

White Collar Defense & Investigations



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DOJ Revises Yates Memo and Relaxes Approach to Corporate Cooperation Credit

The Department of Justice (“DOJ”) announced that it is stepping back from its hard-line approach to corporate cooperation credit in which a corporation was not eligible for credit unless it disclosed all relevant facts about all individuals involved in corporate misconduct. Under the new policy, a corporation will be eligible for cooperation credit so long as it identifies “all individuals substantially involved in or responsible for the misconduct at issue.” Partial cooperation credit will also be available in some instances. Companies under investigation by the DOJ or those that discover corporate misconduct may be able to leverage this change to negotiate for increased cooperation credit. However, companies still need to be forthcoming when cooperating with the DOJ and not try to protect individuals responsible for the wrongdoing.

On November 29, 2018, at the 35th International Conference on the Foreign Corrupt Practices Act, Deputy Attorney General Rod Rosenstein announced revisions to DOJ corporate enforcement policies, specifically the Yates Memo. The changes may make it easier for a corporation to earn cooperation credit because the all-or-nothing approach that had been pursued under the Yates Memo no longer applies. While the DOJ will continue to focus on individuals, there will be greater flexibility and discretion in awarding cooperation credit. Rosenstein also noted the importance of timely resolving these investigations to allow the government to recover fraudulent proceeds, deter future violations, and reward companies that have implemented effective compliance programs.

Under the Yates Memo, issued in September 2015, a corporation was not eligible for any cooperation credit

unless it provided the DOJ with all relevant facts about the individuals involved in corporate misconduct. This required a corporation to identify *every* individual that was *at all* involved in the misconduct—regardless of their status, seniority, or role—or else risk not receiving cooperation credit. Partial credit was not available. According to Rosenstein, this strict policy was not always practical and has been revised to account for the real-world limitations.

Now, a company seeking cooperation credit in criminal cases must identify every individual who was “substantially involved in or responsible for” the criminal conduct. Although “substantially involved” is not defined, Rosenstein noted that the DOJ is focused on individuals who played a significant role, including those who authorized or knew about the misconduct. Also, in some instances, a company may still be eligible for partial credit, even if it is unable to

identify all relevant individuals or provide complete factual information. Similarly, in the civil context, DOJ attorneys now have more discretion to provide cooperation credit on a sliding scale, based on the amount of cooperation from the company.

Despite this policy change, many things remain the same. The DOJ explicitly noted that it remains committed to prosecuting white collar crimes and that pursuing individuals responsible for wrongdoing will be a top priority in every corporate investigation. Additionally, corporations still must engage in full and frank discussions with prosecutors if they want to receive cooperation credit.

Overall, this announcement does not so much reverse DOJ policy but rather provides prosecutors with more flexibility. This increased flexibility should give a company seeking cooperation credit more room to negotiate without first tracking down every employee who may have been involved in the misconduct. Still, a company facing a DOJ probe should remain prepared to be forthcoming with the DOJ and cannot expect to protect individuals from criminal liability.

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