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The Yates Memo – DOJ Issues Questions And Answers: Question 2

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****This is the third in a series of blog posts that** examines **seven FAQs issued by the DOJ** in an effort to clarify certain aspects of its Individual Accountability Policy—as articulated in the "Yates Memo." The second of these questions concerns what a company is required to do to earn cooperation credit.* *Question:* What else, in addition to providing the DOJ with all non-privileged relevant information about individuals involved in misconduct, is a company required to do to earn cooperation credit? *Answer:* The United States Attorneys' Manual ("USAM") identifies several factors that will be considered by the Department of Justice to determine the level of cooperation credit a company will receive. In short, the level of cooperation credit the DOJ will bestow directly correlates with the level of cooperation a company demonstrates.

As noted in our most recent post on this topic, providing all non-privileged relevant information about individuals who participated in the misconduct in question is the *threshold* requirement for receiving cooperation credit. *How* a company cooperates will determine the actual credit a company receives. The USAM identifies factors such as "the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation" that will be considered when determining cooperation credit. *See* USAM 9-28.700 fn. 1. Therefore, it is not enough to provide the DOJ a list of the names of individual bad actors. That only gets you to the starting line. To earn cooperation credit, the DOJ expects a level of cooperation that will aid in the speedy resolution of the agency's criminal investigation. As stated in the USAM, "a corporation's cooperation may be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so expeditiously." Let's distill the expectations highlighted in the USAM. First, the DOJ will expect a company to immediately affirm its commitment to fully cooperate with the agency's criminal investigation (the USAM's use of "timeliness" clearly being a euphemism). Second, the DOJ will expect the company to conduct a sufficiently thorough and comprehensive internal investigation. Lastly, there is an expectation that the company will be "proactive" or take the initiative in its cooperation without being encouraged (or coerced) by the DOJ to do so. These expectations may pose challenges to companies and their counsel. Needless to say, competent counsel should (in most cases) be proactive in engaging the DOJ, or any other investigative agency for that matter. Similarly, counsel should immediately initiate a comprehensive internal investigation to identify any potential wrongdoing. However, there are risks to being *too*

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proactive. Counsel has an ethical obligation to protect the best interests of the company it represents, and must avoid at all costs becoming an extension of the government's enforcement efforts. Counsel must advocate, not prosecute. Therefore, care should be taken when deciding the extent to which a company will be proactive in its cooperation with the DOJ. Navigating this potential minefield will be no easy task. We will no doubt see successes and failures as we venture into the uncharted waters of the DOJ's individual accountability initiative. But it is critically important to remember that the government's *interpretation* of one's level of cooperation will influence the level of cooperation credit the agency affords. At the very least, counsel should be prepared to establish an open line of communication with the DOJ, and demonstrate a level of transparency with respect to how an internal investigation is being conducted and the extent to which a company and its counsel are working to uncover any wrongdoing.