

Report on Medicare Compliance Volume 28, Number 18. May 13, 2019 In FCA Policy, DOJ Tells How to Get Cooperation Credit; It May Raise Bar for Double Damages

By Nina Youngstrom

In a new policy, the Department of Justice (DOJ) explains what it takes for organizations to get cooperation credit in False Claims Act (FCA) cases, which will reduce their penalties. In broad strokes, DOJ expects self-disclosure, remediation, or cooperation in an investigation, including “identifying individuals substantially involved in or responsible for the misconduct,” although U.S. attorneys have “discretion” in applying the policy, which was announced May 7.

There has always been enlightened self-interest in cooperating, but DOJ may be raising the bar for what used to be the rule of thumb—double damages in an FCA settlement, says attorney Becky Martin, former health care fraud coordinator at the U.S. Attorney’s Office for the Southern District of New York. “Before this guidance came out, discussions about cooperation conceptualized its benefits more in terms of the carrot, but what we may be seeing is also a stick,” says Martin, now with McDermott Will & Emery in New York City. “Without cooperating, you won’t get credit.” Otherwise, the policy is short on details. “There are still no tiers or points for particular types of cooperation and no way to know what credit you will get,” she says.

The policy (Sec. 4-4.112 of the *Justice Manual*) describes three main ways to get maximum corporate credit in an FCA case:

1. **Voluntary self-disclosure:** “Entities or individuals that make proactive, timely, and voluntary self-disclosure to the Department about misconduct will receive credit during the resolution of an 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.”
 2. **Other forms of cooperation:** Organizations may earn credit by cooperating in a government investigation, and the policy lists the kinds of activities that will be given credit, although it’s not exhaustive. Here are some of them:
 - a. “Identifying individuals substantially involved in or responsible for the misconduct;
 - b. 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;
 - c. Preserving, collecting, and disclosing relevant documents and information relating to their provenance beyond existing business practices or legal requirements;
 - d. Identifying individuals who are aware of relevant information or conduct, including an entity’s operations, policies, and procedures; and
 - e. Making available for meetings, interviews, examinations, or depositions an entity’s officers and employees who possess relevant information.”
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3. **Remedial measures in response to the FCA violation:** This includes a thorough root cause analysis, implementing or improving an effective compliance program to prevent a recurrence of the misconduct, and disciplining people who were responsible for it and their supervisors.

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