

The Yates Memo – DOJ Issues Questions And Answers: Question 7

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****This is the eighth in a series of blog posts that examines seven FAQs issued by the DOJ in response to questions the Yates Memo raised. The seventh of these questions addresses receiving cooperation credit in a civil matter.***

Question: Does the “all facts” cooperation requirement apply in civil matters as well?

Answer: Yes. If a company wishes to receive cooperation credit in a civil matter, it must disclose the relevant facts regarding the individuals involved in the misconduct.

In two speeches following the issuance of the Yates Memo, Bill Baer, who was an associate attorney general at the time, provided additional guidance on what the DOJ expects in terms of cooperation in civil matters. First, on June 9, 2016, Baer identified complete disclosure as a “threshold requirement” for cooperation credit. Companies must make a complete disclosure of all individuals involved in the wrongdoing, regardless of where an individual falls in the corporate hierarchy. He emphasized that cooperation is not demonstrated by doing what the law requires, such as responding to subpoenas, nor by “one-sided” presentations and white papers. As to what does constitute cooperation, Baer stated a company should help the government reach the “bottom line” of an investigation, which may entail the company taking action such as: making full and detailed admissions, remediation efforts, making available current and former officers and employees for interviews, meetings and depositions, disclosing facts uncovered in an internal investigation, and identifying opportunities to obtain evidence not in the company’s possession. He also stressed what cooperation does not require, including a waiver of the attorney-client privilege, wide-ranging internal investigations that go beyond the scope of the wrongdoing, or doing the DOJ’s work by delivering a litigatable case to them. As to timing, he urged companies to come in as early as possible, even if the company has not yet learned all the facts. He also acknowledged that the downward departure for cooperation is more opaque than in the criminal context, given the range of multiple damages and penalties available in civil enforcement, but reminded companies that disclosure and cooperation can be a good business decision in allowing companies to continue to participate in government contracts. Second, on Sept. 27, 2016, Baer expounded on the principles of cooperation, highlighting the lack of cooperation by financial

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institutions in the wake of the recession. In contrast to the full disclosure he urged in his June speech, Baer noted the government had been forced to build its cases against the financial institutions from the ground up. He then identified “commonalities” of cooperation, saying it:

- must meet the “threshold” of disclosure of all individuals involved regardless of status in the corporate hierarchy
- should be proactive
- may involve the company taking affirmative steps such as:
 - directing the government to inculpatory evidence
 - providing documents or access to witnesses that DOJ may not have found on its own
 - providing summaries of evidence prepared specifically to address the investigation
 - compiling data for the government in a manner helpful to DOJ that it could not have readily achieved on its own
 - encouraging individuals to cooperate
 - providing information that would not have been discovered in the ordinary course of the investigation

Baer again stressed the importance of coming in early and that no “ex post facto” cooperation credit will be given. However, where cooperation allows the DOJ to net greater recoveries, i.e. pursue conduct it otherwise would not have known about, a company will receive greater credit. Beyond cooperation, Baer urged companies to take steps to provide victim relief in order to receive more favorable outcomes. As a recent example of effective cooperation, Baer identified a prescription drug chain investigated for overbilling the government for orders of prescription drugs never picked up by customers. The company cooperated “early and in ways that mattered” by compiling handwritten pick-up signature logs from thousands of pharmacies into spreadsheets that could be analyzed and by sharing its own analysis of the logs, thus saving the government time and resources in tabulating the logs. In short, the DOJ expects complete disclosure of all facts in a manner that will be meaningful to the specific investigation and will be cost-effective. In return, companies will receive some downward departure in damages and penalties, although the precise amount remains more unclear and difficult to predict in the civil context.