

AN A.S. PRATT PUBLICATION

OCTOBER 2019

VOL. 5 • NO. 10

PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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EDITOR'S NOTE: THE NDAA

Victoria Prussen Spears

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Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

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DOJ Guidelines Incentivize Companies to Self-Disclose and Cooperate in False Claims Act Cases

*By Maurice Bellan, William Devaney, Marilyn Batonga, Daniel Fiedler, and Courtney Giles**

The authors of this article discuss the U.S. Department of Justice's Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters, which identify various factors that the Department will consider in issuing credit to companies that voluntarily disclose misconduct that could serve as the basis for False Claims Act violations, or companies that otherwise cooperate in ensuing investigations.

The U.S. Department of Justice (“DOJ”) has issued Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters,¹ which identify various factors that the Department will consider in issuing credit to companies that voluntarily disclose misconduct that could serve as the basis for False Claims Act (“FCA”) violations, or companies that otherwise cooperate in ensuing investigations. While the policy incentivizes companies to make voluntary self-disclosures to obtain maximum credit, other forms of cooperation can also earn meaningful credit, and any credit awarded will vary depending on the circumstances in particular cases.

TYPES OF CREDIT

Credit provided to a company can take the form of a reduction in civil penalties or impact the amount of the damages multiplier sought in the case. In any event, the maximum credit awarded may not exceed an amount that would result in the government receiving less than full compensation for the losses

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¹ https://www.justice.gov/jm/jm-4-4000-commercial-litigation?utm_medium=email&utm_source=govdelivery#4-4.112.

caused by the defendant's misconduct. These losses can include not only the government's damages, but also lost interest, the government's costs in the investigation, and the relator share. However, the DOJ may also consider other avenues for crediting an entity's or individual's cooperation such as notifying a relevant agency about the cooperation so that the agency can take it into consideration during administrative or debarment proceedings, public acknowledgement of the entity's cooperation, or even assisting the entity in resolving qui tam litigation.

HOW TO MAXIMIZE CHANCES FOR A CREDIT

To maximize the chances that the disclosing party will receive credit in the resolution of an FCA matter, the disclosure must not only be voluntary but proactive and timely. For example, prompt and complete cooperation as a result of receiving a subpoena generally will not increase a company's chances of receiving credit. The new guidelines set out a non-exhaustive list of the forms of cooperation that the DOJ will take into account when deciding whether to give cooperation credit and how much credit to give if it decides to do so. These measures include:

- Identifying individuals substantially involved or responsible for the misconduct;
- 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;
- Preserving, collecting, and disclosing relevant documents and information beyond existing business practices or legal requirements;
- Identifying individuals who are aware of relevant information or conduct, including an entity's operations, policies, and procedures;
- Making officers and employees who possess relevant information available for meetings, interviews or depositions;
- Disclosing facts relevant to the government's investigation gathered during the company's independent investigation;
- Providing facts relevant to potential misconduct by third-party entities and third-party individuals;
- Facilitating the review and evaluation of information if it requires proprietary technologies so that the information can be evaluated;
- Admitting liability or accepting responsibility for the relevant conduct; and

- Assisting in the determination or recovery of the losses caused by the company's misconduct.

The Department will also consider whether the company took appropriate remedial measures in response to the FCA violation, including implementing or improving an effective compliance program or disciplining or replacing those responsible for the misconduct. It is expected that prosecutorial determinations regarding the assessment and adequacy of a company's corporate compliance program to be "closely aligned" with the Justice Manual (formerly known as the U.S. Attorneys' Manual), the U.S. Sentencing Guidelines, and other Department policy. This is consistent with the recent guidance issued by the DOJ on April 30, 2019.

The guidelines are consistent with recent efforts by the Department to exercise more control over FCA investigations and litigation. In January 2018, a leaked memo from Michael Granston, director of the DOJ's Commercial Litigation Branch, Fraud Section, instructed Department attorneys to consider seeking dismissal of actions brought by whistleblowers when these FCA suits do not serve the federal government's best interests. The framework from what came to be known as the "Granston Memo" was incorporated into the Justice Manual in September 2018.

KEY TAKEAWAYS

Given the treble damages risk and that penalties for FCA violations have doubled since the enactment of the Bipartisan Budget Act of 2015, a formal pathway for reducing the financial impact of FCA cases is a welcomed event. However, it must be noted that the new guidelines do not change the preexisting legal obligations of an entity or individual to report or cooperate with the federal government. For example, the requirement to disclose credible evidence of certain violations of law required by the Federal Acquisition Regulations are not superseded by these guidelines.²

It is worthwhile highlighting that disclosure is not the only method of cooperation that can earn credit. While merely responding to a subpoena or other compulsory process for information will not earn cooperation credit, meaningful assistance such as provision of additional relevant documents, other proactive support in understanding the relevance of certain information, or any of the above listed actions can also earn cooperation credit, even if an investigation was not initiated through self-disclosure.

To be sure, the DOJ acknowledges that self-disclosure of violations, while encouraged, can and does affect negotiations with other agencies. As credit for

² See Contractor Business Ethics Compliance Program and Disclosure Requirements, 48 C.F.R. pts 2. 3. 9, 42 and 52.

disclosure or other forms of cooperation, the DOJ may consider notifying other agencies of the cooperation so that it can be taken into consideration during administrative proceedings including those for suspension and debarment. As such, the timing and nature of self-disclosure, cooperation with authorities, and remedial actions must be carefully crafted and coordinated to achieve the most favorable results.