GIBSON DUNN

May 14, 2019

COOPERATION CREDIT IN FALSE CLAIMS ACT CASES: OPPORTUNITIES AND LIMITATIONS IN DOJ'S NEW GUIDANCE

To Our Clients and Friends:

On May 7, 2019, the U.S. Department of Justice ("DOJ") released long-awaited guidance on when DOJ will award cooperation credit to targets of False Claims Act ("FCA") enforcement. But those familiar with FCA enforcement are unlikely to find any big surprises in the guidance. Instead, the guidance echoes longstanding DOJ expectations with respect to cooperation and remediation and reaffirms recent DOJ pronouncements regarding how companies may secure credit by identifying individual wrongdoers. Further, DOJ emphasizes, yet again, that entities seeking maximum cooperation credit should voluntarily self-disclose misconduct. As to the value of cooperation to defendants, DOJ's new guidance caps the credit a defendant may receive: under the guidance, the credit may not result in a defendant paying less than single damages. But DOJ offers little detail on the quantum of cooperation necessary to secure single damages, and the award of cooperation credit remains discretionary. This discretion creates uncertainty, but may also present FCA defendants with the opportunity to argue for lower settlement payments during settlement negotiations with DOJ. It remains to be seen which way this discretion cuts in practice.

Background

DOJ's guidance results from a long-running effort, started after the issuance of the 2015 Yates Memorandum, to describe in more detail the bases for cooperation credit in a variety of civil and criminal enforcement contexts. As discussed in a previous Gibson Dunn alert, DOJ announced in June 2018 that it was working to promote more fair and consistent enforcement activities under the FCA, and it pledged to promulgate new and potentially expanded policies on cooperation credit. In November 2018, Deputy Attorney General Rod Rosenstein likewise signaled a retreat from the "all or nothing" approach to cooperation set forth in the Yates Memorandum, announcing, for example, that partial cooperation credit might be available in civil fraud cases, and that companies need not identify *all* individuals involved in the misconduct at issue, just those "substantially involved."

Forms of Cooperation

The FCA guidance released on Tuesday, which is codified in Section 4-4.112 of DOJ's Justice Manual, follows those announcements by allowing more flexibility in terms of what defendants can provide to the government in exchange for cooperation credit.

Self-Disclosure. In a press release issued along with the new guidance, Assistant Attorney General Jody Hunt made clear that voluntary self-disclosure—i.e., proactively approaching the government to report potential violations—is still "the most valuable form of cooperation." Under the new guidance, such disclosure should be both "proactive" and "timely"—characteristics the guidance leaves open to interpretation. Disclosure of misconduct going beyond the scope of concerns known to DOJ will further qualify a defendant for credit.

Other Forms of Cooperation. The new DOJ guidance also includes an illustrative, non-exhaustive list of ten forms of cooperation that may earn a defendant "some cooperation credit." In addition to voluntary disclosure, defendants may also earn credit for taking other actions that "meaningfully assist[]" DOJ in its FCA investigation. Such actions include:

- identifying individuals "substantially involved in or responsible for" misconduct;
- disclosing facts or evidence relevant to potential misconduct by third parties (or facts or evidence not already known to the government);
- preserving and disclosing relevant information beyond existing business practices or legal requirements;
- identifying and making available individuals with relevant information;
- attributing facts to specific sources and providing updates on any internal investigation;
- admitting liability or accepting responsibility for the relevant conduct; and
- assisting in the determination or recovery of losses.

The guidance emphasizes that defendants are not required to waive attorney-client privilege or work product protection to be eligible for credit.

Not surprisingly, actions that do *not* qualify for cooperation credit under the guidance include disclosure of information that is required by law or is under "imminent threat" of discovery or investigation, as well as "merely" responding to a subpoena or demand for information. The guidance does not define terms such as "imminent threat," potentially opening the door to significant DOJ discretion.

The Value of Cooperation

Under the new guidance, the "value" of any cooperation also will impact DOJ's calculus regarding cooperation credit. To assess value, DOJ will consider four factors relating to the assistance or information provided by a defendant: (1) timeliness and voluntariness; (2) truthfulness, completeness, and reliability; (3) nature and extent; and (4) significance and usefulness to the government. In the new guidance, DOJ also emphasizes the importance of remedial measures, such as implementing or improving a compliance program and acknowledging and accepting responsibility.

Benefits of Cooperation

As noted, one aspect of the new guidance that may be met with disappointment is the general lack of clarification or concrete details regarding the benefits of cooperation.

The guidance sets a ceiling for the credit a defendant may receive. Specifically, cooperation credit may not result in the government receiving *less* than "full compensation for the losses caused by the defendant's misconduct," including damages, interest, the costs of investigation, and any relator's share. Further, the guidance lists some non-monetary ways in which DOJ might recognize cooperation, such as notifying another agency of, or publicly acknowledging, the cooperation, or assisting the defendant in *qui tam* litigation.

As members of the FCA defense bar know, double damages are the frequent result when negotiating resolutions of FCA investigations—so the promise of single damages in return for full cooperation has some value. But the guidance provides no specific information about how much of a benefit defendants might expect for cooperation, nor does it offer a means by which a defendant might quantify, calculate, or estimate the benefit. This lack of specific information, while contributing to ongoing uncertainty, may also create an opportunity for defendants to advocate for cooperation credit and lower settlement amounts without any fixed set of limitations on what DOJ may agree to provide, aside from the floor of single damages. Yet, even in the case of single damages, the guidance is silent as to how those single damages must be calculated and whether litigation risk may factor into the calculation. All of these factors combined create the possibility of robust negotiations over cooperation credit, even under this new framework.

DOJ's silence on the precise benefits of cooperation in the FCA context stands in contrast to cooperation frameworks in other contexts. For example, under the FCPA Corporate Enforcement Policy ("FCPA Policy"), it is clear that companies that (1) voluntarily disclose, (2) fully cooperate, and (3) timely and appropriately remediate misconduct "will receive a declination" absent aggravating circumstances. The FCPA Policy defines each of the three elements of cooperation—which are similar in substance to those set out in the new guidance—providing a clearer, albeit not ambiguity-free, roadmap to receiving credit. Notably, the FCPA Policy also quantifies the value of cooperation, stating, for example, that a defendant that did not initially disclose misconduct but later does can expect to receive "up to a 25% reduction" off the low end of the sentencing guidelines. DOJ's guidance in the FCA context is not so explicit.

Cooperation Versus "Outsourced" Investigations

Although DOJ's new guidance is unabashed in its solicitation of "meaningful[]" investigative assistance, just how prescriptive DOJ may be without risking exclusion of some evidence it gathers remains an open question.

Just over a week ago, Chief Judge McMahon of the U.S. District Court for the Southern District of New York issued an opinion (in a criminal, non-FCA case) stating that she was "deeply troubled" by the government in effect "outsourcing" its investigation to its target, which was seeking to cooperate. *See*

Mem. Decision and Order Den. Def. Gavin Black's Mot. for *Kastigar* Relief, *United States v. Connolly*, No. 16 Cr. 0370 (CM) (S.D.N.Y. May 2, 2019). Judge McMahon concluded that the target's lawyers appeared to have done "everything that the Government could, should, and would have done had the Government been doing its own work," *id.* at 24, and that the internal investigation was therefore fairly attributable to the government, *id.* at 29. As a result, Judge McMahon held that the individual defendant's statements to a law firm conducting an investigation on behalf the individual's corporate employer were effectively compelled statements to the government (under the line of cases beginning with *Garrity v. New Jersey*, 385 U.S. 493 (1967)). *See Connolly*, No. 16 Cr. 0370 (CM), at 21, 28–29.

As a criminal case, *Connolly* involves different considerations (and constitutional protections). Nevertheless, it suggests that courts may play—and potentially embrace—a role in distinguishing "cooperation" from compulsion in future cases (particularly FCA matters with parallel civil and criminal components).

* * * * *

Time will tell whether DOJ's lack of specificity with respect to the benefits of cooperation will limit the impact of the new guidance on cooperation credit in FCA enforcement. But, at the very least, defendants will have factors to consider—and single damages to hope for—based on DOJ's latest addition to the Justice Manual.

* * * * *

Time will tell whether DOJ's lack of specificity with respect to the benefits of cooperation will limit the impact of the new guidance on cooperation credit in FCA enforcement. But, at the very least, defendants will have factors to consider—and single damages to hope for—based on DOJ's latest addition to the Justice Manual.

The following Gibson Dunn lawyers assisted in preparing this client update: F. Joseph Warin, Stuart Delery, John Partridge, Jonathan Phillips, Julie Hamilton and Reid Rector.

Gibson Dunn's lawyers have handled hundreds of FCA investigations and have a long track record of litigation success. Our lawyers are available to assist in addressing any questions you may have regarding the above developments. For more information, please feel free to contact the Gibson Dunn attorney with whom you work or the any of the following.

Washington, D.C.
F. Joseph Warin (+1 202-887-3609, fwarin@gibsondunn.com)
Stuart F. Delery (+1 202-887-3650, sdelery@gibsondunn.com)
Joseph D. West (+1 202-955-8658, jwest@gibsondunn.com)
Andrew S. Tulumello (+1 202-955-8657, atulumello@gibsondunn.com)
Karen L. Manos (+1 202-955-8536, kmanos@gibsondunn.com)

Stephen C. Payne (+1 202-887-3693, spayne@gibsondunn.com)
Jonathan M. Phillips (+1 202-887-3546, jphillips@gibsondunn.com)

New York
Reed Brodsky (+1 212-351-5334, rbrodsky@gibsondunn.com)
Alexander H. Southwell (+1 212-351-3981, asouthwell@gibsondunn.com)

Denver
Robert C. Blume (+1 303-298-5758, rblume@gibsondunn.com)
Monica K. Loseman (+1 303-298-5784, mloseman@gibsondunn.com)
John D.W. Partridge (+1 303-298-5931, jpartridge@gibsondunn.com)
Ryan T. Bergsieker (+1 303-298-5774, rbergsieker@gibsondunn.com)

Dallas
Robert C. Walters (+1 214-698-3114, rwalters@gibsondunn.com)

Los Angeles
Timothy J. Hatch (+1 213-229-7368, thatch@gibsondunn.com)
James L. Zelenay Jr. (+1 213-229-7449, jzelenay@gibsondunn.com)

Palo Alto
Benjamin Wagner (+1 650-849-5395, bwagner@gibsondunn.com)

San Francisco
Charles J. Stevens (+1 415-393-8391, cstevens@gibsondunn.com)
Winston Y. Chan (+1 415-393-8362, wchan@gibsondunn.com)