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New DOJ Guidance on "Cooperation Credit"

By Michael W. Peregrine and Tony Maida, McDermott Will & Emery LLP, and Katherine Lauer, Latham & Watkins LLP

It's been a busy few months for the Department of Justice (DOJ) and its antifraud enforcement policies, with fairly important implications for health care systems, their chief legal officers and compliance officers, and their audit & compliance committees.

First was the Criminal Division's April 30 release of the guidance document, entitled *The Evaluation of Corporate Compliance Programs*. Second was the Civil Division's May 7 release of formal guidance on how DOJ awards credit to defendants who cooperate with DOJ during a False Claims Act (FCA) investigation.

The Corporate Compliance guidance has been the subject of substantial media coverage and countless law firm client memoranda, and appropriately so given the value of its direction on compliance program effectiveness. The Cooperation Credit guidance also has received similar attention from lawyers who defend organizations in FCA investigations. However, we suggest that the cooperation credit guidance is not limited to FCA practitioners, but also holds important lessons for a broader legal, compliance, executive, and board audience, particularly given the frequency with which health care systems become involved with DOJ in FCA-related investigations. The health system's chief legal officer and its compliance officer will want to brief key internal constituencies on both developments.

General Concepts of Cooperation Credit

The Cooperation Credit guidance reflects DOJ's stated interest in incentivizing companies to make voluntary disclosures of misconduct and to cooperate with DOJ investigators. As memorialized in the Justice Manual, the guidance identifies how cooperation credit in FCA cases may be earned: by (1) voluntarily disclosing misconduct unknown to the government (which DOJ says is the most valuable form of cooperation); (2) cooperating in an ongoing investigation; or (3) undertaking remedial measures in response to a violation (e.g., through new or improved compliance programs).

Credit in the Context of an Investigation

Notably, the guidance allows for cooperation credit even in situations where the government already has initiated an investigation. But in order to earn such credit, the company has to do something more than simply respond to a subpoena or other document demand—the company must take some other action to assist the investigation that goes beyond its legal obligations. For example, a health system may be entitled to credit for sharing with the government the results of its internal investigation of the alleged conduct. A health system may be entitled to additional credit for making a voluntary self-disclosure of other misconduct outside the scope of the government's existing investigation that the health system discovers in the course of its own internal investigation that is unknown to the government. As another example, a health system may be entitled to credit where it (1) preserves relevant documents and information beyond existing business practices or legal requirements; (2) identifies individuals who are aware of relevant information or conduct; and (3)

facilitates review and evaluation of data or information that requires access to special or proprietary technologies. In all, the guidance lists ten different types of cooperative activities—and this list is not exhaustive according to DOJ.

Credit in Response to Corrective Action

The new guidance also provides a means by which cooperation credit may be extended based on corrective action that a company has implemented in response to an FCA violation. "Qualifying" corrective action might include (1) undertaking a thorough analysis of the root cause of the misconduct; (2) appropriately disciplining or replacing those corporate agents determined responsible for the misconduct; (3) accepting responsibility for the violation; and (4) implementing or (more likely) improving compliance programs to prevent an occurrence.

These are all topics that are stressed in DOJ's new compliance guidance as indicators of compliance program effectiveness. The health system's chief legal officer will want to emphasize to its internal clients the relatedness between the two guidance documents in this and other instances.

Cooperation Credit, Manifested

The Cooperation Credit guidance also addresses the ways in which a company can benefit from earning cooperation credit. The most obvious and immediate manifestation is in the form of a reduction in the damages multiplier and civil penalties attributed to the company in the context of an FCA violation. A second manifestation is the circumstance in which the DOJ will notify a relevant agency concerning the company's voluntary disclosure, cooperation, or remediation so that the other agency may take those actions into account when evaluating how to apply administrative remedies to the company. Lastly, cooperation credit may be manifested through a public DOJ acknowledgment of the company's cooperation.

It bears noting, when setting organizational expectations, that the actual, tangible value cooperation will garner in any individual case remains unclear. One the one hand, DOJ says the maximum credit that a defendant may earn 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 (including the government's damages, lost interest, costs of investigation, and relator share). This calculation may still represent a significant payment, for which DOJ is silent on whether a litigation risk assessment or discount is available in some situations. And DOJ will not commit to any particular formula even if the maximum cooperation credit is earned. But the suggestion that DOJ could settle an FCA matter and provide an FCA release for something less than double damages is a departure from DOJ's historical position and indicates the possibility of resolving FCA matters for a lower multiple even where the government does not face significant litigation risk.

In addition, the Department of Health and Human Services Office of Inspector General (OIG) has previously stated that it considers cooperation in placing a defendant on the permissive exclusion "risk spectrum." Absent a self-disclosure, low damages, or a successor owner situation, cooperation generally does not move the needle, at least currently, on whether OIG seeks a corporate integrity agreement as part of the resolution. On the other hand, the public acknowledgement of cooperation may be beneficial from a public and investor relations perspective, which can have substantial value in managing the aftermath of an FCA settlement.

Corporate Governance Implications

In these and other ways, DOJ's release of the Cooperation Credit guidance is relevant to the work and responsibilities of the board, and its audit & compliance committee.

Whether to pursue cooperation credit in the context of an FCA investigation can be an important decision not only for senior executive leadership of a health care system, but also for its board of directors, which may have the final internal responsibility for such a decision (likely based on the recommendation of the audit & compliance committee). This is especially the case if there are any

potential conflicts with the management team in terms of pursuing specific recommended corrective action.

The board, and particularly its audit & compliance committee, will benefit from a general awareness of the new DOJ guidance, and with the concept of cooperation credit in particular. In addition, there is substantial interrelationship between the implementation of DOJ's policies in the cooperation credit context and those in the compliance program effectiveness context. There are meaningful efficiencies in a coordinated approach, through the chief legal officer and the compliance officer, to educating the committee on these two new developments and in recommending responsive internal action.

About the Authors:

Mr. Peregrine and **Mr. Maida** are partners in the law firm of McDermott Will & Emery, and **Ms. Lauer** is a partner in the law firm of Latham & Watkins.