting liability or accepting responsibility; and
7. Assisting in the determination or recovery of the losses caused by the misconduct.

An individual or organization does not have to satisfy all of the factors to receive credit. In evaluating the value of the information, the government will consider:

1. The timeliness and voluntariness of the assistance;
2. The truthfulness, completeness, and reliability of the information;
3. The nature and extent of the assistance; and
4. The significance and usefulness of the cooperation to the government.

In addition to the factors addressed above, the government will also consider whether an entity has taken remedial actions in response to a violation. Such actions might include:

1. Performing a root cause analysis of the underlying conduct and remediating the root cause where appropriate;
2. Implementing or improving a compliance program; and
3. Appropriately disciplining or replacing those responsible for the misconduct either through direct participation or failure in

oversight (including supervisors).

Finally, the policy describes the credit that a cooperating company or individual might receive. The policy is not specific, but makes clear that the government has a significant amount of discretion in providing credit and that determinations will be made on a case-by-case basis. The policy provides that a company or individual hoping for maximum credit must 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 entity or individual does not qualify for full credit, the DOJ can still provide partial credit. In most cases, credit will be provided in the form of reduced False Claims Act penalties or a lesser damages multiplier. The maximum credit will never exceed an amount that would result in the government receiving less than full compensation for losses caused by the misconduct, including damages, lost interest, costs of investigation and a relator’s share of the recovery.

Under the policy, the DOJ can also award credit in other ways, including notifying a relevant agency about an entity’s or individual’s disclosure or other cooperation so that the agency can evaluate it in considering administrative action; publicly acknowledging the cooperation; or assisting the cooperating party in resolving qui tam litigation.

This False Claims Act cooperation policy, which was first hinted at by DOJ Civil Fraud director Michael Granston in a March 2019 speech, continues a trend of recent policy enactments by the DOJ that may assist companies and individuals facing possible False Claims Act liability, including the January 10, 2018 “Granston Memo,” which outlines the circumstances under which the DOJ should consider seeking dismissal of False Claims Act cases brought by relators. While cooperation with the DOJ has many potential benefits, it remains unclear how much credit cooperating individuals and companies will receive and the form it will take. Companies that discover potential False Claims Act violations should immediately consult with counsel about next steps, including conducting an internal investigation and the possibility of cooperating with the government.

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