



DOJ Identifies And Clarifies How To Obtain Credit For Cooperation In False Claims Act Cases

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On May 7, 2019, the United States Department of Justice's Civil Division further clarified the standards and circumstances under which the Department will award credit to defendants who cooperate with the Department during a False Claims Act investigation. This latest guidance, codified in the *Justice Manual* at § 4-4.112, represents another installment in the Department's longstanding efforts to apply the principles of federal prosecution to cases involving corporate wrongdoing.

In September 2015, under then-Deputy Attorney General Sally Yates, the Department issued a memorandum (the "Yates Memo"), which identified six principles aimed at strengthening the Department's pursuit of individual corporate wrongdoing, the most consequential of which was the requirement that "in order to qualify for any cooperation credit, corporations must provide all relevant facts relating to the individuals responsible for the misconduct."¹ The Yates Memo followed a series of memos by previous Deputy Attorneys General outlining the factors to be considered in deciding whether to charge a corporation based on the acts of its agents, or individual employees. *See, e.g., the Filip Memo (2008); the McNulty Memo (2006); the Thompson Memo (2003); and the Holder Memo (1999).*² These factors have always included the nature and extent of the corporation's cooperation in the investigation.

On November 29, 2018, then-Deputy Attorney General Rod Rosenstein announced a revision to the Yates Memo's "all or nothing" requirement for obtaining cooperation credit in civil enforcement cases.³ Noting that "[c]ivil cases are different," the DAG further stated that, in civil enforcement actions, "our attorneys need flexibility to accept settlements that remedy the harm and deter future violations, so they can move on to other important cases."⁴

This newest guidance, which is directed at the Department's FCA litigators, identifies the types of cooperation eligible for credit. Under the policy, cooperation credit in False Claims Act cases may be earned by: (i) voluntarily disclosing misconduct unknown to the government, (ii) cooperating in an ongoing investigation, or (iii) undertaking remedial measures in response to a violation.

Voluntary Disclosure: Credit may be given to entities or individuals that make "proactive, timely, and voluntary self-disclosure" of misconduct under the FCA. Furthermore, entities that discover additional misconduct during the course of an internal investigation into the government's concerns, and voluntarily disclose the additional misconduct, will also qualify for cooperation credit.

Cooperation: An individual or entity can earn credit "by taking steps to cooperate with an ongoing government investigation." While noting that a "comprehensive list of activities that constitute such cooperation is not feasible because of the diverse factual and legal circumstances involved in FCA investigations," the policy does provide a fairly comprehensive list of ten types of activities that may

¹ <http://www.justice.gov/dag/file/769036/download>

² For more information about the Yates Memo and its predecessors, please see our previous article on this topic: <https://www.agg.com/The-Yates-Memo--A-Warning-to-Execs-and-Employees-Effects-of-Expanding-the-DOJs-Efforts-to-Combat-Corporate-Wrongdoing-and-Hold-Individuals-Accountable-10-06-2015/>

³ Our article on the then-Deputy Attorney General's announcement can be found at: <https://www.agg.com/DOJ-Eases-Requirement-for-Obtaining-Cooperation-Credit-in-False-Claims-Act-Cases-12-05-2018/>

⁴ <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>

qualify for cooperation credit:

- Identifying individuals substantially involved in or responsible for the misconduct;
- 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;
- Preserving, collecting, and disclosing relevant documents and information relating to their provenance beyond existing business practices or legal requirements;
- Identifying individuals who are aware of relevant information or conduct, including an entity's operations, policies, and procedures
- Making available for meetings, interviews, examinations, or depositions an entity's officers and employees who possess relevant information;
- 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;
- Providing facts relevant to potential misconduct by third-party entities and third-party individuals;
- 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;
- Admitting liability or accepting responsibility for the wrongdoing or relevant conduct; and
- Assisting in the determination or recovery of the losses caused by the organization's misconduct.

The policy also provides guidance on how to value cooperation, directing Department attorneys to consider: (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: These may include:

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

In addition to the guidance on identifying credit-worthy cooperation, the policy identifies other forms of credit that may be given in exchange for cooperation, including: (1) notifying the relevant agency of the entity's cooperation for the agency to consider in evaluating its administrative decisions; (2) publicly acknowledging the cooperation or remediation; and (3) assisting the individual or entity to resolve qui tam litigation with relators.

Notably, and possibly in response to earlier criticism of the Yates Memo, the new guidance stipulates that "entities and individuals are entitled to assert their legal rights and, unless required by law, do not have to cooperate with a government investigation," but while they remain "free to reject these options," they will then "forgo any potential credit consistent with the law." Even more pointedly, the guidance also states that "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."

This latest word on the subject of cooperation in FCA cases further shifts the focus from the charging decision to the means of softening the consequences of the decision for cooperators. Designed to incentivize cooperation, the new policy is also intended to streamline investigations by enlisting targeted individuals and entities in the investigation and resolution of the ever-growing number of FCA investigations and cases.

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