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The Yates Memo – DOJ Issues Questions And Answers: Question 4 (Part 1)

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Mark D. Stuaan
Partner

This is the fifth in a series of blog posts that examines seven FAQs issued by the DOJ in response to questions the Yates Memo raised. The fourth of these questions concerns when a company should voluntarily disclose misconduct.

Question: When should a company report misconduct?

Let's investigate what the DOJ's response tells us about voluntary disclosure: It is fair to say that the Yates Memo focuses on a company's cooperation with the DOJ, focusing primarily on a company providing information about culpable individuals. For example, five of the seven FAQs refer to "cooperation" or "cooperating." Yet, FAQ No. 4 relates to reporting misconduct and does not specifically mention cooperation. Similarly, the DOJ's response to FAQ No. 4 makes only a brief, but important, reference to cooperation. The only explicit mention of company cooperation in the DOJ's response to FAQ No. 4 refers to how there is "significant value [in] early reporting" and that it is important to recognize that voluntary disclosure of misconduct is not the same as cooperation. Another part of the department's response touches on cooperation, albeit in an indirect reference: "…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." The DOJ's response to FAQ No. 4 clarifies that voluntary disclosure is not the same as cooperation, but that the two are related. Portions of the U.S. Attorneys' Manual (USAM) convey the same message. The potentially significant difference between voluntary disclosure and cooperation is illustrated, in part, by virtue of the USAM having separate sections on both factors: USAM § 9-28.700 (The Value of Cooperation) and § 9-28.900 (Voluntary Disclosures). There will be more about the relationship between voluntary disclosure and cooperation in part two of this blog.

Turning Over Additional Information

A company may still receive "mitigation credit for voluntary self-disclosure" even if it makes the disclosure at a time when the company had not "learned certain relevant facts by the time it made its initial disclosure." Company counsel should keep in mind that if that happens, the department expects that additional information will be turned over. The triggering event for a company to report misconduct arises when a "preliminary assessment" has been made

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by a company that “criminal conduct has likely occurred.” The assessment does not have to be, and probably should not be, a final or complete assessment of possible misconduct by all individuals. That is true in large part because of the time and resources that would be needed to reach a final or complete assessment. Thus, a significant decision for the company will be to figure out the point at which the company has sufficient information (even as information is being gathered) to determine whether criminal conduct has likely occurred and, therefore, whether the company should or should not make a disclosure. A “preliminary assessment” clearly contemplates a situation where not all the facts are known. This is in line with the DOJ “encourag[ing] early voluntary disclosure of criminal wrongdoing, see USAM 9-28.900, even before all facts are known to the company” and the department “not expect[ing] that such early disclosures would be complete.” USAM 9-28.700 n.1. However, in such situations, the DOJ expects that “the company will move in a timely fashion to conduct an appropriate investigation and provide timely factual updates to the department.” *Id.* In light of the DOJ’s use of the word “likely” in its response, counsel for a company might consider the standard to be one akin to a preponderance of the evidence. That is, the “measuring stick” for a company’s assessment (albeit a preliminary one) that criminal conduct has “likely occurred” could be deemed to be once it appears more likely true than not that criminal conduct has taken place. Because of the almost limitless range of factual situations, there is no one-size-fits-all date by which a company should voluntarily disclose misconduct. It is worth keeping in mind that the government, as the recipient of a voluntary disclosure, will have its own opinion as to when the company had sufficient information to determine whether criminal conduct has likely occurred. Thus, company counsel would be wise to do his or her best to assess the information as it becomes available from the perspective of the government and not just from the perspective of counsel for the company. The department will deem a company’s voluntary disclosure to be of little value, and therefore, of little value to the company, if it is not made “promptly after” a “preliminary assessment that criminal conduct has likely occurred.” Because of the relationship between voluntary disclosure and cooperation, it is possible that a belated voluntary disclosure could also adversely impact a company’s effort to get cooperation credit. Further, a belated voluntary disclosure could jeopardize a meaningful reduction in the company’s culpability score if it is convicted. These considerations must be balanced against the prospect of placing a company on the government’s radar because of a prompt but preliminary voluntary disclosure. Of course, in some situations the potential benefits of voluntary disclosure will outweigh the risks. In other situations, the scale will tip the other way. The decision to voluntarily disclose, or not voluntarily disclose, should not be made in the dark. A company is well-advised to have the benefit of an internal investigation before making the decision. It is difficult to envision a scenario where a company could intelligently and prudently make a decision that it has a "preliminary assessment that criminal conduct has likely occurred” without a sufficiently in-depth internal investigation. Check back soon for a post about what the DOJ’s response to FAQ No. 4 tell us about cooperation.