Does Yates Sound The Death Knell For Joint Defense Agreements?

The revised cooperation credit rules issued by the US Department of Justice (DOJ) in September 2015 under the Yates Memo require companies to focus on individuals from the outset of an investigation and to disclose ***all*** facts about corporate wrongdoers to the government. This new landscape potentially pits the interests of the company against the interests of the corporate constituent (*i.e.*, an officer, director, employee or shareholder) from the get-go. It is also unclear what impact the Yates Memo has on the DOJ's existing policy concerning joint defense agreements (JDAs), which has traditionally only mandated that a company be able to provide "some relevant facts" to the government. Do the new Yates cooperation credit rules sound the death knell for JDAs between companies and their constituents? Not quite. But JDAs likely will become less common and more complex.

Company-constituent JDAs have long been a valuable tool in corporate investigations and government enforcement litigation. They foster open channels of communication and allow parties to work on a common joint defense. Under a typical JDA, companies, constituents and their counsel can freely share confidential information without the fear of waiving work product or attorney-client privileges. From the company's perspective, JDAs can play a vital role in corporate investigations because they more readily allow the company to ascertain what happened from their constituents. From the constituent's perspective, JDAs allow them to learn about what other constituents have disclosed in the context of an investigation and the company's perspective on potential liability. The keystone of a JDA is a common interest among its parties. Once a party has reason to believe its interests no longer align with the other parties to the JDA, it must withdraw. Nevertheless, any confidential information the withdrawing party received under the JDA must be kept confidential.

The Yates Memo changes the JDA calculus. Under the DOJ's new policy, a company can only be eligible for cooperation credit if it discloses ***all*** relevant facts about individuals involved in corporate misconduct. This is an "all or nothing" policy. If the company wants cooperation credit, it must tell the government everything it knows about culpable constituents. It is unclear how this new cooperation credit rule melds with the DOJ's existing policy on JDAs. Since 2008, the policy has been that a JDA does not automatically render a company ineligible for cooperation credit. *See US Attorneys' Manual* § 9-28.730 (Sept. 2008) ("… the 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."). The *US Attorneys' Manual* also specifies that to avoid losing cooperation credit eligibility, the JDA should not prevent the company "from providing *some relevant facts* to the government...." *Id*. (emphasis added). While the DOJ's standing JDA policy has not received much attention in the past, the "some relevant facts" threshold appears to conflict with the new "all or nothing" policy imposed under Yates.

Yates will likely have three primary consequences on the use of JDAs:

1. ***JDAs will become less frequent***. From the company's perspective, a JDA could hinder its ability to obtain cooperation credit if the constituent attempts to block the company from disclosing facts acquired under the JDA. This "constituent veto" could potentially jeopardize the company's ability to qualify for cooperation credit under Yates. And from the constituent's perspective, there likely will be an increased reluctance to enter into an information sharing agreement with a company they believe may try to "throw them under the bus" down the road in exchange for leniency, especially if the company insists on an "anti-veto" provision that preserves the ability to disclose to the government all information provided by the constituent under the JDA.

2. ***JDAs will require more upfront due diligence***. The new Yates policy regarding cooperation credit eligibility creates a potential conflict between the company and the constituent at the outset of any investigation. Thus, in order to determine whether the interests of the company and the constituent are sufficiently aligned to trigger the "common interest" precondition of a JDA, the company may have to complete some minimum amount of due diligence concerning the constituent's potential culpability before deciding that a JDA is appropriate.

3. ***JDAs will become more complex***. The new Yates policy regarding cooperation credit eligibility applies to companies and other organizational entities, but not individuals. Thus, while constituents likely will be less inclined to enter into JDAs with their companies, they will still be able to enter into JDAs with other constituents to the exclusion of the company. This could potentially lead to a web of multiple, overlapping JDAs that would only compound the complexity of tracking common interests and confidentiality obligations. In addition, for the company-constituent JDAs, companies likely may feel compelled to include provisions that expressly address a potential future need to withdraw from the JDA and disclose facts learned under the JDA to the government.

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