

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:

- ii. demonstrating a thorough analysis of the cause of the underlying conduct and, where appropriate, remediation to address the root cause;
- iii. implementing or improving an effective compliance program designed to ensure the misconduct or similar problem does not occur again;¹
- iv. 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
- v. 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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4-3.100 – Pursuit of Claims Against Individuals

The Department of Justice prioritizes fighting corporate fraud and other misconduct because effective pursuit of civil claims protects citizens, the government, and the nation's economy, and because expeditious and vigorous civil enforcement provides a strong deterrent to misconduct. Holding individuals who perpetrate wrongdoing accountable, in addition to corporations or business entities, is one of the most effective ways of combatting corporate misconduct. Doing so deters future illegal activity, incentivizes changes in corporate behavior, holds the proper parties responsible for their actions, and promotes the public's confidence in our justice system.

(1) Civil corporate investigations should focus on individuals from the inception of the corporate investigation.

By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation acts only through individuals, investigating the conduct of individuals efficiently and effectively reveals the facts and extent of any corporate misconduct. Second, a focus on individuals increases the likelihood that those with knowledge of the corporate misconduct will be identified and provide information about the individuals involved, at any level of an organization. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil allegations (or criminal charges) against not just the corporation but against culpable individuals as well.

(2) Criminal and civil attorneys handling corporate investigations should be in routine communication with each other.

Early and regular communication between civil attorneys and criminal prosecutors handling corporate fraud investigations can be crucial to the Department's ability to effectively pursue individuals in these matters. Consultation between the Department's civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government's potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. See [JM 1-12.000](#); [JM 1-12.100](#).

Where civil attorneys believe that an individual identified in the course of their corporate investigation should be the subject of a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation. Department attorneys should also be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Criminal and civil investigations by the FBI or other investigative agencies should be carried out concurrently, including investigations as to the extent of the government's damage. Care should be taken to use grand jury materials in connection with civil actions pursuant to Fed. R. Crim. P. 6(e). See *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983); see also 18 U.S.C. § 3322 (permitting disclosure of grand jury materials to government attorneys pursuing FIRREA civil penalty actions). Similarly, care should be taken to use the fruits of Civil Investigative Demands only as permitted by the authorizing statute, *e.g.*, 31 U.S.C. § 3733, *et seq.*

(3) To be eligible for cooperation credit in a civil corporate case, a corporation must provide meaningful assistance to the government's investigation. To earn maximum cooperation credit, a corporation must do a timely self-analysis and be proactive in voluntarily disclosing wrongdoing and identifying all individuals substantially involved in or responsible for the misconduct, without making the government compel such disclosures with subpoenas or other investigative demands.

Corporate cooperation in civil cases should be measured by how much meaningful assistance the corporation provides to the government. Meaningful assistance may include, for example, a corporation's voluntary disclosure of misconduct, cooperation that allows the Department to identify a problem and

secure a resolution without expending investigative resources that otherwise would be required, or assistance that enables the Department to pursue misconduct that otherwise would not be redressed.

A corporation that seeks to earn maximum cooperation credit generally should do a timely self-analysis and be proactive in voluntarily disclosing wrongdoing and identifying all individuals substantially involved in or responsible for the misconduct, without making the government compel such disclosures with subpoenas or other investigative demands. However, in civil cases, Department attorneys may exercise their discretion in appropriate circumstances to offer some cooperation credit to a corporation that has meaningfully assisted the government's investigation, even absent assistance that would qualify for maximum credit, if the award of some credit for cooperation serves the public interest and furthers the administration of justice. The mere submission of legally required information, by itself, generally does not constitute meaningful assistance. Nor will the Department award any credit to a corporation that conceals involvement in the misconduct by members of senior management or the board of directors, or otherwise demonstrates a lack of good faith in its representations regarding the nature or scope of the misconduct.

The extent of the cooperation credit earned will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation).

(4) Before finalizing a civil corporate resolution, the Department should carefully consider the liability of culpable individuals. The Department should preserve the ability to pursue civil remedies against those individuals, unless further action is not necessary or warranted to serve the public interest.

In instances where the Department reaches a resolution with a company before resolving matters with responsible individuals, Department attorneys should take care to preserve the ability to pursue the individuals. A Department attorney seeking to allow the release of civil claims related to the liability of individuals based on a corporate settlement must document the basis for the determination that further action against the individuals is not necessary or warranted, and must obtain written supervisory approval of the decision to allow the release of civil claims in the case.

Each Department component and U.S. Attorney's Office may select the level of supervisory review to be required within that component or Office, consistent with their enforcement needs and circumstances.

(5) Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to culpable individuals in such cases must be memorialized and approved.

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against culpable individuals, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Delays in the corporate investigation should not affect the Department's ability to pursue potentially culpable individuals. While every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception, in situations where it is anticipated that a tolling agreement is nevertheless unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations periods.

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