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The Yates Memo – DOJ Issues Questions And Answers: Question 4 (Part 2)

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What does the DOJ's response to FAQ No. 4 tell us about cooperation?

This is the second of two posts relating to FAQ No. 4. In a previous post, we addressed the DOJ's response to FAQ No. 4 regarding voluntary disclosure by a company. This post will address what the DOJ's response says about a company cooperating, which includes, as we noted in Part 1, only a brief but important reference to cooperation: "In recognition of the significant value early reporting holds for the government, the Principles [of Federal Prosecution Of Business Organizations] were revised to separate voluntary disclosure from cooperation in order to treat prompt voluntary disclosure as an independent factor to be considered." While it may be a rare, and probably highly unusual, situation when a company voluntarily discloses misconduct, but then decides not to cooperate with the government, such a situation is not outside the realm of possibility. Voluntary disclosure does not obligate a company to cooperate. However, according to the DOJ's response to FAQ No. 4, "it is expected that, in circumstances where the company self-discloses before all facts are known, the company will continue to turn over additional information to the government as it becomes available." This language indicates that if a company makes a voluntary disclosure, it will have established an expectation in the DOJ that the company will cooperate thereafter. Even if a company does not voluntarily disclose wrongdoing, it might still end up cooperating with a government investigation. If that situation arises, it must be remembered that under the Sentencing Guidelines, the company may well have given up an argument that it is entitled to the maximum reduction in its Culpability Score calculation because it will not be able to demonstrate that it self-reported misconduct "prior to an imminent threat of disclosure or government investigation" and/or that it did not self-report "within a reasonably prompt time after becoming aware of the offense." U.S.S.G. § 8C2.5(g)(1). U.S.S.G. § 8C2.5, Application Note 13 focuses on cooperation illustrating the difference between voluntary disclosure and cooperation, and provides in part: "To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization." The DOJ policy provides that "[t]he extent of the cooperation credit earned [by a company] will depend on all the various factors that have traditionally applied in making [the] assessment (*e.g.,* the timeliness of the cooperation, the diligence, thoroughness and

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speed of the internal investigation, and the proactive nature of the cooperation).” USAM § 9-28.700. On the other hand, company counsel must keep in mind that while voluntary disclosure is not the same as cooperation, they are very much inter-related: “prosecutors may consider a corporation’s timely and voluntary disclosure, both as [A] an independent factor *and* [B] in evaluating [i] the company’s overall cooperation and [ii] the adequacy of the corporation’s compliance program and [iii] its management’s commitment to the compliance program. *See* USAM 9-28.700 and 9-28.800. In order to illustrate the potential significance of reducing a company’s Culpability Score as much as possible under the Sentencing Guidelines for those less familiar with the Sentencing Guidelines, we will compare the hypothetical fine range for “Company A” with that of “Company B.” We will assume that Company B qualifies for a five-point reduction in its Culpability Score because it timely self-reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct. Company A on the other hand did not timely self-report the offense to appropriate governmental authorities, and did not fully cooperate in the investigation, but it did clearly demonstrate recognition and affirmative acceptance of responsibility for its criminal conduct; thereby garnering a one-point reduction. Assuming that all other sentencing factors are identical for Company A and Company B, we will say that Company A has a Culpability Score of 12 (with its 1 point reduction), while Company B has a Culpability Score of 8 (with its 5 point reduction). If the Base Fine for both companies is $2 million dollars, Company A will face a fine range of $4 million to $8 million but Company B will face a fine range of $3.2 million to $6.4 million. Both companies face very substantial fine ranges in our hypothetical, but Company B would face an appreciably lower fine range because it timely self-reported the offense to appropriate governmental authorities and fully cooperated in the investigation. The risks of voluntarily disclosing misconduct, and/or cooperating with the government, must be balanced against the benefits of doing one or the other or both. In some situations the potential benefits will outweigh the risks. In other situations, the scale will tip the other way. To some extent, the balancing of the risks and benefits can be ‘quantified’ by assessing, and if need be re-assessing, the impact on a company’s fine range under the Sentencing Guidelines. The decision to voluntarily disclose or not voluntarily disclose, and to cooperate or not cooperate, should not be made without having the benefit of a sufficiently in-depth and robust internal investigation before making those decisions.