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DOJ Official Bill Baer Elaborates on Cooperation in False Claims Act and Other Civil Enforcement Matters: Cooperation in Eye of Beholder

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The law is uncertain. One example of this uncertainty is how the "*Yates Memo*" is to be applied in civil cases—in particular, what constitutes "cooperation" and how cooperation may benefit a company under investigation for ***False Claims Act*** violations. On September 29, 2016, the ***US Department of Justice (DOJ)*** attempted (for a second time) to address the lack of clarity surrounding cooperation in civil matters. While DOJ provided some more detail on what it viewed as "full cooperation," and indicated that "new guidance" had been issued within DOJ on cooperation in civil enforcement matters, it still failed to give concrete guidance on how such cooperation may benefit a company in a FCA or other civil resolution. In essence, DOJ is saying "Trust us" to companies considering the potential benefits of cooperation.

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The Yates Memo

In September 2015, Deputy Attorney General Sally Yates issued the Yates Memo on individual accountability in the context of corporate investigations. The memo was palpably more concerned with criminal matters, but also made clear that the Yates "individual accountability" principles would apply to civil matters as well. The memo provided guidance in a number of areas, including when a company could benefit from "cooperation credit." Cooperation credit has a well-understood role in criminal matters. *See, e.g.,* Principles of Federal Prosecution of Business Organizations (USAM 9-28.700 *et seq.*). But cooperation credit is not a comfortable fit in the FCA arena. Indeed, the only example the Yates Memo gave on how cooperation might apply in a civil case related to the "reduced damages" provision of the FCA, 31 U.S.C. § 3729(a)(2), which provides for reduced damages where a party "fully cooperates" with the government. Critically, however, this provision only applies if the party furnishes the government with information about a FCA violation *before* the person had "actual knowledge of the existence of an investigation into such violation." In other words, the only example given in the Yates Memo for how cooperation could benefit a company in the FCA context is in the case of a voluntary disclosure—the very small minority of FCA matters. So this left open the question of what cooperation means and what benefits it will bring in the more typical case, *i.e.,* where a company first learns there may be a False Claims Act issue when it receives the civil investigative demand (CID) or other subpoena.

DOJ has now addressed the application of individual accountability principles to civil cases on two occasions this year in speeches by DOJ official Bill Baer, the first on June 9 and most recently, on September 29. Taken together, the speeches provide an evolving understanding of what DOJ means by "full cooperation," but explain remarkably little about the benefits such cooperation may confer.

The June 2016 Speech: Yates Principles' Application to Civil Cases

In his June 2016 speech, Baer covered the range of issues—not just cooperation—that arise with the application of Yates principles to civil cases, *see here*. With respect to cooperation, the June speech was notable for what DOJ does *not* consider cooperation, such as mere compliance with a subpoena and "one-sided presentations and white papers." The speech also gave broad outlines of what would qualify, *e.g.,* disclosure of "all facts relating to

the individuals involved in the wrongdoing"; making officers and employees available for meetings, interviews or depositions; disclosing facts gathered during an internal investigation; identifying opportunities to obtain evidence not in the possession of the organization. With respect to the benefits of cooperating, Baer assured the audience that "[w]here a company satisfies the threshold requirement of disclosure as to individuals and otherwise cooperates with the government's investigation, the department will use its significant enforcement discretion in FCA matters to recognize that cooperation." Baer essentially conceded the variability of outcomes in FCA matters, acknowledging the "different damages issues and measures" and range of multipliers and penalties that are potentially applicable, but said that DOJ is "committed to taking into account the disclosures and cooperation provided by defendants and to resolve matters for less than the matters would otherwise have settled for based on the applicable law and facts." No light was shed on how DOJ would quantify the value of cooperation in coming to a resolution.

The September 2016 Speech: Cooperation in Civil Cases

In his September 2016 speech, Baer reiterated the themes of cooperation and its benefits. Significantly, Baer implicitly acknowledged the need for more clarity on what actually does constitute meaningful cooperation in a civil law enforcement investigation, both inside and outside DOJ, stating:

> I recently issued new guidance within the department on cooperation in civil enforcement matters. This guidance makes clear that the department encourages productive self-disclosure and cooperation from would-be defendants in civil enforcement matters. The department often has latitude to determine the contours of an appropriate resolution—discretion that can and will be exercised to credit significant and timely cooperation.

Baer reaffirmed that cooperation meant meeting the "threshold requirement" of the Individual Accountability policy by disclosing "all facts relating to the individuals involved in the wrongdoing, no matter where those individuals fall in the corporate hierarchy." Baer also made clear that full cooperation is more than meeting this requirement and that while effective cooperation will vary from case to case, "certain commonalities" have emerged:

> (1) "Cooperation should be proactive; that is, the company should materially assist [DOJ], including by disclosing facts that are relevant to the investigation, even when not specifically asked to do so." This "proactive" cooperation may involve:
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> - Describing the conduct at issue and pointing DOJ to "inculpatory documentary evidence, such as emails and text messages";
> - Providing documents or access to witnesses that DOJ might not have obtained through compulsory process;
> - Providing summaries of evidence "prepared specifically to assist the government's investigation";
> - Providing reports to DOJ that "compile data in a manner that is helpful" for DOJ and that it could not "readily achieve on its own";
> - Encouraging individuals with knowledge of the relevant conduct to cooperate with the investigation;
> - Providing information that might otherwise not have been discovered in the ordinary course of the investigation.
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> (2) Cooperation should be timely. "Cooperation that calls [DOJ's] attention to a problem that [DOJ] previously did not know about at the early stages of an investigation is substantially more helpful than cooperation after [DOJ has] invested significant time and energy in exposing problematic conduct." Importantly, "little or no cooperation credit will be afforded in situations where the supposed cooperation occurs after [DOJ] has completed the bulk of its investigation."
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> (3) Providing information that "enables the government to pursue conduct that might otherwise have been addressed" can result in being considered for credit. This type of cooperation "may involve detailing relevant conduct by a different party (or parties) participating in the same or similar scheme or that enables [DOJ] to net greater recoveries."
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> (4) Corporate actions that "lead to a more positive result," such as acknowledgement of responsibility or efforts to assist victims of the alleged conduct.

Baer was at pains to repeat what does not constitute cooperation: compliance with a subpoena; putting the government in the position of building the case "from the ground up"; "one-sided presentations urging the department to decline an enforcement action." Somewhat ominously, Baer elaborated that "[i]ndeed, [DOJ] may view some such activities—including the belated provision of information that an entity was legally obligated to produce—as impediments to investigative work rather than genuine examples of cooperation."

While Baer has disclaimed any suggestion that DOJ's expectations about cooperation amount to expectations that corporate defendants will do DOJ's bidding by effectively building the government's case for it, the examples of cooperation that have been provided certainly raise eyebrows, particularly when viewed in combination with what some might read as a suggestion that legitimate efforts by a corporation to defend itself will be viewed as uncooperative and obstructionist.

With respect to the benefits of cooperation, Baer said:

> … a company that offers meaningful cooperation and timely victim relief should be afforded a more favorable resolution than a company that fights kicking and screaming until the end. My internal guidance makes the point that [DOJ] has latitude in deciding how to resolve civil cases—discretion that can be exercised to credit meaningful cooperation, including through an appropriately reduced monetary sanction or penalty. If it's helpful, you can think of this as analogous to a "downward departure" where a criminal defendant has provided substantial assistance to the government's investigation.

Unanswered Questions

All of this leaves clients and defense counsel in an unenviable position, even when there is a desire to "cooperate." For instance, where there is a genuine dispute about conduct or its legal ramifications, will voicing that disagreement be considered a "one-sided presentation urging the department to decline an enforcement action"? If a company omits to provide the government with "inculpatory documentary evidence, such as emails and text messages," has the company forfeited the ability to be viewed as cooperative even if such documents were not responsive to any subpoena or other process? Even if they only barely relate to the subject matter of the government's investigation? While DOJ has said that nothing in the Yates memo requires waiver of privilege, will a decision not to waive nonetheless be a factor in DOJ's assessment of cooperation? It will be the client's decision whether to cooperate or not, but it will be defense counsel's task to find the line between legitimate defense and what might be perceived as a failure to cooperate.

Finally, and critically, defendants continue to be in the dark about what benefits cooperation genuinely confers. We are told to think of this as a downward departure as to damages—but from what number? And by how much? In contrast to criminal matters, there are no civil guidelines for FCA downward departures, and as Baer himself noted, there is no one model of single damages, no one way to calculate the application of penalties or the range of multipliers. It is also worth noting that the government has historically agreed to more favorable terms when defendants enter into consensual resolutions as opposed to litigating—however, in the past, defendants got those terms without providing the kind of "cooperation" that Baer has now outlined in his speech. So will "full cooperation" result in a "downward departure" from how the government has historically resolved cases? Or will failure to conform to the government's definition of cooperation raise the settlement bar? In other words, how should a lawyer assess what "cooperation" is worth and whether that value offsets cooperation's substantial cost? Given that Baer feels that DOJ attorneys need guidance on these issues, it may be that there are no consistent answers at this point, and the value of cooperation will have to be determined district by district and case by case. Talk about uncertainty.