

The Yates Memo – DOJ Issues Questions And Answers: Question No. 1

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****This is the second 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 first of these questions concerns the change in corporate cooperation requirements.***

Question: How did the Individual Accountability Policy change the requirements of corporate cooperation?

Answer: Before the Individual Accountability Policy (the “Policy”) took effect, the United States Attorneys’ Manual (“USAM”) identified a company’s “willingness to provide relevant information and evidence and identify relevant actors” as one of several factors that a prosecutor “may consider” in determining the nature and extent of the company’s cooperation. Thus, a company could be eligible for some degree of cooperation credit even if it hadn’t disclosed basic facts about who did what.

Under the policy, a company must turn over all non-privileged relevant information about the individuals involved in the misconduct in order to receive any consideration for cooperation. This is a threshold requirement, and unless it is satisfied, the company will be ineligible for cooperation credit. The takeaway here is that the policy removed some amount of prosecutorial discretion—government attorneys may no longer give cooperation credit to companies that fail to provide “basic facts about who did what.” Indeed, the DOJ’s guidance makes clear that a company failing to satisfy this threshold requirement will not be eligible for cooperation credit (regardless of what the prosecuting attorney may think about the company’s willingness to provide information). Thus, a company looking to receive cooperation credit should carefully consider whether it has turned over to the government “all non-privileged relevant information about the individuals involved in the [alleged] misconduct.” Before taking any action, however, a corporation under government scrutiny should seek guidance from knowledgeable counsel. While cooperation credit often carries significant benefits (such as reduced penalties), it is important for a corporation to understand its legal rights and obligations before pursuing such credit.

Check back next week for more in depth analysis and best practices in response to the FAQs.

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