The Dilemma of Joint Defense Agreements in Internal Investigations After the Yates Memo

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The release of "Memorandum on Individual Accountability for Corporate Wrongdoing" – the so-called Yates Memo[1] – by the Department of Justice (DOJ) in September 2015 caused much alarm about the prospect of DOJ's pursuit of individuals for corporate misconduct. Now, more than two years later, the public can start to assess the real effect of the implementation of that policy. In fact, significant fines have been levied against senior corporate officials. The Chief Executive Officer of Tuomey Healthcare System paid $1 million to resolve his role in the allegations pursued by the DOJ that Tuomey violated the Stark law through its financial relationship with a group of specialists.[2] In reaching the agreement, the CEO also agreed to waive any right to indemnification from the company, ensuring that the settlement was paid out of personal funds.[3] Indeed, in FY 2017, the DOJ touted for the first time that it "obtained more than $60 million in settlements and judgments with individuals under the False Claims Act that did not involve joint and several liability with the corporate entity."[4] Taking individual liability one step further, the DOJ also seems to be willing to consider the liability of lower level employees. In the recent eClinicalWorks settlement, not only were senior executives jointly responsible for the $155 million settlement, but a software developer and three project managers also entered into settlements with DOJ for $50,000 and $15,000 each, respectively.[5]

In addition to heightening the risk for individual executives and employees, the Yates Memo also creates practical and ethical challenges to attorneys representing companies in internal investigations. Joint defense agreements (JDAs) have been common tools for companies to facilitate these internal investigations. Under the theory of the common interest privilege, JDAs enable counsel for entities and counsel for potentially liable individuals to work collaboratively in the investigation without waiving the attorney-client privilege. However, the Yates Memo requires that, in order for an entity to receive cooperation credit under the federal prosecutorial guidelines, companies must disclose any wrongdoing by individual employees discovered during the course of an internal investigation. As a result, a collateral consequence of the Yates Memo is that it undermines JDAs because a company seeking cooperation credit will be required to disclose information about a potentially responsible employee which it received through a JDA under the cloak of privilege.

The Role of Cooperation in Federal Prosecutions

Prosecutors have much discretion in deciding whether and how to charge a party with criminal or civil violations and in negotiating any resolution. However, their discretion is guided by the "Federal Principles of Prosecution of Business Organizations" (the FPP) found in the United States Attorneys' Manual.[6] The FPP discusses the factors that prosecutors should consider when deciding whether and how to criminally prosecute a corporation and/or its officials.[7] Those factors include a corporation's cooperation in an investigation of corporate wrong-doing. Specifically, the FPP states: "Cooperation is a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution."[8]

The DOJ's policy on cooperation by corporations is driven to a large extent by the practical challenges of investigating corporate misconduct. The commentary to the policy on cooperation by corporations acknowledges that investigating corporate wrong-doing can present several obstacles, including that lines of authority and responsibility within a corporation may be shared among various divisions or departments so that it is difficult to determine who the decision-makers are[9]. In addition, records and personnel may span across many departments and/or broad geography, making the collection of evidence difficult. As a result, "a corporation's cooperation may be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so expeditiously."[10]

While the impact of cooperation has been somewhat difficult to gauge, in November 2017, the DOJ issued a new enforcement policy that addressed a corporation's cooperation in a different context that may give some insight into how the DOJ views the benefit of a corporation's cooperation. Regarding violations of the Foreign Corrupt Practices Act (FCPA), if a company cooperates, the DOJ will apply a presumption of declination of prosecution of the company.[11] In a speech given recently to the American Bar Association White Collar Conference, the acting head of the DOJ Criminal Division announced that the November 2017 FCPA enforcement policy will be used as nonbinding guidance in other criminal cases, as well.[12]

The FPP directly applies to criminal prosecutions but their standards arguably also have application to affirmative civil enforcement cases under the False Claims Act (FCA). Even while the tangible benefits of cooperation in a criminal investigation have not been perfectly clear, it is even more difficult to evaluate the tangible benefits of cooperating in a civil investigation. However, not long after the issuance of the Yates Memo, the then-Principal Deputy Associate Attorney General, William Baer (who oversaw the DOJ Civil Division), gave a speech at the American Bar Association Conference on False Claims Act enforcement which included comments about cooperating in the context of civil FCA cases.[13] Specifically, Mr. Baer stated that, when a company meets the DOJ's requirements for cooperation, "the department will use its significant enforcement discretion in FCA matters to recognize that cooperation."[14] While analogizing cooperation credit in the civil FCA context to a downward departure in the criminal context, Mr. Baer also acknowledged that the analysis is complicated by the remedial and deterrent goals of the statute.[15] Despite those analytical challenges, he concluded that "we are committed to taking into account the disclosures and other cooperation provided by defendants and to resolve a matter for less than [it] would otherwise have settled for based on the applicable law and facts."[16] The DOJ's enforcement discretion when a company cooperates in an FCA investigation can include exercising flexibility in the time period included in the settlement's covered conduct as a limitation on damages and adjusting the multiplier applied to the loss calculation. A similar benefit can be conferred under the self-disclosure protocol for the Department of Health and Human Services, Office of the Inspector General. That self-disclosure policy allows for a minimum multiplier of 1.5 times the loss amount, rather than the treble damages mandated by the FCA.[17]

Cooperation and the Yates Memo

While the Yates Memo is most noted for its direction to prosecutors to evaluate individual liability fully when investigating and charging corporate wrong-doing, its directive related to assessing a corporation's cooperation has had a similarly significant impact. The Yates Memo states that in order for a corporation to receive any credit for cooperating, the company must "identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts related to that misconduct."[18] A corporation seeking to receive credit for cooperation must, therefore, be prepared to divulge to the government any information gathered during its internal investigation regarding the misconduct of individual officers or employees. The DOJ has incorporated this requirement into the FPP.[19]

JDAs and the Challenges of Cooperation

Early in an investigation, a company may assert that it is "cooperating" with a government investigation when it is merely producing documents responsive to a government subpoena. However, meeting the government's definition of cooperation involves much more than simply producing documents and has become more challenging under the Yates Memo. Under the Yates Memo, cooperation now requires disclosing individual misconduct to the government, which enhances the potential and actual conflicts of interest between the company that conducts an investigation and the officers and employees who provide information in that investigation. These conflicts of interest can preclude the use of JDAs.

In order to conduct an effective internal investigation, company investigators often seek direct access to the individuals implicated in the potential misconduct. JDAs are a common tool to facilitate the company's access to those individuals by giving them assurance that any statements made in the context of the investigation will not be shared with law enforcement. As discussed below, JDAs protect information obtained in the course of the investigation (potentially including admissions of wrong-doing) against disclosure, thereby encouraging an individual to share information freely. But now, those companies which seek to obtain cooperation credit from the DOJ must decide at the outset of an investigation whether to offer a JDA to those individuals potentially implicated in the wrong-doing while knowing that not offering a JDA will likely limit or cut off access to those individuals.

The legal basis for JDAs is the "common interest privilege," which allows parties to share communications without waiving the attorney-client privilege as long as those communications are in the furtherance of a common litigation interest shared by the parties. The "common interest privilege" (also referred to as the "joint defense" doctrine) protects "the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel."[20] Importantly, once a protected communication has been made pursuant to a JDA, the privilege can only be waived by the consent of all the parties to the agreement.[21] Most written JDAs expressly incorporate the concept that all parties to the agreement must consent to the release of any privileged information obtained pursuant to the JDA. Moreover, information furnished pursuant to a JDA remains privileged even if the JDA is terminated.[22]

In this context, a company conducting an investigation under the auspices of a JDA will likely be prevented from disclosing information needed to obtain cooperation credit. Without a JDA, however, the company's ability to obtain information may be significantly limited. As such, a company embarking on an investigation must deal with the predicament of not being able to cooperate without obtaining information, but not being able to obtain information if it wants to cooperate. Compounding the problem is that, at the outset of an investigation, it can be very difficult to make an assessment of whether it's in a company's best interest to seek cooperation credit from the government or whether it should enter into a JDA with any potentially implicated individuals.

Is there a middle ground? The DOJ has instructed that "[c]orporations may wish to address this situation by crafting and participating in joint defense agreements, to the extent they choose to enter them, and provide such flexibility as they deem appropriate."[23] Unfortunately, the DOJ has not provided any further guidance on what this flexibility looks like.

Arguably, a company may consider crafting a JDA that permits the company to disclose facts it receives from the employee through a joint defense communication, as opposed to legal opinions or attorney work product. Indeed, many JDAs allow a party to disclose facts discovered independently from the protected communications, so disclosing facts obtained from participants to the agreement would be an extension of that principle. Many individuals may choose to not enter a JDA with such a provision, however. Additionally, the company may consider making future employment contingent on cooperation during an investigation, thereby forcing the employee into entering a JDA under which the company can dictate the terms of the agreement. However, both of these options are potentially problematic in that they may erode the trust between its participants and restrain the individual from fully cooperating during an interview, effectively defeating the benefits of a JDA.

Unfortunately, objective data useful in gauging the impact of the Yates Memo on JDAs is not available. The measure of the impact of the memo on corporate investigations could potentially be borne out by tracking the number of resolutions in which corporations received credit for cooperating and those in which the company chose not to seek that credit. However, the DOJ does not track that information. What is known is that the Yates Memo appears to be increasing both the number of recoveries obtained from individuals and the amounts of those individual recoveries in civil FCA cases.[24] Those increasing recoveries suggest that companies will continue to face a difficult choice between entering into JDAs with individuals potentially implicated in a government investigation and seeking cooperation credit from government prosecutors.

Conclusion

While the Deputy Attorney General suggested in October 2017 that changes to the Yates Memo may be on the way[25], prosecutions of individual corporate employees and officers seem to be continuing at a brisk pace. As a result, companies must carefully weigh the benefits of cooperating with a government investigation against conducting an internal investigation with the cooperation of key employees under the cloak of privilege, because in the current post-Yates Memo environment, it is challenging to do both.

[1] U.S. Dep't of Justice, Office of Deputy Attorney General, *Individual Accountability for Corporate Wrongdoing*, available at https://www.justice.gov/archives/dag/file/769036/download (last visited May 11, 2018).

[2] U.S. Dep't of Justice, News Release, *Former Chief Executive of South Carolina Hospital Pays $1 Million, available at* https://www.justice.gov/opa/pr/former-chief-executive-south-carolina-hospital-pays-1-million-and-agrees-exclusion-settle (last visited May 11, 2018).

[3] Donna S. Clark and Banee Pachuca, *Former Tuomey CEO Settles with DOJ for $1 Million*, Baker Hostetler Health Law Update, Nov. 14, 2016, *available at* https://www.healthlawupdate.com/2016/11/former-tuomey-ceo-settles-with-doj-for-1-million/ (last visited May 11, 2018).

[4] U.S. Dep't of Justice, News Release, *Justice Department Recovers Over $3.7 Billion from False Claims Act Cases in Fiscal Year 2017*, *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017 (last visited May 11, 2018).

[5] U.S. Dep't of Justice, News Release, *Electronic Health Records Vendor to Pay $155 Million to Settle False Claims Act Allegations*, *available at* https://www.justice.gov/opa/pr/electronic-health-records-vendor-pay-155-million-settle-false-claims-act-allegations (last visited May 11, 2018).

[6] U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-28.700, The Value of Cooperation, *available at* https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.700 (last visited May 11, 2018).

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-47.120–FCPA Corporate Enforcement Policy, *available at* https://www.justice.gov/criminal-fraud/file/838416/download (last visited May 11, 2018).

[12] *DOJ Criminal Division Announces FCPA Corporate Enforcement Policy Provides Nonbinding Guidance for All Criminal Cases*, JDSUPRA, Mar. 9, 2018, *available at* https://www.jdsupra.com/legalnews/doj-criminal-division-announces-fcpa-43249/ (last visited May 11, 2018).

[13] U.S. Dep't of Justice, Office of Public Affairs, *Acting Associate Attorney General Bill Baer Delivers Remarks on Individual Accountability at American Bar Association's 11th National Institute on Civil False Claims Act and Qui Tam Enforcement, available at* https://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-individual-accountability (last visited May 11, 2018).

[14] Id.

[15] Id.

[16] Id.

[17] U.S. Dep't of Health and Human Services Office of the Inspector Gen., *OIG's Provider Self-Disclosure Protocol—Updated*, Section IV(E), available at https://oig.hhs.gov/compliance/self-disclosure-info/files/provider-self-disclosure-protocol.pdf (last visited May 11, 2018).

[18] Individual Accountability for Corporate Wrongdoing, *supra* note 1.

[19] U.S. Attorneys' Manual § 9-28.700, *supra* note 6.

[20] *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).

[21] *In re Grand Jury Subpoenas*, 902 F.2d 244, 248 (4th Cir. 1990).

[22] Jonathan N. Rosen, Joint Defense and Confidentiality Agreement (CA), Practical Law Standard Document w-000-0682.

[23] U.S. Dept. of Justice, U.S. Attorneys' Manual § 9-28.730.

[24] *Compare* U.S. Dept. of Justice, News Release, *Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Year 2016*, Dec. 14, 2016, *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016, with U.S. Dept. of Justice, News Release, *Justice Department Recovers Over $3.7 Billion From False Claims Act Cases In Fiscal Year 2017*, Dec. 17, 2017,

available at https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017 (last visited May 11, 2018).

[25] Program on Corporate Compliance and Enforcement, New York University School of Law, *Deputy Attorney General Rod Rosenstein Keynote Address on Corporate Enforcement Policy*, Oct. 6, 2017, *available at* https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/ (last visited May 11, 2018).

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