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Cooperation 2.0

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Recently, the Department of Justice (DOJ) has upped the ante for companies seeking credit for cooperating in investigations. Firms must not only fully disclose all facts concerning individuals responsible for the misconduct as articulated in the so-called Yates Memo, but must also *certify* in writing that they have provided the DOJ with all non-privileged information about those individuals. The Securities and Exchange Commission (SEC) likewise has been outspoken about its scrutiny of individual culpability. Companies typically have provided such details when cooperating with the DOJ and SEC. Yet the recent strong rhetoric and increasingly rigid policies signal that regulators may not see it that way and indicate they may now demand more than historical norms. Companies and individuals involved in investigations, therefore, face a new era – a sort-of "Cooperation 2.0."

Evolutions in the Cooperation Rubric

The DOJ and SEC have long provided credit to entities that cooperate with the agencies during investigations. In 2001, for example, the SEC's "Seaboard Report" stated that the SEC was not taking action against the company, in part based on the company's proactive cooperation. And it is not unusual for companies, upon learning of potential issues, to promptly investigate and self-report the investigatory results to the SEC or DOJ in the hopes of securing a more beneficial outcome.

On September 9, 2015, Deputy Attorney General Sally Q. Yates issued a memorandum stating that, going forward the DOJ intends to scrutinize individuals, not just companies, involved in potential wrongdoing. The Yates Memo explained that "[b]oth criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct." The DOJ said that "in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct."

The SEC has been in lock step with the DOJ. In a November 17, 2015, speech, Director of the Division of Enforcement Andrew Ceresney said that the SEC's focus includes holding individuals responsible for violations. This echoed earlier comments from Chair Mary Jo White, who said that the SEC considers charging responsible individuals as "critical" – focusing first on individuals and moving out to entity liability rather than vice versa.

In early February 2016, the Wall Street Journal reported that the DOJ Fraud Section also will require written confirmation that all non-privileged information about potential wrongdoing by individuals has been provided to the DOJ. A DOJ spokesperson is quoted stating that "[c]ompanies cannot just disclose facts relating to general corporate misconduct and withhold

facts about the individuals involved."

These principles are not new to practitioners who regularly interact with the DOJ or SEC. Yet the increasingly formal policies reflect a regulatory suspicion that cooperating companies have not truly been open books when reporting about individual conduct.

Practical Implications for Entities and Individuals

Due to this increased scrutiny, individuals and entities are well-advised to undertake a number of considerations, which are of even more importance in today's Cooperation 2.0 regime.

- **Investigate Potential Red Flags** – Companies cannot garner cooperation credit by ignoring indications of potential wrongdoing. Companies thus should ensure that they promptly, reliably, and cost-efficiently investigate the full context of potential issues – typically a process best undertaken by independent outside counsel. An effective presentation to the DOJ and SEC necessarily entails a full download of these investigatory details.
- **Clearly Define and Document the Investigation** – Carefully defining the scope of an investigation from the start is critical to efficiently and effectively uncover details about an issue. While many investigations entail an iterative process, clearly defining the scope at each step will determine which individuals' conduct to investigate (and report to the regulators). Moreover, a clearly defined scope will better prepare entities to provide the certification mandated by recent DOJ dictates. Documenting the investigatory steps undertaken likewise helps ensure that cooperative efforts have a reasoned underpinning.
- **Consider Individual Counsel** – In light of the DOJ's and SEC's demands for details about potential individual culpability, entities and individuals are well-advised to consider if and when to engage separate, outside counsel for individuals and – importantly – who that counsel should be. When faced with investigatory requests, individuals should be cognizant of employment terms, such as cooperation clauses, which may affect severance payments and other such matters.
- **Undertake Appropriate Remediation** – Effective cooperation includes undertaking, and reporting on, appropriate remedial efforts to stop any ongoing misconduct and to improve procedures designed to prevent potential future misconduct.
- **Safeguard Privileges** – All internal investigations necessarily entail careful safeguarding of privileges. In light of the reporting and certification mandates of the Cooperation 2.0 regime, companies and their counsel must pay particular attention to which individuals receive privileged information about the investigation, lest privilege be inadvertently waived by disclosure to an individual with antagonistic interests. An investigation conducted by outside counsel reporting to independent managers or directors resolves many of these issues.

- **Update and Upgrade Insurance Coverage** – Not all insurance policies provide coverage for internal investigations or for pre-charging investigations by the SEC or DOJ. Entities and their personnel should review existing policies to ensure satisfactory coverage, particularly if individuals may seek their own counsel in light of the Cooperation 2.0 requirements.

In sum, although recent DOJ and SEC dictates may not represent a wholesale change from historical practices, the rhetoric and rigidity of current practices has intensified, thus mandating adjustments that warrant careful consideration.

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