

# DOJ Issues Guidance on Cooperation In False Claims Act Investigations

May 9, 2019

On May 7, 2019, the Department of Justice (“DOJ” or “the Department”) issued formal guidance to DOJ’s False Claims Act (“FCA”) litigators on the circumstances in which DOJ will grant credit for cooperation during FCA investigations.<sup>1</sup> The guidance explains the factors that DOJ considers in determining whether to award cooperation credit in FCA investigations and the types of credit available.<sup>2</sup>

Under the guidance, cooperation credit in FCA cases may be earned by voluntarily disclosing misconduct unknown to the government, cooperating in an ongoing investigation or undertaking remedial measures in response to a violation of the FCA. Aside from taking these steps, a company may receive at least partial credit by identifying individuals with relevant information about the conduct, preserving relevant documents and information beyond existing business practice or legal requirements, and assisting in an ongoing investigation by disclosing relevant facts, among others. Cooperation credit will take the form of reducing the penalties or damages multiple sought by the DOJ. The maximum credit that a defendant receives may not surpass the amount of full compensation the government would receive for losses caused by the defendant’s misconduct. This amount includes government damages, lost interest, costs of investigation and relator share.

The value of the credit awarded will vary depending on the facts and circumstances of each case. The DOJ’s extension of cooperation credit is discretionary and dependent on a consideration of “all appropriate factors” including the nature and seriousness of the violation, its scope, the extent of any damages, the defendant’s history of recidivism, the harm or risk of harm from the violation, whether U.S. interests are serviced by a

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<sup>1</sup> <https://www.justice.gov/opa/pr/departments-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual>

<sup>2</sup> <https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.112>



compromise, a wrongdoer's ability to satisfy an eventual judgment and litigation risks presented if the matter proceeds to trial.

### **Voluntary Self-Disclosure and Cooperation**

"Entities or individuals that make proactive, timely, and voluntary self-disclosures to the Department about misconduct will receive credit during the resolution of a FCA case." Voluntary self-disclosure of additional misconduct in the course of an internal investigation into government concerns will also qualify the entity for cooperation credit.

The value of voluntary disclosure or additional cooperation will depend on the timeliness and voluntariness of assistance, the truthfulness and completeness of the information provided, the nature and extent of assistance and the significance and usefulness of the cooperation.

According to the guidance, additional cooperation can take multiple forms, as provided by the DOJ in its non-exhaustive list:

1. Identifying individuals substantially involved in or responsible for the misconduct;
2. Disclosing relevant facts and identifying evidence relevant to the government's investigation and not otherwise known to the government;
3. Preserving, collecting and disclosing relevant documents and information outside the scope of existing business practices or legal requirements;
4. Identifying individuals who are aware of relevant information or conduct;
5. Making available for meetings, interviews, examinations or depositions an entity's officers and employees who possess relevant information;

6. Disclosing facts relevant to the government's investigation gathered during the entity's independent investigation with the 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;
7. Providing facts relevant to potential misconduct by third-party entities and third-party individuals;
8. Providing information in native format, and facilitating review and evaluation of that information if it requires special or proprietary technologies;
9. Admitting liability or accepting responsibility for the wrongdoing or relevant conduct; and
10. Assisting in the determination or recovery of the losses caused by the organization's misconduct.

### **Remedial Measures**

The relevant remedial actions that DOJ attorneys are instructed to consider may include:

1. conducting a thorough root cause analysis of the underlying conduct;
2. implementing or improving an effective compliance program to prevent future misconduct;<sup>3</sup>
3. appropriately disciplining or replacing individuals identified as responsible for the misconduct, either through direct participation or failure in oversight, including those with supervisory authority over the area where the misconduct occurred; and
4. any other steps taken by the entity that demonstrate that it recognizes the seriousness

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<sup>3</sup> DOJ will also consider the entity's prior compliance program in making its evaluation of a defendant's liability under the FCA.

of its misconduct, has accepted responsibility for it, and implemented measures to prevent future misconduct, including identification of future risks.

### Credit for Disclosure, Cooperation and Remediation

As in other circumstances involving voluntary self-disclosure, cooperation and remediation, an entity seeking full cooperation credit for FCA cases will have timely disclosed the conduct to government authorities, meaning that disclosure will not have been made under imminent threat of discovery or investigation. This includes identification of all individuals substantively involved or responsible for the misconduct.

Moreover, full cooperation goes beyond disclosure of information as required by law or as response to subpoena or investigative demands. Entities or individuals that conceal involvement of misconduct by senior management or members of the board of directors will not be awarded any credit.

Finally, to receive full credit, entities must take remedial steps to prevent and detect future misconduct.

### Implications for *Qui Tam* Actions

According to the guidance, the Department may consider avenues that would permit an individual to claim credit in FCA cases, including “assisting the entity or individual in resolving *qui tam* litigation with relators.”

In January 2018, the DOJ issued separate guidance, originally published in an internal memorandum, regarding the circumstances in which the DOJ will intervene in a *qui tam* action and move to dismiss.<sup>4</sup>

<sup>4</sup> See U.S. Dep’t of Justice, Civil Div., Commercial Litigation Branch, Fraud Section, Memorandum on Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A), Jan. 10, 2019.

<sup>5</sup> Under the FCA, any private citizen may sue an individual or a business that it alleges is defrauding the government and recover funds on the government’s behalf. The government will investigate the allegation and decide whether or not it will intervene in the case. If the

That guidance was based on increases in the number of *qui tam* actions filed under the FCA by relators and instructed DOJ attorneys to consider moving to dismiss such actions rather than simply declining to participate in order to protect the government’s interests, preserve limited resources, and avoid adverse precedent. As later codified in the Justice Manual, the guidance provides defense counsel with arguments for the far more preferable outcome of dismissal rather than declination to intervene.<sup>5</sup> Those factors for DOJ attorneys to consider, and for defense counsel to argue, include: the lawsuit lacks merit on its face based either on the facts or the law, there is a pre-existing government investigation, the lawsuit would interfere with the agency’s policies or administration of its prerogatives and the lawsuit would lead to the disclosure of classified information or the compromise of national security interests.<sup>6</sup>

This Spring, the United States Supreme Court is expected to issue its long-awaited decision in *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, which presents the question whether a relator in a FCA case where the government has declined to intervene is nonetheless entitled to the benefit of the alternative statute of limitations period that begins to run only when facts material to the right of action are known or should have been known by the Government. Particularly if the Supreme Court holds in favor of the relator in *Cochise Consultancy*, the factors set forth in the guidance and in the policy regarding intervention and dismissal will be important for every company in a FCA case to consider.

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government does not intervene, any recovery will still be for the benefit of the government but the relator will obtain a share of the recovery, typically (in a non-intervened case) between 25 and 30 percent of the recovery, as well as reasonable expenses, attorney’s fees, and costs. 31 U.S.C. 3730(d)(2). Thus, there is a strong incentive for defense counsel to argue for dismissal rather than declination.

<sup>6</sup> See <https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.111>