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# Reassessing the Cost-Benefit Calculation of Joint Defense Agreements in the Modern Corporate Enforcement Era

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Your corporate client has just been raided by the FBI. A preliminary conversation with the prosecutor indicates that the Government's concerns lie in conduct that, if borne out, could result in half of the C-suite and many middle- to lower-level sales people having criminal exposure.

For years the traditional playbook has been for corporate counsel conducting an internal investigation to *Upjohn* interview all relevant personnel and develop factual information before making a determination to provide counsel for individuals who have potential culpability. Thereafter, counsel for the company and the lawyered individuals would typically enter into a Joint Defense Agreement ("JDA"). The question presented now is whether the cooperation policies that have been articulated by the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") affect that approach. In particular, given the potentially-high value of cooperation credit, the decision of whether and when to get individuals counsel—with the attendant effect on company counsel's ability to obtain information—is more critical than ever.

*Corporate Cooperation in Federal Prosecutions*

Federal prosecutors are required to follow the "Federal Principles of Prosecution of Business Organizations" when making charging decisions related to corporate federal crime. Those principles, which have been incorporated into the Justice Manual,[1] specify that "cooperation is a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a

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## Practice Areas

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case that otherwise is appropriate for indictment and prosecution."[2] However, while it is clear that "credit" is available for cooperating companies, no specific value was attributed to that credit. That lack of clarity caused much speculation as to whether the benefits of such "credit" justified the risks of disclosing potentially inculpatory information.

In November 2017, DOJ released the "Foreign Corrupt Practices Act Corporate Enforcement Policy."[3] In announcing the policy, Deputy Attorney General Rod Rosenstein explained that it was intended to provide "greater certainty for companies struggling with the question of whether to make voluntary disclosures of wrongdoing."[4] The policy provides a "presumption" that a company will receive a declination if the company voluntarily self-discloses its FCPA misconduct, fully cooperates with DOJ, "timely and appropriate[ly]" remediates, and there are no "aggravating circumstances" present.[5] While the policy's equation of cooperation with declination was originally limited to FCPA cases, DOJ leadership has announced that the Criminal Division (as opposed to the various United States Attorney's Offices) will also use the policy as non-binding guidance in other criminal cases, and did so in 2018 when declining to charge Barclays PLC.[6] As such, now more than ever, corporations have every incentive to earn "cooperation credit."

However, just as DOJ has clarified what "credit" may be available, it has also issued more detailed guidance as to how corporations can earn such credit. Specifically, DOJ has highlighted the importance of corporations identifying culpable individuals. In 2015, then Deputy Attorney General Sally Yates authored a memo entitled "Individual Accountability for Corporate Wrongdoing," now colloquially referenced as the "Yates Memo." The Yates Memo served as a zenith of almost two-decades worth of DOJ policies declaring the importance of prosecuting culpable individuals, but with a sharp new twist: companies had to disclose "all relevant facts about individual misconduct" to receive "any consideration for cooperation."[7] The Yates Memo further specified that companies seeking credit must actively investigate wrongdoing—a company cannot "plead ignorance . . . [it must] investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals."[8] In November 2018, Deputy Attorney General Rod Rosenstein tempered some of the most strident requirements for cooperation credit in civil cases, but reiterated DOJ's position that cooperation credit in criminal cases remains an all or nothing proposition requiring corporations to undertake "good faith" efforts to identify "every individual who was substantially involved in or responsible for the criminal conduct."[9]

All in all, the clear takeaway from recent DOJ guidance is that corporations that do not undertake internal investigations and provide the Government with evidence identifying personnel who were substantially involved or responsible for criminal conduct risk losing cooperation credit—which could very well mean a declination. With such a valuable prize on the table, corporate counsel certainly have added motivation to disclose relevant facts that could inculpate members of the company's senior leadership team or even Board members. These motives, however, may fundamentally alter traditional thinking on a company's securing counsel for its executives and subsequent participation in a JDA.

*Corporate Cooperation in SEC Enforcement Actions*

Like DOJ, the SEC "has a robust program that is intended to encourage cooperation in SEC investigations and enforcement actions."[10] Beginning with the *Seaboard Report* in 2001 and then again in 2010 with the Commission's "Policy Statement Concerning Cooperation by Individuals in its Investigation and Related Enforcement Actions," the SEC has set forth what it expects of both companies and individuals seeking cooperation credit. As it pertains to corporations, the *Seaboard Report* specifically asks, "did management, the Board or committees consisting solely of outside directors oversee the review (of the nature, extent, origins, and consequences of the conduct)?" and "did company employees or outside persons perform the review?"[11] Thus, as with DOJ policy, the SEC expects corporations to conduct an independent review of any malfeasance when seeking cooperation credit.

*Joint Defense Agreements*

JDAs have long been a staple of corporate investigations. JDAs facilitate fact finding in internal investigations by creating privileged pathways for the exchange of key information between represented employees and the corporation in situations where the participants' interests are closely aligned. They also allow multiple parties with common interests to share resources and strategies, and often provide participants with sufficient information to rebut unfounded allegations.

From a corporate perspective, there are many advantages to participating in a JDA. An effective internal investigation requires corporate counsel to have direct access to individuals, something inherently necessary to fact finding. Individuals, after all, are the ones who act for the company and, in turn, create potential liability for the company. However, because individuals may also be personally liable for their actions, they often need their own counsel—counsel that may not let his or her client be interviewed by the company, or that will certainly want to be present for and actively participate in subsequent interviews for fear that the corporation may elect to waive privilege and share inculpatory information attributable to the client with the Government.

Enter the JDA, which can ease corporate counsel's access to necessary information by securing that information from disclosure to the Government absent consent of the employee through his counsel. Because JDAs protect information learned pursuant to their terms from disclosure to the Government, they increase the likelihood that employees will be forthright with their own counsel about their knowledge of, or participation in, wrongdoing—information that is critical to a corporate counsel's ability to craft the best possible strategy for the company.

*JDAs and Cooperation Credit: Strategies for Corporate Counsel*

The Government has given only limited guidance on corporate counsel's predicament of whether, when and how to handle JDAs. While prosecutors have long taken a dim view of JDAs, DOJ's position has evolved slightly through the years from viewing JDAs as something that "may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation,"[12] to present guidance which dictates that "the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit."[13] Indeed, the current Justice Manual states that "prosecutors may

not request that a corporation refrain from entering into such agreements."[14] At the same time, however, DOJ cautions that a "corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit . . . Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired."[15] And, to that end, DOJ has, somewhat unhelpfully, advised that "[c]orporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate."[16]

It is unclear just what "flexibility" DOJ is recommending with respect to JDAs. However, there are some practical steps corporate counsel may wish to take to maximize the utility of internal investigations and limit the risk of a JDA restricting the corporation's ability to disclose key information to obtain cooperation credit.

*First*, it is absolutely incumbent that corporate counsel conduct initial interviews of all employees with potentially relevant information. Employee interviews are essential for collecting critical facts that will enable counsel to assess risk and serve as the foundation for strategic decisions. That said, counsel should be mindful that the Government sometimes issues deconfliction requests, asking a company to defer interviewing employee witnesses until after it has had an opportunity to do so, to avoid infecting potential witnesses with information they would not otherwise have. Such requests may present issues for corporations because failure to comply likely weighs against their receiving full cooperation credit, but corporations and their boards also have a duty to investigate allegations of potential wrongdoing and take steps to terminate such wrongdoing as soon as possible—tasks that may be impossible without employee interviews. In such situations, counsel should consider talking to the Government about these fiduciary duties and ask for assurances that the investigated conduct is not ongoing.

While blanket *Upjohn* interviews seem to be an obvious first step, DOJ guidance regarding individual accountability and the requirements for cooperation credit have added new tensions to an age-old problem: when should a company "lawyer up" an employee? On one hand, DOJ pronouncements about corporations turning over information regarding individuals' culpable conduct enhance a corporation's obligation to ensure its employees have the benefit of independent counsel as soon as possible. On the other hand, the Government has made it clear that corporations may not qualify for cooperation credit if they do not conduct an internal investigation and turn over key information—information that a company might not be able to readily harvest from a represented employee.

To thread that ethical needle, corporate counsel conducting *Upjohn* interviews must be particularly cognizant to provide truthful answers to interviewee questions regarding "where they fit" in the investigation and what corporate counsel will do with the information. If the Government tells corporate counsel that a specific employee is a subject or target of its investigation, and to the extent communicating that information to that employee does not create the potential for obstructive behavior, the company should share that information and remind the employee about the possibility of obtaining personal counsel.

If an employee with potential exposure expresses a desire to have personal counsel participate in the interview, the company has a decision to make: it can stop the interview until the employee is able to secure counsel, or it can make clear that interview participation is a condition of his or her employment and attempt to plow forward. Both options have potential drawbacks. Of course, if an employee has counsel, the corporation's access to the employee will be inherently limited. Limited access to employees equates to delayed acquisition of facts a company may need to make strategy decisions or a fulsome disclosure. On the other hand, terminating the employee may mean the company will never learn key facts and, in situations where the employee resides in a foreign jurisdiction, terminating the employee may be viewed by the Government as hindering its investigation by making that employee unavailable. While that type of coordination with the Government, like honoring deconfliction requests, likely passes muster, corporate counsel needs to be wary to avoid, in their zeal to obtain cooperation credit, essentially becoming an arm of the Government investigation by "taking orders" from the Government. This issue of Government control of a corporation's internal investigation was most recently raised in the 2018 criminal trial of former Deutsche Bank employees Matthew Connoly and Gavin Black for LIBOR manipulation. There, SDNY Judge McMahon called post-trial defense arguments seeking to overturn the verdict "the real deal" referring to "Mr. Connolly's Kastigar/outsourced investigation motion."[17]

*Second*, the company should take a cautious and iterative approach to embarking on JDAs. Where corporate counsel knows that, if questioanble conduct occurred, particular individuals would certainly have been involved, counsel should delay entering JDAs with such individuals. When parties in a JDA find that their interests are no longer aligned, like when a company decides to cooperate with the Government and provide information implicating a member of the JDA, the company must exit the JDA. To the extent the company has unilateral JDAs, it may simply terminate the JDAs with the implicated individuals while maintaining agreements with others who may continue to provide relevant information. Given DOJ's recent scaling back of the Yates Memo to focus disclosure on those who were involved in or supervised bad conduct—as opposed to all relevant facts—it may be possible for a corporation to negotiate a release with those who do not fit that description that allows the company to share information initially obtained pursuant to a JDA. Having individualized JDAs enables such sharing without obtaining permission from multiple parties.

Finally, a company's decision to obtain cooperation credit by providing information on employees does not mean the company needs to leave its employees high and dry. While it may not be appropriate to form or maintain a JDA with such individuals, it may still be appropriate to engage in information sharing. A JDA's purpose is to protect privilege—but facts a party wants to, or will, share with the Government are not privileged. As such, as long is there is no foreseeable risk of obstruction or flight, the corporation may choose to share with employees what it is telling the Government. In turn, employees may want to share with the company their best "pitch"—companies may provide the Government with all pertinent information, presuming it is accurate.

*Conclusion*

Despite increased tensions created by recent DOJ policy pronouncements, JDAs remain an essential strategy consideration for corporate counsel conducting an internal investigation when the corporation and employees/executives have a shared interest in defending a case. However, given the premium value associated with cooperation in the modern enforcement era, corporate counsel must carefully weigh the necessity of such agreements for conducting the investigation against the risks that the company may be precluded from sharing the investigatory findings necessary to earn credit. Counsel must also be mindful of their ethical duties to their client and the individuals to terminate or cease sharing information under a JDA when the parties no longer share a common interest.

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[1] Until September 25, 2018, the Justice Manual was known as the United States Attorneys' Manual. Though it changed the name, DOJ retained the same section numbering system.

[2] Justice Manual § 9-28.700.

[3] Justice Manual § 9-47.120.

[4] Deputy Attorney Gen. Rosenstein, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 27, 2017), available at: https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

[5] *Id.* Note also that, while there is a "presumption" of declination, companies taking advantage of this policy must also "pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue." Justice Manual § 9-47.120(1).

[6] *See, e.g.*, Deputy Assistant Attorney Gen. Miller, Remarks at the 5th Annual GIR New York Live Event (Sept. 27, 2018), available at: https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division.

[7] Deputy Attorney Gen. Sally Q. Yates, *Individual Accountability for Corporate Wrongdoing* (Sep. 9, 2015), available at: https://www.justice.gov/archives/dag/file/769036/download.

[8] Deputy Attorney Gen. Sally Q. Yates, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), available at: https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

[9] Deputy Attorney Gen. Rosenstein, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), available at: https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0; *see also* Justice Manual § 9-28.700.

[10] Steven Peikin, Co-Director, SEC Division of Enforcement, Keynote address at the New York City Bar Association's 7th Annual White Collar Crime Institute (May 9, 2019), available at: https://www.sec.gov/news/speech/speech-peikin-050918.

[11] *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, Securities Exchange Act Release No. 34-44969 (Oct. 23, 2001) ("Seaboard Report"), available at: http://www.sec.gov/litigation/investreport/34-44969.htm.

[12] Deputy Attorney Gen. Eric Holder, *Bringing Criminal Charges Against Corporations* (Jun. 16, 1999), available at: https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/1999jun16_privwaiv_dojholder.authcheckdam.pdf.

[13] Justice Manual § 9-28.730.

[14] *Id.; see also* Justice Manual § 9-28.700 (recognizing that there "may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is legally prohibited from disclosing it to the government" at which point the "company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor").

[15] *Id.*

[16] *Id.*

*See* https://www.law360.com/articles/1089994/gov-t-role-in-paul-weiss-probe-puts-deutsche-trial-at-risk.