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Credit for cooperation: What you need to know about the DOJ's new guidelines for FCA investigations

In May 2019, the U.S. Department of Justice ("DOJ") [issued new guidelines](#) regarding cooperation and remedial efforts with False Claims Act ("FCA") investigations. The guidelines, 4-4.112, detail the credits individuals and entities may receive.

Ultimately, the DOJ has discretion in determining the appropriate resolution of FCA violation matters. But, the DOJ has articulated multiple factors that may reduce the credits available or render an entity or individual completely ineligible for credit. These factors are:

- 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 a compromise can adequately serve the United States' interests;
- A wrongdoer's ability to satisfy an eventual judgment; and
- The litigation risks presented if the matter proceeds to trial.

Behaviors that may entitle an entity or individual to credit are: (1) voluntary disclosure, (2) cooperation with an ongoing investigation, and (3) the implementation of remedial measures.

The DOJ wants to incentivize self-disclosure by companies and individuals that discover false claims. Credit will be granted to entities and individuals that voluntarily self-disclose misconduct in a proactive and timely manner. If a DOJ investigation is already underway, an entity's voluntary self-disclosure of additional misconduct beyond the scope of the investigation will also qualify the entity for credit.

Taking steps to cooperate with an ongoing DOJ investigation may also entitle an individual or entity to credit. Cooperation does not include disclosure of information required by law. Examples of cooperation include: identifying relevant individuals, disclosing relevant facts, providing timely updates on the entity's independent internal investigation, providing facts relevant to third-party misconduct, accepting responsibility for wrongdoing, or admitting liability.

The value of voluntary self-disclosure and cooperation will be determined based on four factors:

1. The timeliness and voluntariness of the assistance;
2. 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 steps taken by an entity may also entitle the entity to credit. Examples of remedial efforts include: thorough analysis of the root cause of the misconduct, implementing or improving a compliance program, appropriate discipline or replacement of those responsible for the misconduct, measures taken to reduce the risk of repetition of the misconduct, identifying future risks, and other steps taken that demonstrate acceptance of responsibility as well as recognition of the severity of the misconduct.

Timely self-disclosure, full cooperation with the DOJ investigation, and adequate remedial efforts may earn maximum credit. Partial credit can be received when the entity or individual meaningfully assisted the government's investigation.

A defendant's credit cannot be so high as to result in less than full compensation for the government of the losses caused by the defendant's misconduct. The DOJ may use their discretion in granting credit to reduce penalties or damages sought from the defendant. The DOJ may also notify other relevant agencies of the entity's or individual's credit, publicly acknowledge the steps taken by the entity or individual, or assist the entity or individual in resolving *qui tam* litigation.

No credit will be awarded to an entity or individual that conceals the involvement of senior management or the board of directors in the misconduct. Additionally, if the individual or entity shows a lack of good faith toward the government, no credit will be awarded.

These guidelines do not change an entity's or individual's right to not cooperate with a government investigation.

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