

The Yates Memo – DOJ Issues Questions And Answers: Question 6

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****This is the seventh in a series of blog posts that examines seven FAQs issued by the DOJ in response to questions raised by the Yates Memo. The sixth of these questions addresses whether companies should enter into joint defense agreements.***

Question: Can a cooperating company enter into a joint defense agreement with individuals' counsel?

As [mentioned in a previous post](#) about the Yates Memo, the Department of Justice (DOJ) has certainly cast a pall on joint defense agreements (JDA) in potential criminal investigations. The DOJ's guidance seems to indicate that any corporation interested in obtaining cooperation credit in the form of a reduced penalty or a deferred prosecution agreement must carefully consider whether entering into a JDA could stymie the corporation's ability to provide relevant facts to the DOJ. Similarly, any corporate affiliate, agent, independent contractor, or other entity or individual potentially involved in a DOJ investigation must be aware that the "common interest" that is critical to such agreements could disappear if the corporation decides it is in its best interest to roll over on one of its JDA partners. After giving a little background on JDAs, this post provides some practical guidance to consider.

What is a Joint Defense Agreement?

In the criminal defense context, a JDA allows parties to share privileged or confidential information, legal strategies and workloads when defending against allegations of criminal conduct, without waiving any applicable confidences or privileges. For a JDA to be effective, the parties to the agreement must have a common interest (not all interests must be "common," but there has to be at least one) and an expectation that information shared will remain confidential and/or privileged. Historically, any information shared during the period in which the parties to a JDA had a common interest remains confidential and/or privileged **after** their interests diverge. As a result, such agreements have fostered internal cooperation and assisted both corporations and the individuals and entities with which they

work to efficiently investigate, ferret out and defend against allegations of wrongdoing. The DOJ's guidance will change this.

Will the DOJ's guidance impact the JDA?

Undoubtedly, yes. In light of the DOJ's current mandate that corporations disclose **all relevant facts** about individual misconduct, JDAs will have to evolve. To ensure the opportunity to obtain cooperation credit, corporations must retain the flexibility to dish dirt on individuals and other culpable parties – even if they have learned information about culpable conduct during the JDA's pendency. Because one party cannot waive the privilege for other parties to a JDA, corporate counsel should consider requiring an escape clause in the JDA. Such a clause may provide, for instance, that the JDA is void from the beginning if any information as to culpability is discovered during the course of an internal investigation. This would allow the corporation to share information regarding individual culpability with the DOJ **even if** it learns such information during the pendency of, and arguably through the existence of, a JDA.

Should I enter a JDA?

It is always best for any individual or corporation seeking to enter a JDA to obtain individualized legal advice regarding their options. Pursuant to the DOJ's guidance, as outlined above, there will be distinct considerations to contemplate before entering into a JDA depending on whether you are an individual or a corporation. For instance, a corporation may only want a limited purpose or entity JDA, while an individual may only want to enter into a JDA that excludes a corporation. To work through these issues and obtain guidance, it is best to obtain legal advice prior to taking any action.