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DOJ Releases Guidance on Cooperation Credit in False Claims Act Cases

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On May 7, 2019, the U.S. Department of Justice ("DOJ") released formal guidance regarding cooperation credit for defendants in False Claims Act ("FCA") investigations. The new policy defines the types of conduct that the DOJ will recognize as "cooperation" and provides some guidance regarding how such cooperation should be credited in the context of monetary settlements of FCA claims. The DOJ will retain considerable discretion regarding when and how much credit to award.

FCA settlements have not typically included a formal cooperation credit component, and this guidance may signal a change in how the DOJ intends to approach FCA settlements, perhaps more closely following the model used in criminal cases, where cooperation credit has long been explicitly considered and quantified in ultimate resolutions. Should that be the case, the DOJ may — as it has in criminal cases — include additional detail in future FCA settlements to publicize and quantify the effects of the new policy. In the short term at least, there will naturally be uncertainty about how the guidance will be applied; however, the guidance will shape companies' discussions with the DOJ when arguing for cooperation discounts.

The New Guidance Defines Three Types of Cooperation

The guidance defines three types of conduct that the DOJ will recognize as "cooperation" for the purposes of awarding cooperation credit in FCA settlements: "Voluntary Disclosure"; "Other Forms of Cooperation"; and "Remedial Measures." Importantly, although the guidance states that a defendant seeking "maximum credit" should engage in all three forms of cooperation, a defendant that does not do so may still receive partial credit so long as it engaged in some form of cooperation that "meaningfully assisted" the government's investigation.

Voluntary Disclosure: The first form of cooperation defined in the guidance is the "proactive, timely, and voluntary self-disclosure" of misconduct to the DOJ regarding "previously unknown false claims and fraud." The guidance makes clear that mere disclosure of information required to be disclosed by law, or production of documents and information in response to a subpoena, does not qualify for cooperation credit. But a defendant already under investigation may receive cooperation credit if it discovers and proactively discloses information regarding "additional misconduct going beyond the scope of the known concerns" at issue in the investigation or otherwise known to the government.

Other Forms of Cooperation: A defendant who does not qualify for "voluntary disclosure" credit may still earn cooperation credit by "taking steps to cooperate with an ongoing government investigation." Noting that "a comprehensive list of activities that constitute such cooperation is not feasible," the guidance provides examples of the types of conduct that may qualify for credit under this prong of the policy. While companies should review the full list contained in the guidance, in the context of any specific case, the types of activities that may qualify for cooperation credit include:

- Identifying individuals involved in the misconduct or who have knowledge of the misconduct, and making officers/employees available for interviews or depositions;
- Preserving/producing documents, information and metadata beyond what is legally required and/or facilitating review of information that requires specialized or proprietary technology;
- Disclosing non-privileged information gathered during the defendant's internal investigation of the misconduct;
- Providing information regarding potential misconduct by third parties and/or providing information about opportunities to gather evidence that is not in the defendants' position or not otherwise known to the government; and
- Admitting liability or accepting responsibility for the relevant conduct and/or assisting in the determination or recovery of losses caused by the conduct.

Remedial Measures: Under the guidance, DOJ attorneys will also take into account "whether an entity has taken appropriate remedial measures in response to the [FCA] violation." Such measures may include undertaking a thorough analysis of the cause of the underlying conduct and, where appropriate, remediating the "root cause"; implementing or improving an effective compliance program to prevent future misconduct; disciplining or replacing the individuals directly involved in the misconduct and those with supervisory authority over the area where misconduct occurred; and "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."

The New Guidance Contains Fewer Specifics Regarding How Cooperation Will be Credited

Although the introduction to the new guidance states that it "identif[ies] factors that will be considered and the credit that will be provided" for cooperation, the second part of that formulation — the amount of credit that will be provided — remains highly discretionary: "Where the conduct of the entity or individual warrants credit, the Department has discretion in FCA cases to reward such credit … . [T]he value of credit awarded to an entity or individual will vary depending on the facts and circumstances of each case."

The amount of credit that the DOJ will provide remains highly discretionary.

Within this highly discretionary context, the guidance identifies qualitative factors that the DOJ will consider in determining the value of cooperation, including: "(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." The guidance also provides that this discretion will "most often … be exercised by reducing the penalties or damages multiple sought by the Department." The most concrete aspect of the guidance is the statement that, even in a maximum credit scenario, a defendant's liability cannot be less than the government's actual damages (i.e., single damages) plus interest, costs of investigation and any relator's share under the FCA. Aside from this damages floor, the amount of credit available for cooperation is entrusted to DOJ attorneys' discretion.

The fact that the DOJ has specifically enumerated qualifying forms of cooperation will give defendants a

formal basis for arguing that cooperation credit is appropriate in the context of a particular resolution.

The Practical Effect of the Guidance Remains to be Seen

It is not clear whether and to what extent the new guidance will alter existing DOJ practices for resolving FCA cases. The codification of activities that are eligible for cooperation credit does not appear to break new ground — most, if not all, of the forms of cooperation listed in the guidance are activities that defendants usually already do, or consider doing, in responding to a FCA investigation. But the fact that the DOJ has specifically enumerated them as qualifying forms of cooperation will give defendants a formal basis for arguing that cooperation credit is appropriate in the context of a particular resolution.

The impact of the guidance on quantifying the amount of credit available based on qualifying cooperation is similarly unclear. Although the FCA cooperation credit guidance parallels prior DOJ guidance on cooperation in the criminal enforcement context, there is significantly less transparency in the resolution of civil cases: unlike criminal cases, where plea agreements, sentencing memoranda, and DOJ publications provide clear visibility into the Department's position on the amount of credit awarded for cooperation, civil settlements rarely contain such information. FCA settlement agreements typically do not contain profit or government reimbursement figures, specify the single damages figure, or disclose the multiplier used to arrive at the final settlement amount. Nor do they typically describe defendants' cooperation, or lack thereof, in the settlement documentation. Therefore, it is difficult to quantify what the Department's past practices have been regarding cooperation credit for FCA defendants, and, barring a major change in the way settlements are documented, it will be difficult to determine other than through case-by-case experience whether the new guidance changes the DOJ's approach to settlement going forward.

One aspect of the new guidance that may signal an unwelcome departure from existing practice is the statement that discretionary cooperation credit will "most often ... be exercised by reducing ***the penalties*** or damages multiple sought by the Department." (emphasis added) In the past decade, over dozens of resolutions, we have typically seen cases under the FCA settle in a range of 1.5- to 2.5-times actual

damages, with a trend in more recent years toward the upper end of that range, and without any penalties at all. Put differently, defendants' cooperation is typically an argument in favor of a lower damages multiplier, and regardless of cooperation, penalties are practically never an element of FCA settlements. It would be a significant (though, in our view, unlikely) departure from DOJ practice if the Department began with a starting point of penalties being included in settlements, absent cooperation. And such a departure would likely substantially offset any benefit arising from an expansion of defendants' ability to argue for cooperation credit.

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