DOJ's New Civil Division Cooperation Guidelines For False Claims Act

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On the heels of the DOJ Criminal Division’s revisions to its Corporate Enforcement Policy to encourage cooperation, the Civil Division’s Commercial Litigation Branch has issued its own cooperation guidelines that identify a non-exhaustive list of types of cooperation that may entitle entities or individuals to cooperation credit. The guidelines also discuss how a potential cooperation credit should be calculated, including the size of the credit and the impact of remedial measures. Companies can use these guidelines to refine their cooperation strategies and methods during False Claims Act (“FCA”) investigations.

The types of incentivized cooperation listed—such as the most strongly encouraged “Voluntary Disclosure,” plus others such as “Identifying individuals substantially involved in or responsible for the misconduct” and “Admitting liability or accepting responsibility”—are not surprising. Nevertheless, it is helpful that the Commercial Litigation Branch drafted a formal written policy so all companies can operate under the same set of information. In other words, the Civil Division is now following the Criminal Division by memorializing its informal practices in a uniform set of guidelines.

Companies, and their attorneys, will note the Civil Division’s strong respect for the attorney-client privilege. The guidelines make clear that satisfying its cooperation standards does not require turning over any “information subject to attorney-client privilege or work product protection.” The guidelines also bar DOJ attorneys from seeking privileged information in exchange for cooperation credit, providing that “[e]ligibility for credit… is not predicated on waiver of the attorney-client privilege or work product protection, and none of the guidelines herein require such a waiver.”

Yet the guidelines emphasize that not all helpful cooperation can lead to cooperation credit. The key question is whether the cooperation is voluntary. Examples of compelled cooperation that cannot lead to any credit include “responding to a subpoena, investigative demand, or other compulsory process for information,… the disclosure of information that is under imminent threat of discovery or investigation,” and “any preexisting obligation an entity… has under the law to report to or cooperate with the federal government.” The DOJ will not grant cooperation credit to companies for doing something they are legally required to do.

The DOJ chose not to set—or even recommend or discuss—what particular degree of cooperation credit would be appropriate in various circumstances. Delineating more specific steps may have led to companies and individuals trying to calculate whether it was worth cooperating in their particular situations. By leaving the scope of the credit open, the DOJ encourages cooperation across the board. The only specific limit on the size of the cooperation credit is that it “may not exceed an amount that would result in the government receiving less than full compensation for the losses caused by the defendant’s misconduct.”

The guidelines are now must-read material for a company considering cooperation in an FCA investigation.

For more information, please contact Jonathan S. Feld at 312-627-5680 or jfeld@dykema.com, Andrew VanEgmond at 734-214-7603 or avanegmond@dykema.com, or your Dykema relationship attorney.

Attorneys

Jonathan S. Feld
Andrew T. VanEgmond
Practice Areas

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