

DOJ SELF-DISCLOSURE AND COOPERATION CREDIT

The DOJ's recent revisions to its Justice Manual created a new path for self-disclosing potential fraud to the government – one which is unique in its ability to defray the costs of potential False Claims Act violations.

In 2015, Deputy Attorney General Sally Quillian Yates released a memo entitled *Individual Accountability for Corporate Wrongdoing*, more commonly known as the Yates Memo.^[1] The Yates Memo ordered a focus on identifying individuals responsible for corporate FCA violations. It was also the first official mention of applying the concept of cooperation credit, generally used in criminal sentencing, to the government's settlement considerations in civil FCA cases. In the Yates Memo, the DOJ linked cooperation credits to corporations providing it with information about individuals involved in the alleged misconduct, "regardless of their position, status, or seniority"^[2] and noted that credit for cooperation would only be provided in civil matters if entities provided facts regarding individuals' misconduct too.

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation.^[3]

In May 2019, the DOJ, in an apparent follow-up to the Yates Memo, updated its Justice Manual to include guidance for awarding cooperation credit in civil FCA cases.^[4] For the first time, the DOJ expressly described the unique benefit to a potential FCA defendant in self-reporting to the DOJ – significant reduction in FCA fines and penalties – an advantage not offered by other forms of self-disclosure. The guidance encourages corporations to voluntarily self-disclose misconduct and cooperate with the DOJ. In return for taking steps like identifying involved individuals, undertaking more extensive data preservation, investigating and analyzing the root cause of the misconduct, implementing disciplinary action and implementing or improving the compliance program, the DOJ will consider awarding cooperation credit.

The guidance identified three specific actions which may justify cooperation credit: (1) voluntary disclosure to the DOJ; (2) ongoing cooperation with an investigation; and (3) remediation. First, voluntary disclosure to the DOJ could justify cooperation credit if it is "proactive, timely, and voluntary self-disclosure to the Department."^[5] Additional credit would apply to entities that self-disclose additional misconduct outside the original scope discovered during an investigation into the entity's, or the DOJ's, original concerns.^[6] It will also consider self-reporting to a relevant agency, public acknowledgement of the self-disclosure and assistance in resolving any *qui tam* litigation with a relator, if relevant.^[7]

Second, ongoing cooperation with a government investigation could also justify cooperation credit. The guidance provides an illustrative list of cooperative measures, including:

- Identifying individuals responsible for the misconduct;
- Preserving and disclosing relevant documents and providing them in native format to facilitate review;
- Identifying individuals with knowledge about the misconduct;
- Admitting liability or accepting responsibility; and
- Helping recover losses for the misconduct.^[8]

But the DOJ made clear it will weigh additional acts that assist an ongoing investigation.

Third, the DOJ will also look to remedial measures, including measures to address the root cause of the problem, improvement of a compliance program, discipline of those responsible and anything else that demonstrates recognition of misconduct, acceptance of responsibility and affirmative measures to prevent repetition of misconduct.^[9]

The credit is discretionary with the DOJ and generally results in reduced penalties or damages multiplier available under the FCA. The maximum credit available would be single damages plus lost interest, investigative costs and relator share, if relevant.^[10]

The DOJ's new guidance offers a unique remedy other self-reporting mechanisms might not, including through the OIG's Provider Self-Disclosure Protocol or CMS's Self-Referral Disclosure Protocol ("SRDP"): a potentially significant reduction of FCA fines and penalties. All the cooperation credit opportunities enumerated in the new guidance can be achieved only through self-disclosure to the DOJ itself. With this in mind, health care providers considering self-disclosure through the OIG Self-Disclosure Protocol or CMS's SRDP may wish to consult with counsel about seeking credit through the new DOJ guidance.

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[1] Yates, Sally, *Individual Accountability for Corporate Wrongdoing*, USDOJ (September 9, 2015), <https://www.justice.gov/dag/file/769036/download>.

[2] Yates, Sally, *Individual Accountability for Corporate Wrongdoing*, p. 3.

[3] Id.

[4] *Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual*, Department of Justice, Office of Public Affairs, May 19, 2019.

[5] *Justice Manual*, § 4-4.112. May 19, 2019.

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] Id.