

**U.S. DEPARTMENT OF JUSTICE
JUSTICE MANUAL**

4-4.000 – COMMERCIAL LITIGATION (excerpted text)

4-4.112 - Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters

Introduction

These guidelines identify factors that will be considered and the credit that will be provided by Department of Justice attorneys when entities or individuals voluntarily self-disclose misconduct that could serve as the basis for False Claims Act (FCA) liability and/or administrative remedies, take other steps to cooperate with FCA investigations and settlements, or take adequate and effective remedial measures.

In addition to the factors discussed below, the Department of Justice, in its discretion, takes into account many considerations when evaluating the appropriate resolution of FCA matters, including the nature and seriousness of the violation, the scope of the violation, the extent of any damages, the defendant's history of recidivism, the harm or risk of harm from the violation, whether the United States' interests will be adequately served by a compromise, the ability of a wrongdoer to satisfy an eventual judgment, and litigation risks presented if the matter proceeds to trial. Some of these considerations may reduce the credit available to an entity or individual, or in egregious circumstances, may render the entity or individual ineligible for any credit. The discussion in these guidelines does not limit Department attorneys' discretion to consider all appropriate factors in determining whether and on what basis to resolve an FCA matter.

Disclosure, Cooperation, and Remedial Action

Voluntary Disclosure. The Department has a strong interest in incentivizing companies and individuals that discover false claims to voluntarily disclose them to the government. Voluntary self-disclosure of such misconduct 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 would otherwise be lost. Entities or individuals that make proactive, timely, and voluntary self-disclosure to the Department about misconduct will receive credit during the resolution of a FCA case. During the course of an internal investigation into the government's concerns, moreover, entities may discover additional misconduct going beyond the scope of the known concerns, and the voluntary self-disclosure of such additional misconduct will qualify the entity for credit.

Other Forms of Cooperation. In addition to voluntarily self-disclosing misconduct, an individual or entity can earn credit by taking steps to cooperate with an ongoing government investigation. A comprehensive

list of activities that constitute such cooperation is not feasible because of the diverse factual and legal circumstances involved in FCA investigations. However, the following measures illustrate the type of activities by entities or individuals under investigation that will be taken into account. These measures are not mandatory and an entity or individual does not have to satisfy all of them to qualify for some cooperation credit.

- i. Identifying individuals substantially involved in or responsible for the misconduct;
- ii. Disclosing relevant facts and identifying opportunities for the government to obtain evidence relevant to the government's investigation that is not in the possession of the entity or individual or not otherwise known to the government;
- iii. Preserving, collecting, and disclosing relevant documents and information relating to their provenance beyond existing business practices or legal requirements;
- iv. Identifying individuals who are aware of relevant information or conduct, including an entity's operations, policies, and procedures;
- v. Making available for meetings, interviews, examinations, or depositions an entity's officers and employees who possess relevant information;
- vi. Disclosing facts relevant to the government's investigation gathered during the entity's independent investigation (not to include information subject to attorney-client privilege or work product protection), including attribution of facts to specific sources rather than a general narrative of facts, and providing timely updates on the organization's internal investigation into the government's concerns, including rolling disclosures of relevant information;
- vii. Providing facts relevant to potential misconduct by third-party entities and third-party individuals;
- viii. Providing information in native format, and facilitating review and evaluation of that information if it requires special or proprietary technologies so that the information can be evaluated;
- ix. Admitting liability or accepting responsibility for the wrongdoing or relevant conduct; and
- x. Assisting in the determination or recovery of the losses caused by the organization's misconduct.

In considering the value of any voluntary disclosure or additional cooperation, government counsel will consider the following factors: (1) the timeliness and voluntariness of the assistance; (2) the truthfulness, completeness, and reliability of any information or testimony provided; (3) the nature and extent of the assistance; and (4) the significance and usefulness of the cooperation to the government.

Remedial Measures. Department attorneys will also consider whether an entity has taken appropriate remedial actions in response to the FCA violation. Such remedial actions may include:

- i. demonstrating a thorough analysis of the cause of the underlying conduct and, where appropriate, remediation to address the root cause;
- ii. implementing or improving an effective compliance program designed to ensure the misconduct or similar problem does not occur again;

- iii. appropriately disciplining or replacing those identified by the entity as responsible for the misconduct either through direct participation or failure in oversight, as well as those with supervisory authority over the area where the misconduct occurred; and
- iv. any additional steps demonstrating recognition of the seriousness of the entity's 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.

Credit for Disclosure, Cooperation, and Remediation

An entity or individual that seeks to earn maximum credit in a False Claims Act matter generally should 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. However, even if an entity or individual does not qualify for maximum credit, they may receive partial credit if they have meaningfully assisted the government's investigation by engaging in conduct qualifying for cooperation credit. *See* Department of Justice Manual, § 4-3.100(3).

Where the conduct of the entity or individual warrants credit, the Department has discretion in FCA cases to reward such credit. Most often, this discretion will be exercised by reducing the penalties or damages multiple sought by the Department.

The maximum credit that a defendant may earn may not exceed an amount that would result in the government receiving less than full compensation for the losses caused by the defendant's misconduct (including the government's damages, lost interest, costs of investigation, and relator share).

The Department may consider, in appropriate circumstances, additional avenues that would permit an entity or individual to claim credit in FCA cases, including:

- Notifying a relevant agency about an entity's or individual's disclosure, other cooperation, or remediation, so that the agency in its discretion may consider such factors in evaluating its administrative options, such as suspension, debarment, exclusion, or civil monetary penalty decisions;
- Publicly acknowledging the entity's or individual's disclosure, other cooperation, or remediation; and
- Assisting the entity or individual in resolving qui tam litigation with a relator or relators.

The foregoing options are ways in which the Department may in its discretion credit disclosure, other cooperation, or remediation; they are not entitlements that arise whenever these factors are present. As noted above, the value of credit awarded to an entity or individual will vary depending on the facts and circumstances of each case.

Other Considerations

Nothing in these guidelines changes any preexisting obligation an entity or individual has under the law to report to or cooperate with the federal government.²

Cooperation does not include disclosure of information required by law, or merely responding to a subpoena, investigative demand, or other compulsory process for information. However, cooperation credit may be awarded where an entity or individual meaningfully assists the government's investigation by, for example, disclosing additional relevant documents or information, or otherwise proactively aiding the government in understanding the context or significance of the documents or information produced. Cooperation also does not include the disclosure of information that is under an imminent threat of discovery or investigation.

The Department will not award any credit to an entity or individual that conceals involvement in the misconduct by members of senior management or the board of directors, or to an entity or individual that otherwise demonstrates a lack of good faith to the government during the course of its investigation. *See* Department of Justice Manual, § 4-3.100(3).

Entities and individuals are entitled to assert their legal rights and, unless required by law, do not have to cooperate with a government investigation. Nothing about the guidelines herein changes those rights. Entities and individuals remain free to reject these options and forgo any potential credit consistent with the law.

Eligibility for credit for voluntary disclosure or other forms of cooperation is not predicated on waiver of the attorney-client privilege or work product protection, and none of the guidelines herein require such a waiver.

The measures set forth in these guidelines are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any party.

[1] In addition to considering a company's decision to implement or improve a compliance program after an alleged violation, the Department may take into account the prior existence of a compliance program in evaluating a defendant's liability under the False Claims Act. For example, the Department may consider the nature and effectiveness of such a compliance program in evaluating whether any violation of law was committed knowingly. In making such an evaluation, the criteria to be considered may include those set forth in the Department of Justice Manual at § 9-28.800.

[2] For example, the Federal Acquisition Regulation requires contractors to self-disclose credible evidence of certain violations of law and significant overpayments in connection with the award or performance of

a federal contract or subcontract. Contractor Business Ethics Compliance Program and Disclosure Requirements, 48 C.F.R. pts. 2, 3, 9, 42 and 52.

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