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DOJ FCA Guidelines Hardly Revolutionary, But Now More Formal

By: Peter Hutt II and Michael Wagner

Frequently hinted at by Justice Department officials in recent speeches and public statements, the new DOJ formal guidelines (the Guidelines) for awarding credit to entities that cooperate in False Claims Act (FCA) investigations are hardly revolutionary in many respects, as they largely memorialize existing discretionary practices for awarding cooperation credit that are well familiar to practitioners in the area.

Nonetheless, the codification of the Guidelines in the Justice Manual may prove to be a significant development, especially if this more formal policy statement results in greater transparency and consistency in settlement discussions with the DOJ.

Unfortunately, the Guidelines leave unresolved certain key questions, and whether the DOJ ultimately achieves its objective of promoting increased disclosure and cooperation will depend substantially on the manner in which the Guidelines are implemented.

Three Ways to Earn Cooperation Credit

The Guidelines outline three ways in which organizations facing potential FCA liability can earn cooperation credit:

1.voluntarily self-disclosing misconduct;
2.cooperating with existing government investigations; and
3.implementing meaningful remedial actions.

Although these are traditional measures of cooperation, the Guidelines offer instructive details about the DOJ's expectations with respect to each category.

First, the Guidelines provide that entities "will receive credit" for voluntarily self-disclosing new misconduct or providing information about additional misconduct after the initiation of an investigation. As discussed further below, however, the Guidelines' definitive statement that entities "will receive credit" for self-disclosures is in tension with later statements in the same document that limit cooperation credit in certain circumstance, including where disclosure of information is required by law or where an investigation is imminent.

Second, the Guidelines include an illustrative list of additional cooperative measures that may result in the receipt of cooperation credit. Among other things, organizations may obtain credit

by identifying individuals substantially involved in the misconduct, making key employees available for interviews, preserving and disclosing documents beyond existing legal requirements, and assisting in the determination or recovery of losses. Under the Guidelines, the DOJ will consider the timeliness, completeness, and usefulness of information provided when determining the value of the cooperation.

Third, appropriate remedial measures, such as the implementation or improvement of corporate compliance programs and the institution of disciplinary actions against individuals responsible for the misconduct, also may generate cooperation credit. Although the Guidelines do not expressly reference it, the DOJ's recently updated "Evaluation of Corporate Compliance Programs" presumably would inform any analysis of whether a compliance program is deserving of cooperation credit.

Observations

Not Groundbreaking. Much of the DOJ Guidelines address practices that already are common among companies facing the prospect of an FCA investigation. For example, companies often provide the DOJ with relevant facts, results of internal investigations, and opportunities to interview witnesses. Likewise, through these disclosures or otherwise, companies often identify individuals involved in the alleged conduct, as well as individuals with relevant knowledge. Similarly, the Guideline's discussion of remedial measures also largely tracks existing practice.

To address issues of potential exclusion, suspension, or debarment from federal programs or contracts, companies have long had a strong interest in implementing or improving compliance programs and in taking appropriate disciplinary actions against individuals involved in misconduct.

Potential for Significant Reduction in Multiplier. One aspect of the Guidelines may break new ground, depending on how it is implemented in practice. The Guidelines provide that maximum cooperation credit "may not exceed an amount that would result in the government receiving less than full compensation" for its asserted losses caused by the organization.

Thus, where a company demonstrates its full cooperation, the Guidelines suggest that the company's liability may be limited to single damages—i.e., less than the double-damages multiplier the statute currently contemplates for cases involving self-disclosure.

If the DOJ in practice is willing to forgo application of a damages multiplier in exchange for a defendant's cooperation, this would represent a significant and welcome change from current practice and would go a long way toward achieving the DOJ's goal of promoting self-disclosure and cooperation.

Of course, this change almost certainly will place even greater emphasis on negotiations over how to calculate damages in the first instance.

Additionally, while the prospect of a resolution with single damages may be enticing in the abstract, it remains to be seen whether the Guidelines provide a sufficiently concrete assurance to prompt companies to voluntarily inform the government of hitherto undisclosed misconduct.

Key Questions Unresolved. The focus on voluntary self-disclosure represents perhaps the most interesting feature of the Guidelines, but the DOJ has left significant questions unanswered on this subject. As the Guidelines recognize, the DOJ has a "strong interest in incentivizing companies . . . to voluntarily disclose" misconduct, but the Guidelines' discussion of cooperation credit for self-disclosures is equivocal.

For example, the Guidelines specifically reference the continuing mandatory disclosure obligation imposed on government contractors under the FAR immediately before declaring that "[c]ooperation does not include disclosure of information required by law." Although it surely cannot be the case that the DOJ intends to deprive government contractors of the opportunity to pursue cooperation credit available to every other industry, the language of the Guidelines does raise questions about the circumstances in which government contractors can receive cooperation credit for self-disclosures.

Presumably, a contractor's choice to disclose any information beyond the mere fact of a potential FCA violation—which is all that is required under the FAR—will entitle the contractor to cooperation credit under the Guidelines.

In addition, even aside from the mandatory disclosure question, it is unclear how broadly the DOJ will interpret the prohibition on granting credit for disclosure of information that is compelled by law or "under an imminent threat of discovery or investigation."

This is an important issue because much of the cooperative conduct outlined in the Guidelines—proffering facts, identifying individuals, etc.—often is undertaken only after the receipt of a government subpoena or CID, even though the conduct itself may not be directly required by the subpoena.

Again, the DOJ surely does not intend for receipt of a subpoena to foreclose the possibility of earning cooperation credit for subsequent disclosures of relevant information, but the ambiguity in the Guidelines may not be particularly reassuring for companies weighing self-disclosure.

These questions are substantial, and so long as they remain unresolved they will dampen industry enthusiasm for providing disclosures and cooperation in the FCA context. But to the extent that the DOJ clarifies the intent of the Guidelines, whether through additional policy statements or course of dealing in the field, the Guidelines might fulfill the DOJ's apparent hope of kick-starting a new era of transparency and cooperation between FCA defendants and their regulators.