Cooperation Standards in Government Investigations: Practical Tips

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Cooperation with law enforcement is a strategy that every corporation involved in a government investigation must consider. The benefits of cooperation are clear and include reduced penalties, swifter resolutions, and less burdensome investigations. Cooperation with the government has proven a cost-effective strategy for some organizations in recent years, with some companies facing lower or no fines. Conversely, failing to cooperate risks antagonizing the investigator which can cause problems for the corporation. However, in the nebulous middle ground, there are some cases in which a company must carefully consider the pros and cons of cooperation with the government.

In this article, we review the guidelines set forth by the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), and then provide some practical tips for corporations facing a government investigation on how to cooperate with the agencies.

COOPERATING WITH THE DEPARTMENT OF JUSTICE

Organizations facing a DOJ investigation should be familiar with the guidelines issued by the agency over the years via a series of memoranda. They should also be well-versed in the DOJ's Prosecution Principles in the Justice Manual. Government attorneys are required to adhere to the policies set forth in the memoranda and Justice Manual.[1]

The main guidelines and their revisions fall under a string of memoranda published over the years under the names Thompson, McNulty, Filip, and Yates. The first, the Thompson Memorandum, was

[1] U.S. DEP'T OF JUSTICE, JUSTICE MANUAL (2018) [hereinafter JUSTICE MANUAL], https://www.justice.gov/jm/justice-manual.

released in 2003, stating as one of its express purposes to place "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."[2] The memorandum required prosecutors to consider the following nine factors when conducting an investigation, determining whether to bring charges, or negotiating plea agreements:

1. The nature and seriousness of the offense;
2. The pervasiveness of wrongdoing within the corporation;
3. The corporation's history of similar conduct;
4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
5. The existence and adequacy of the corporation's compliance program;
6. The corporation's remedial actions;
7. Collateral consequences arising from prosecution;
8. The adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
9. The adequacy of remedies such as civil or regulatory enforcement actions.[3]

Over the years, three major revisions to Thompson followed. The McNulty Memorandum, released in 2006, stated that prosecutors could only request privilege waivers if there was a "legitimate need" for the privileged information, and that if a legitimate need existed after going through a multi-factor analysis, prosecutors should seek the least intrusive waiver necessary to complete a thorough

[2] Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to all Component Heads and United States Attorneys, on *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.
[3] *Id.* at 2.

investigation.[4] The Filip Memorandum, not a memorandum per se, made revisions in 2008 to the U.S. Attorneys Manual ("USAM"), as the Justice Manual was previously known. In 2015, Deputy Attorney General Susan Yates announced an increased focus on pursuing individual corporate wrongdoing, including revisions to the Principles of Federal Prosecution of Business Organizations in the USAM. The revisions added a new introduction, "Foundational Principles of Corporate Prosecution,"[5] which put the focus on individual wrongdoers.

At the outset, one important consideration for practitioners to understand is that the revisions reflect increased scrutiny of cooperation credit worthiness. The Yates Memorandum also notes that by building cases against individual wrongdoers, DOJ accomplishes multiple goals, including increasing the agency's ability to identify the full extent of corporate misconduct, increasing the likelihood that those with knowledge of the corporate misconduct will be identified and provide information about the individuals involved, and maximizing the likelihood that the final resolution will include charges against culpable individuals—not just the corporation.[6]

More on the Prosecution Principles

There are two other important considerations with regard to the Prosecution Principles:

- **Eligibility for cooperation credit**. A section in the Justice Manual regarding attorney notes and interview memoranda related to cooperation was also revised in 2015.[7] This principle states at the outset that eligibility for cooperation credit is not predicated upon waiver of the attorney-client privilege or work product protection.

[4] Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads and United States Attorneys, on *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006), 8-9, http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.
[5] JUSTICE MANUAL, *supra* note 1, at § 9.28.010
[6] *Id.*
[7] *Id.*, § 9.28.720 – Cooperation: Disclosing the Relevant Facts.

- **The value of cooperation.** DOJ also revised its Prosecution Principle detailing the value of cooperation, in the section "General Considerations of Corporate Liability."[8] This text states that a corporation's cooperation with the government's investigation is a mitigating factor by which a corporation can gain credit.

Other Noteworthy Sections in the Justice Manual

Finally, two other sections in the Justice Manual are notable. They include:

- **Attorney-Client Privilege.** The DOJ addresses privilege directly in the section "Attorney-Client and Work Product Protections."[9] It notes that the attorney-client privilege is one of the "oldest and most sacrosanct privileges under the law," and that waiver of this privilege has never been a prerequisite under the Prosecution Principles for a corporation to be viewed as cooperative.[10]
- **Obstructing the Investigation**. In this section of the Manual, prosecutors are also instructed to consider whether the corporation has engaged in conduct intended to impede the investigation, such as inappropriate directions to employees or their counsel.[11]

Key Lessons from Prosecution Agreements

DOJ's historical prosecution agreements offer some key lessons for practitioners.

[8] *Id.*, § 9-28.200.
[9] *Id.*, § 9-28.710.
[10] *Id.*
[11] *Id.*, § 9-28.730.

- Remediation matters.[12] DOJ has consistently emphasized the importance of companies' efforts to proactively identify misconduct, provide restitution, and implement compliance programs.[13]
- Companies should do everything possible to adjust their internal investigations to DOJ's priorities and remove any obstacles to the DOJ inquiry.[14]
- Companies need to be aware that if DOJ finds that the company is culpable for grave misconduct, even complete cooperation may not be enough to protect it from substantial fines or prosecution.[15]
- With the publication of the Yates Memorandum and revisions to the Prosecution Principles, companies need to be prepared for increased prosecution of individual wrongdoers as well as stricter scrutiny of a company's cooperation efforts.

The Yates Memorandum raises some newer challenges for companies facing an investigation.

- In order to be eligible for *any* cooperation credit, the memorandum requires companies to provide "all relevant facts about the individuals involved in corporate misconduct."[16]
- DOJ's emphasis on individual responsibility—no matter how senior the executive—could make individuals reluctant to come forward with information.[17]
- The potential for conflicts of interest has increased,[18] so companies will need to make an early assessment of whether a conflict of interest exists with respect to the law firm representing

[12] JOSEPH DE SIMONE, MARCUS CHRISTIAN, & JAMES ANCONE, *Cooperation in SEC and DOJ Cases*, *in* SECURITIES INVESTIGATIONS: INTERNAL, CIVIL AND CRIMINAL, § 10:3.3 (2d ed. 2010).
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Memorandum from Sally Q. Yates, Deputy Att'y Gen., to Heads of Department Components and United States Attorneys, on *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), 3, https://www.justice.gov/archives/dag/file/769036/download.
[17] DE SIMONE, CHRISTIAN, & ANCONE, *supra* note 12, at § 10:3.3.
[18] *Id.*

the company and the individual(s) and in-house counsel. Companies should err on the side of retaining separate counsel for the individual(s).[19]

- The Yates Memorandum may increase the risks of waiver of attorney-client privilege and work product protection.[20]

COOPERATING WITH THE SECURITIES AND EXCHANGE COMMISSION

When facing an SEC investigation, companies should be familiar with key frameworks, statements, and expectations. One includes the Seaboard Report, where the SEC articulated a framework for evaluating cooperation by companies.[21] The report identified four broad measures of a company's cooperation: self-policing prior to the discovery of the misconduct, self-reporting of misconduct when it is discovered, remediation, and cooperation with law enforcement authorities.[22] Another key document, the Penalties Statement, elaborated on the role that cooperation plays in deciding whether to impose monetary penalties on corporations.[23]

The SEC also gives important written guidance in its Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions.[24] This guidance is included in the SEC's Enforcement Manual. The SEC generally evaluates four considerations in determining whether, how much, and in what manner to credit cooperation by individuals: the assistance by the individual, the

[19] *Id.*
[20] *Id.*
[21] U.S. SEC. & EXCH. COMM'N, 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, Exchange Act Release No. 44969, 76 SEC Docket 220 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm.
[22] *Id.*; *see also Spotlight on Enforcement Cooperation Program*, SEC.gov, http://www.sec.gov/spotlight/enfcoopinitiative.shtml (last modified Sept. 20, 2016).
[23] U.S. SEC. & EXCH. COMM'N, STATEMENT OF THE SEC CONCERNING FINANCIAL PENALTIES (Jan. 4, 2006), *available at* https://www.sec.gov/news/press/2006-4.htm.
[24] U.S. SEC. & EXCH. COMM'N, POLICY STATEMENT CONCERNING COOPERATION BY INDIVIDUALS IN ITS INVESTIGATIONS AND RELATED ENFORCEMENT ACTIONS, Release No. 34-61340, 17 CFR Part 202 (Jan. 19, 2010).

importance of the underlying matter, societal interest in holding the cooperating individual fully accountable, and the profile of the individual.[25]

It is important to note that the updated SEC Enforcement Manual also provides SEC staff with various cooperation tools, such as the following.

1. **Proffer Agreements:** These are written agreements "generally providing that any statements made by a person, on a specific date, may not be used against that individual in subsequent proceedings," with certain exceptions.[26]
2. **Cooperation Agreements:** "[A] written agreement between the Division of Enforcement and a potential cooperating individual prepared to provide substantial assistance to the Commission's investigation and related enforcement actions."[27]
3. **Deferred Prosecution Agreements:** "[A] written agreement between the Commission and a potential cooperating individual or company in which the Commission agrees to forego an enforcement action against the individual or company if the individual or company agrees to, among other things: (1) cooperate truthfully and fully in the Commission's investigation and related enforcement actions, (2) enter into a long-term tolling agreement; (3) comply with express prohibitions and/or undertakings during a period of deferred prosecution; and (4) in most cases, agree either to admit or not to contest underlying facts that the Commission could assert to establish a violation of the federal securities laws."[28]
4. **Non-Prosecution Agreements:** "[A] written agreement between the Commission and a potential cooperating individual or company, entered in limited and appropriate

[25] *Id.* at 3-6.
[26] U.S. SEC. & EXCH.COMM'N, Division of Enforcement, *Enforcement Manual* § 3.3.7 (Nov. 28, 2017), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.
[27] *Id.* at § 6.2.1.
[28] *Id.* at § 6.2.2.

circumstances, that provides that the Commission will not pursue an enforcement action against an individual or company if the individual or company agrees to, among other things: (1) cooperate truthfully and fully in the Commission's investigation and related enforcement actions; and (2) comply, under certain circumstances, with express undertakings."[29]

PRACTICAL GUIDANCE

1. **Consider the outcomes of recent DOJ and SEC cases.** Failing to cooperate with a government investigation can result in big problems for companies. In the ideal situation, the company is rewarded for its cooperation and receives either a reduced penalty or no penalty at all.[30] For example, Hyperdynamics Corp. cooperated with DOJ in a Foreign Corrupt Practices Act investigation, and received a declination letter noting that "the Department values cooperation with investigations."[31]

   Yet in other, less-than-ideal cases, the government praised a corporation for its cooperation but nonetheless imposed a large fine.[32] For example, in *United States v. Baker Hughes Services International, Inc.*, the DOJ described Baker Hughes' cooperation as "exceptional," but nonetheless imposed a combined $44 million in civil penalties and criminal fines.[33]

   In a third set of cases, a corporation's extensive—and expensive—efforts at cooperation were "acknowledged" by the government, but a huge fine was still imposed.[34] For instance,

[29] *Id.* at § 6.2.3.
[30] DE SIMONE, CHRISTIAN, & ANCONE, *supra* note 12, at § 10:1.
[31] Letter from Patrick Stokes, Deputy Chief, to Covington & Burling, LLP, on *Hyperdynamics Corporation* (May 21, 2015), http://origin-qps.onstreammedia.com/origin/multivu_archive/ENR/0-Hyperdynamics-Corporation---Declination-Letter.pdf.
[32] DE SIMONE, CHRISTIAN, & ANCONE, *supra* note 12, at § 10:1.
[33] *Baker Hughes*, No. H-07-129, Dkt. Entry No. 9, at 4 (S.D. Tex. Apr. 24, 2007).
[34] DE SIMONE, CHRISTIAN, & ANCONE, *supra* note 12, at § 10:1.

Alcoa Aluminum agreed to pay $223 million in criminal fines and forfeitures despite its "extensive cooperation" with DOJ.[35]

Finally, in the worst-case scenario, the corporation's shallow efforts at cooperation backfire and the government decides to impose *additional* sanctions beyond those for the underlying misconduct.[36] One example includes Lucent's $25 million settlement with the SEC, which identifies examples of lack of cooperation, such as inadequate document production.[37]

2. **Talk with in-house or outside counsel to understand the boundaries of privilege and work-product doctrine.** Corporations should follow best practices to preserve attorney-client privilege in emails, meetings, and other communications. Care should be taken to assure that everyone in the organization understands that simply having an attorney at a meeting, or copied on an email, is not enough to create attorney-client privilege. Similarly, the principles of the work-product doctrine should be outlined and explained so that stakeholders, including lower-level employees, can understand what is protected and what is not. Training employees on attorney-client privilege and work product doctrine best practices can help to ensure that everyone is being accurate and consistent in how they are treating privileged information.[38]
3. **Perform diligently and carefully once the decision to cooperate has been made.** In remarks made to the D.C. Bar Association, Stephen Cutler, a former Director of the SEC's Division of Enforcement, said in 2004, "no matter how bad the underlying conduct, you can always make

[35] Press Release, Dep't of Justice, Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay $223 Million in Fines and Forfeiture (January 9, 2014), *available at* http://www.justice.gov/opa/pr/alcoa-world-alumina-agrees-plead-guilty-foreign-bribery-and-pay-223-million-fines-and.
[36] DE SIMONE, CHRISTIAN, & ANCONE, *supra* note 12, at § 10:1.
[37] Press Release, U.S. Sec. & Exch. Comm'n, Lucent Settles SEC Enforcement Action Charging the Company with $1.1 Billion Accounting Fraud (May 17, 2004), *available at* https://www.sec.gov/news/press/2004-67.htm.
[38] Heather L. Fields, *Attorney-Client Privilege and Corporate Compliance*, Reinhart Law (Nov. 18, 2015), https://www.reinhartlaw.com/wp-content/uploads/2015/12/Attorney-Client-Privilege-and-Corporate-Compliance.pdf.

things worse."[39] Obviously, there are huge incentives as well as strong external pressures to cooperate with the government. Once the decision to cooperate has been made, however, the company must be willing to go the distance in cooperating and must cooperate well. If the corporation cooperates poorly, it can make its situation much worse.

4. **Work with experienced counsel to understand risk factors resulting from cooperation.** In cooperating with a government investigation, a corporation will often run into many other accompanying issues, such as public relations problems, increased private litigation risks, additional compliance burdens, and ethical and legal quandaries related to the corporation's dealings with individual employees involved in the investigation.[40] The corporation should carefully select and work closely with experienced in-house and outside counsel to assess these risk factors and how they relate to the decision to cooperate with the government. The retention of outside counsel with prior government experience is often very valuable.

CONCLUSION

A corporation facing a government investigation can be in for a long and potentially expensive process. Although cooperating with the investigation is not guaranteed to yield a better result for the corporation, by being proactive and having a plan in place, the corporation can make the process as smooth as possible. Furthermore, by reviewing the spectrum of recent DOJ and SEC cases and following the practical strategies outlined above, companies that decide to cooperate with the government in an investigation can achieve a higher level of certainty that their efforts at cooperation will be successful.

[39] Stephen M. Cutler, Director, Division of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks Before the District of Columbia Bar Association (Feb. 11, 2004), *available at* https://www.sec.gov/news/speech/spch021104smc.htm.
[40] DE SIMONE, CHRISTIAN, & ANCONE, *supra* note 12, at § 10:1.