

FAQs: Corporate Cooperation and the Individual Accountability Policy

1. How did the Individual Accountability Policy change the requirements of corporate cooperation?

Before the Individual Accountability Policy (the “Policy”) took effect, the United States Attorneys’ Manual (“USAM”) identified a company’s “willingness to provide relevant information and evidence and identify relevant actors” as one of several factors that a prosecutor “may consider” in determining the nature and extent of the company’s cooperation. Thus, a company could be eligible for some degree of cooperation credit even if it hadn’t disclosed basic facts about who did what.

Under the Policy, a company must turn over all non-privileged relevant information about the individuals involved in the misconduct in order to receive any consideration for cooperation. This is a threshold requirement, and unless it is satisfied, the company will be ineligible for cooperation credit.

2. What else is a cooperating company required to do?

Companies – like individuals – are not required to cooperate. If a company seeks mitigation credit for cooperation, however, it must turn over all non-privileged relevant information about the individuals involved in the misconduct in order to satisfy the threshold requirement for that credit. The actual cooperation credit that a company ultimately receives, however, will depend on a number of additional factors. These include the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation. *See* USAM 9-28.700; *see also* USAM 9-28.710 fn. 1 (“There are other dimensions of cooperation beyond the mere disclosure of facts, such as providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records.”).

3. What is a cooperating company not required to do?

Receiving cooperation credit is in no way contingent on a waiver of either the attorney-client or the work product privilege. Now, as before, “prosecutors should not ask for such waivers and are directed not to do so.” USAM 9-28.710.

Cooperation does not mean that a company should conduct an overly broad investigation or embark on a lengthy, costly investigation every time it learns of misconduct. On the contrary, the Department expects companies to carry out investigations that are thorough but tailored to the scope of the wrongdoing.

A company also is not required to deliver a prosecutable case in order to obtain credit for cooperation. If a prosecutor is satisfied that the company has turned over all the relevant facts, the company can receive cooperation credit, even if the government cannot or does not bring charges against individuals.

Similarly, the company's counsel is not required to present its conclusions about the culpability of any individual or its legal theories to the government. Thus, as long as the company provides the relevant facts about the individuals involved in the conduct under investigation, the company will be eligible to receive cooperation credit.

Finally, a company is not required to take specific actions against employees as part of its efforts to obtain cooperation credit. It bears noting, however, that the Principles of Federal Prosecution of Business Organizations (the "Principles") have long provided that "[a] corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur." USAM 9-28.1000 ("Restitution and Remediation"). In considering any such remedial actions the company has taken, "prosecutors should consider ... whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct." *Id.*¹

4. When should a company report misconduct?

The Department "encourages early voluntary disclosure of criminal wrongdoing ... even before all facts are known to the company, and does not expect that such early disclosures would be complete." USAM 9-28.700. Once a company has made a preliminary assessment that criminal conduct has likely occurred, it should promptly report the matter to the government if it desires mitigation credit for voluntary self-disclosure. A company will not be disqualified from receiving such credit simply because it hadn't learned certain relevant facts by the time it made its initial disclosure. However, it is expected that, in circumstances where the company self-discloses before all facts are known, the company will continue to turn over additional information to the government as it becomes available. *Id.*

In recognition of the significant value early reporting holds for the government, the Principles were revised to separate voluntary disclosure from cooperation in order to treat

¹ This principle recognizes that "effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees," and that "prosecutors should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers." *Id.* But the focus of remediation is distinct from cooperation, which involves providing factual information to the government.

prompt voluntary disclosure as an independent factor to be considered. *See* USAM 9-8.900.

5. What happens if a company cannot determine who did what within the organization or is prohibited from providing that information to the government?

The Policy, as incorporated into the USAM, recognizes that, in certain circumstances, and “despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is actually prohibited from disclosing it to the government.” USAM 9-28.700 fn.1. In such circumstances, the Principles state that the “the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor.” *Id.* The prosecutor will make a determination, based on all the circumstances, about the validity of the claim, and discuss an appropriate resolution with company counsel. A company should identify any such concerns and convey them to the prosecutor as early as possible in the investigation.

In instances where there is a claim of privilege over one or more relevant facts, counsel for the corporation must let the prosecutor know about the existence of and basis for such a claim, so that the prosecutor is aware that there are relevant facts that are not being provided and has an opportunity to understand the basis for the claim of privilege.

6. Can a cooperating company enter into a joint defense agreement with individuals’ counsel?

As the Principles have long held, “[t]he mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements.” USAM 9-28.730. Of course, entering into such an agreement has the potential to complicate a corporation’s ability to cooperate, and, therefore,

the 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.

Id. Ultimately, “[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.” *Id.*

7. Does the “all facts” cooperation requirement apply in civil matters as well?

Yes. If a company wishes to receive cooperation credit in a civil matter, it must disclose the relevant facts regarding the individuals involved in the misconduct.
