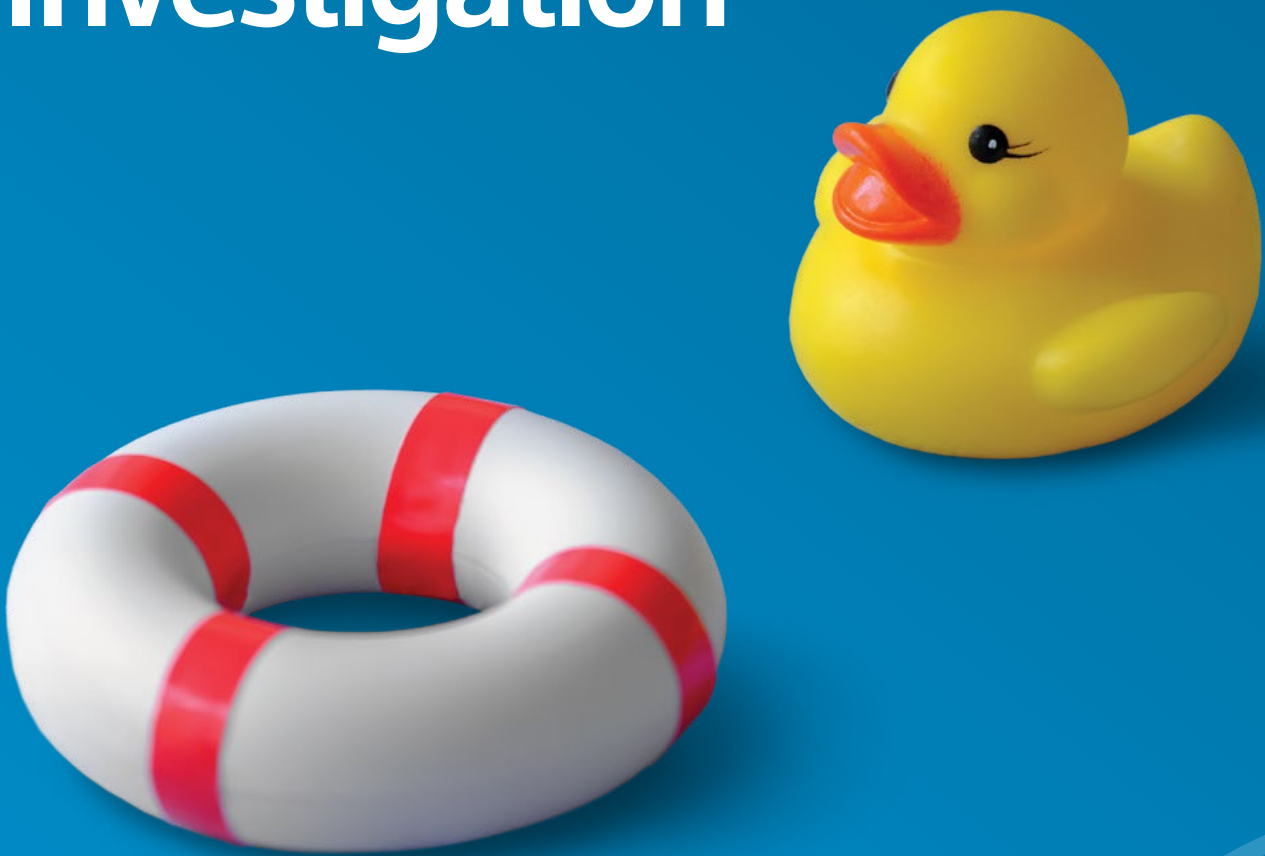


# Evaluating Whether to Cooperate in a Federal White Collar Criminal Investigation



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The government relies heavily on the cooperation of individuals and entities in federal white collar criminal investigations. Cooperating witnesses can identify key evidence and witnesses, and can help breathe life into otherwise document-heavy cases. Before recommending that a client cooperate in a white collar criminal investigation, counsel must have an early and detailed discussion with the client about the potential benefits, risks, duties, and unknowns that go along with cooperation.

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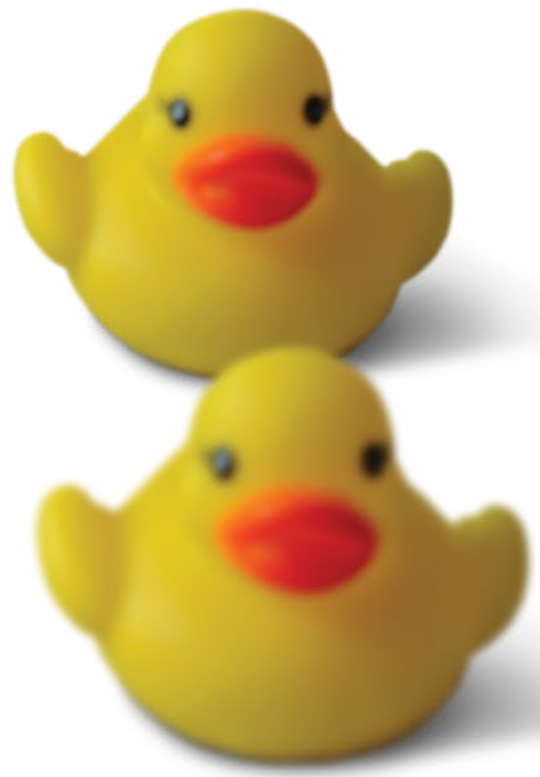


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In most federal white collar criminal investigations, the government seeks the assistance of cooperating witnesses to provide clarity and context. Individuals and entities that cooperate can help the government pinpoint critical information, including documents and witnesses, and explain criminal schemes from an insider's perspective. The government's ability to attract cooperators is driven by its authority to control the types and number of criminal charges brought against a cooperator, and to move for a reduced sentence based on the cooperator's substantial assistance in the investigation and prosecution of others.

The decision to cooperate or to refuse to cooperate requires a fact-specific inquiry. After a client makes this decision, it is difficult to change course. For example, once cooperation begins, the client must make admissions to the government that will typically preclude certain trial defenses. Conversely, if a client refuses to cooperate for a period of time, the government may no longer be interested in extending any benefits in exchange for cooperation.

This article explores key issues counsel should consider when determining whether to recommend that a client cooperate in a federal white collar criminal investigation. Specifically, it addresses:

- The main benefits and risks of cooperation.
- The factors to evaluate when an individual is considering whether to cooperate.
- The factors to evaluate when an entity is considering whether to cooperate.
- The potential ramifications of not cooperating.



Search [Navigating the Cooperation Process in a Federal White Collar Criminal Investigation](#) for more on the cooperation process, including attorney and client proffers, types of cooperation agreements, and sentencing hearings.

## BENEFITS AND RISKS OF COOPERATION

Individuals and entities facing criminal exposure can obtain substantial benefits by cooperating in a federal investigation, including:

- Non-prosecution agreements (NPAs).
- Deferred prosecution agreements (DPAs).
- Immunity from some of the criminal conduct that the government has charged or may charge.
- Reduced sentences (see below *Substantial Assistance Departures for Individuals*).
- Reduced financial penalties (see below *Substantial Assistance Departures for Entities*).

However, cooperators generally must admit to criminal conduct with no guarantee of a favorable outcome. Individuals and entities contemplating cooperation face many risks and unknowns because they typically:

- Must decide whether to cooperate at an early stage and under short, inflexible government deadlines due to, among other things:
  - the applicable statutes of limitation; and
  - the Speedy Trial Act of 1974 (18 U.S.C. §§ 3161-3174; see Department of Justice (DOJ), Justice Manual, Criminal Resource Manual § 628).

- Have incomplete information regarding:
  - the government's evidence;
  - the judge who will be assigned to the case;
  - the charges the government is likely to bring against the potential cooperator;
  - whether others are likely to cooperate and provide incriminating evidence against the potential cooperator; and
  - the time and effort necessary to satisfy cooperation obligations.

## INDIVIDUAL COOPERATION

Before determining whether to recommend that an individual cooperate in a federal white collar criminal investigation, counsel should understand:

- Which types of individuals the government usually targets for cooperation.
- What forms of assistance the government may require from an individual cooperator.
- How the government typically initiates the cooperation process with an individual.
- Whether an individual cooperator faces a statutory mandatory minimum sentence from which cooperation may provide relief.
- What specific factors to consider about the individual and the government's case against the individual.

## TYPES OF INDIVIDUAL COOPERATORS

Cooperators in white collar matters often fit one or more common profiles. They include individuals who are:

- Not the government's primary targets.
- Less culpable participants in the alleged criminal conduct.
- Low-level employees of the entity involved in the alleged criminal conduct.
- Capable of explaining complex documents, such as accounting records, to the government and the jury.
- In close relationships with the government's primary targets.

In rarer cases, the government may rely on a more culpable individual as a cooperator to pursue convictions against less culpable individuals. This is most likely to occur where an individual cooperates against a group of others with varying levels of culpability, including some who are more culpable and some who are less culpable than the cooperator. This can also occur where an individual cooperates against numerous less culpable individuals. However, both prosecutors and juries may find it off-putting for a culpable high-level employee to implicate only the employee's subordinates.

## FORMS OF ASSISTANCE FROM INDIVIDUAL COOPERATORS

At a minimum, individual cooperators must meet with prosecutors and federal agents to provide information about crimes others have committed. Additionally, cooperators may be required to:

- Produce documents.
- Participate in investigative operations, such as:
  - recording telephone calls or in-person meetings under an agent's supervision; or
  - introducing undercover agents into the criminal scheme.

- Testify:
  - before the grand jury;
  - at trial; or
  - at any pre- or post-trial hearings.

## INITIATION OF THE COOPERATION PROCESS FOR INDIVIDUALS

The cooperation process for individuals typically begins after federal agents:

- Approach an individual for an unannounced interview.
- Serve an individual with a grand jury subpoena.
- Arrest an individual.

### Drop-Ins

Federal agents sometimes approach individuals who are unaware they are under investigation, commonly referred to as drop-ins. If an individual agrees to be interviewed during a drop-in, the agents may try to persuade the individual to cooperate before the individual has an opportunity to retain counsel.

Statements an individual makes during a drop-in can compromise the individual's ability to contest any charges the government brings in the future, particularly if the individual:

- Admits to criminal conduct.
- Makes a false, material statement (18 U.S.C. § 1001).
- Makes misleading statements (18 U.S.C. §§ 1503, 1505, and 1512(c)).

If an individual seeks counsel after making compromising statements that admit guilt, cooperation may be the best option. This is because the compromising statements make it more difficult for counsel to credibly threaten to go to trial.

### Grand Jury Subpoenas

Individuals who are served with grand jury subpoenas may seek the advice of counsel. In these cases, counsel should weigh the advantages and disadvantages of cooperation before the scheduled grand jury appearance. If counsel and the client conclude that cooperation would be advantageous, counsel should contact the prosecutor to offer a client proffer and request postponement of the grand jury appearance. Prosecutors typically prefer to obtain information in a proffer before calling a grand jury witness whose testimony is unknown. Counsel should attempt to assess whether the prosecutor is interested in the client's cooperation, including by providing an attorney proffer in advance of the client's proffer.

### Arrests

In some cases, prosecutors file criminal charges and federal agents arrest individuals before offering them the opportunity to cooperate. After an initial court appearance:

- The defendant may ask counsel to approach the prosecutor to discuss cooperation.
- The prosecutor may ask counsel to discuss cooperation with the defendant.

- The prosecutor may conduct a reverse proffer, where the government shows the defendant evidence to demonstrate the strength of its case and the likelihood of a conviction to convince the defendant that cooperation is the best option.

Counsel should immediately meet with the defendant to assess whether cooperation is an option and, if so, whether cooperating is in the defendant's best interests. The defendant must make the decision to cooperate quickly because, among other reasons:

- The government may be more likely to accept a defendant as a cooperator where the defendant's assistance helps the government avoid the burdens of producing discovery and litigating motions.
- The timeliness of the defendant's assistance is a factor the sentencing court assesses under Section 5K1.1 of the US Sentencing Guidelines (see below *Substantial Assistance Departures for Individuals*).
- The value of the defendant's information may be time-sensitive.
- It can be advantageous to be the first individual to cooperate in a case where multiple defendants ultimately decide to cooperate.

## SUBSTANTIAL ASSISTANCE DEPARTURES FOR INDIVIDUALS

Individual cooperators may be eligible for reduced sentences based on their substantial assistance to the government under the following two provisions:

- **Section 5K1.1 of the Sentencing Guidelines.** Under this provision, a prosecutor may make a motion stating that the defendant has provided substantial assistance in the investigation or prosecution of another person, which authorizes the judge to depart downward from the otherwise applicable Sentencing Guidelines range. Although the Sentencing Guidelines are no longer binding, they remain a judge's starting point and initial benchmark at sentencing (see *Gall v. United States*, 552 U.S. 38, 49 (2007)).
- **18 U.S.C. § 3553(e).** Under this provision, a prosecutor may make a motion authorizing the judge to sentence a defendant below an otherwise applicable statutory minimum sentence. Although most white collar criminal cases do not involve statutes with mandatory minimum sentences, a few of these cases may implicate the statute prohibiting aggravated identity theft (18 U.S.C. § 1028A), which carries a mandatory two-year consecutive sentence.

Substantial assistance motions under these two provisions are distinct, but parties and the courts often refer to them collectively as a Section 5K1.1 motion.

When determining the extent of a substantial assistance departure for an individual cooperator, judges consider:

- The significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance received (see *United States v. Losovsky*, 571 F. Supp. 2d 545, 546 (S.D.N.Y. 2008)).
- The truthfulness, completeness, and reliability of the defendant's information and testimony.
- The nature and extent of the defendant's assistance.

- Any injury suffered or any danger or risk of injury to the defendant or the defendant's family resulting from the defendant's assistance.
- The timeliness of the defendant's assistance.

(US Sentencing Guidelines § 5K1.1.)

The extent of assistance needed to be deemed significant and useful can vary depending on the prosecutors, agency, division, office, and section. Prosecutors typically view a cooperator's testimony against another defendant as significant and useful cooperation, regardless of whether the defendant is convicted. However, prosecutors may disagree on the standard that applies to non-testifying cooperators. Although most individual cooperators receive a benefit for cooperating even if they are not called to testify, some prosecutors may not consider providing evidence alone to be significant and useful unless it leads to a specific result, such as:

- An arrest.
- An indictment.
- A guilty plea.
- A conviction.

Judges often grant Section 5K1.1 motions and impose lower sentences, however, they have discretion to impose any reasonable sentence up to the statutory maximum. A cooperator typically may not appeal a judge's refusal to depart downward for substantial assistance (see, for example, *United States v. Hayes*, 939 F.2d 509, 511-13 (7th Cir. 1991); *United States v. Castellanos*, 904 F.2d 1490, 1497 (11th Cir. 1990)). The degree of a judge's departure is also generally not reviewable, unless there is evidence that the judge considered an impermissible factor such as race (see, for example, *United States v. Hargrett*, 156 F.3d 447, 450-51 (2d Cir. 1998)).

#### CASE-SPECIFIC FACTORS TO CONSIDER FOR INDIVIDUALS

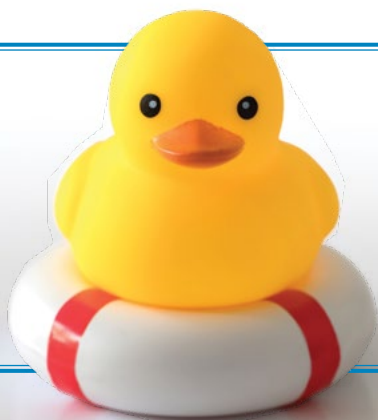
When representing an individual who is considering cooperation, counsel should evaluate the following factors:

- **The individual's willingness to be truthful and provide investigative cooperation.** The individual must be open and forthcoming, including by admitting to criminal conduct and disclosing relevant facts the government was unaware of without being asked. Additionally, the individual must be able to comply with all terms of the anticipated cooperation agreement.
- **The individual's background.** Issues that may arise in government interviews or at trial include the individual's:
  - past criminal history;
  - employer disciplinary actions;
  - drug or alcohol abuse; and
  - psychiatric disorders.

- **The quality of the individual's information and potential usefulness to the government.** Significant and useful assistance can result in a strong 5K1.1 motion and a reduced sentence. For example, a strong 5K1.1 motion may state that the cooperator:
  - successfully helped the government prosecute multiple high-level and important defendants; or
  - engaged in investigative operations by recording meetings or telephone calls with potential targets of the investigation.

If the cooperator's information is unlikely to assist the government in bringing significant cases, the ensuing Section 5K1.1 motion may be too weak to justify pleading guilty and giving up the chance to fight any criminal charges.

- **The strength of the government's case against the individual and the likelihood of prosecution if the individual does not cooperate.** An individual facing overwhelming evidence may be best served by trying to cooperate, even if the individual lacks substantial information about others. Alternatively, if the government's case is weak, an individual who is well situated to cooperate and has valuable information may be better served by going to trial.
- **The amount and type of requested cooperation.** In some cases, prosecutors may require an individual to undertake many onerous tasks to fulfill the cooperation requirements, which may weigh against cooperation. In other cases, the prosecutors' required forms of cooperation may make cooperation the best choice.
- **The individual's personal characteristics and resources.** Some individuals may be unwilling to testify against others, even if they are well situated to do so. Other individuals may be willing to testify, but lack the ability to do so in a clear and coherent manner. An individual with a strong defense to the government's allegations and the resources to defend against them should consider whether the possibility of a reduced sentence is worth giving up the chance to avoid criminal liability altogether by:
  - convincing the government not to file charges; or
  - prevailing at trial.



**Although most individual cooperators receive a benefit for cooperating even if they are not called to testify, some prosecutors may not consider providing evidence alone to be significant and useful unless it leads to a specific result.**

## COOPERATION VERSUS WHISTLEBLOWING

The line between a whistleblower and a cooperator can be blurred. A whistleblower reports criminal activity, anonymously or otherwise, often in the hopes of receiving a financial reward. Sometimes, the whistleblower may have criminal exposure for participating in the criminal activity.

The consequences that flow from whether the government views an individual primarily as a cooperator or a whistleblower can be dramatic. Even in the best-case scenario, cooperators typically must do an extensive amount of work in exchange for only the government's promise to make a substantial assistance motion. Whistleblowers, on the other hand, usually must make minimal efforts beyond the initial report of unlawful conduct and can obtain multi-million dollar rewards. Whistleblowers also receive protections against employer retaliation.

If a client may qualify as a whistleblower, counsel should inform the government at the outset of the matter. If a client is involved in criminal conduct, however, counsel and the client should consider carefully whether to come forward. The client must weigh the risks of criminal exposure, which can lead to an indictment and guilty plea, against any benefits that may be obtained under the applicable whistleblower program. If a whistleblower has criminal exposure and agrees to cooperate with the government, cooperation occurs in a similar manner to non-whistleblower cases and the whistleblower reward is reduced to account for the whistleblower's participation in the criminal conduct.



Search [Whistleblower Protections Under Sarbanes-Oxley and the Dodd-Frank Act](#) for more on whistleblower incentives and the scope of protected whistleblowing activity.

- **The likelihood that others choose to cooperate against the individual.** If others can implicate the individual, it is beneficial for the individual to be the first one to begin cooperating. If others are unlikely to agree to cooperate against the individual and the government's case is otherwise weak, the individual may be better served by going to trial.
- **The agency, division, office, or section investigating the individual and the charges to which the individual must plead guilty if the individual cooperates.** Local cooperation practices may vary. For example, some US Attorney's Offices require a cooperator to plead guilty to all crimes that the cooperator has ever committed, while others limit the guilty plea to just the crimes under investigation. The charges inform counsel of the sentencing range the individual is likely to face. If the range is too high, cooperation credit may not make a significant difference and the individual may be better served by going to trial.
- **If the government has charged the individual, the assigned judge's history of sentencing cooperators.** Some district judges apply a formulaic reduction for cooperation, such as a 50% reduction in sentence, while others conduct a holistic assessment of an individual's cooperation to determine the reduction. If the assigned judge does not typically give much credit for cooperation, that may weigh in favor of going to trial. Alternatively, if the judge generally imposes lenient sentences on both cooperators and non-cooperators, that may also weigh in favor going to trial, given that cooperation imposes significant personal costs and may not provide much additional benefit. However, counsel must be aware that there is no guarantee the judge initially assigned to the individual's case or a related defendant's case will be the judge who ultimately sentences the individual.

### ENTITY COOPERATION

Before determining whether to recommend that an entity cooperates in a federal white collar criminal investigation, counsel should understand:

- How the government typically initiates the cooperation process with an entity.
- How an entity can qualify for cooperation credit.
- Whether an entity may be entitled to any substantial assistance departures.
- What specific factors to consider about the entity and the government's case against the entity.
- The tension an entity may face if it is already in a joint defense agreement with an employee and then decides to cooperate with the government.

### INITIATION OF THE COOPERATION PROCESS FOR ENTITIES

Cooperation with an entity typically begins in response to an action by the government, such as:

- Serving a grand jury subpoena or a document request on the entity.
- Obtaining guilty pleas from individual employees of the entity.

### COOPERATION CREDIT FOR ENTITIES

To be eligible for cooperation credit, an entity must:

- Identify all individuals substantially involved in or responsible for the misconduct at issue.
- Provide the DOJ with all relevant facts related to the misconduct. (DOJ, Justice Manual § 9-28.700.)

Unlike individual cooperators with knowledge based on their personal experiences, an entity seeking to cooperate with the government typically must investigate the relevant facts by, for example:

- Reviewing its employees':
  - emails;
  - calendar entries;
  - recorded telephone calls;
  - chat transcripts;
  - client files;
  - disciplinary records; and
  - trading records.
- Interviewing the relevant employees and agents acting on the entity's behalf.



Search [Conducting Internal Investigations: SEC and DOJ Investigations Toolkit](#) for a collection of resources to help entities and their counsel prepare for and conduct effective internal investigations.

If an entity cannot identify all relevant individuals in the case or disclose every fact despite its good faith efforts to cooperate fully, the entity may still be eligible for cooperation credit (US Sentencing Guidelines § 8C2.5(g) cmt. n.13). However, the entity will bear the burden of explaining the obstacles it encountered and why they could not be overcome. An entity that fails to learn the facts about individual misconduct or to provide the information to the government risks forfeiting cooperation credit. (DOJ, Justice Manual § 9-28.700.)



Search [Criminal and Civil Liability for Corporations, Officers, and Directors](#) for more on earning cooperation credit.

## SUBSTANTIAL ASSISTANCE DEPARTURES FOR ENTITIES

Cooperating entities may be eligible for reduced fines based on their substantial assistance to the government under Section 8C4.1 of the Sentencing Guidelines. Judges consider the following factors to determine the extent of a substantial assistance departure for an entity:

- The significance and usefulness of the entity's assistance, taking into consideration the government's evaluation of the assistance received.
- The nature and extent of the entity's assistance.
- The timeliness of the entity's assistance.

(US Sentencing Guidelines § 8C4.1.)

## CASE-SPECIFIC FACTORS TO CONSIDER FOR ENTITIES

Entities facing criminal charges often choose to cooperate with the government rather than contest the charges and potentially go to trial. This is because:

- The government already obtained the convictions of individuals associated with the entity, which provides the government with a low bar to attribute those individuals' wrongdoing to the entity.

- The reputational harms associated with a protracted court battle dissuades the entity from pursuing a trial.

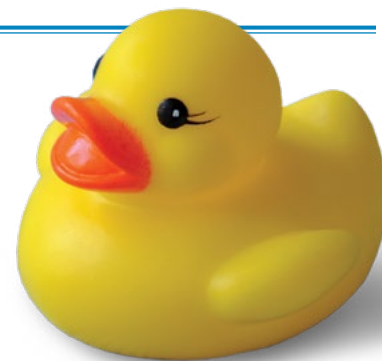
On the other hand, an entity may choose to go to trial in cases where:

- The entity believes the law imposing liability is unclear.
- The government's witnesses are not credible.
- The entity is likely to be put out of business even if it reached a favorable disposition with the government.

When representing an entity that is considering cooperation, counsel should evaluate the following factors:

- **The quality of the entity's information and potential usefulness to the government.** The government generally expects a cooperating entity to provide ready access to documents and a candid assessment of whether individuals associated with the entity engaged in any wrongdoing. The government also requires entities to proactively identify information the government was unaware of without being asked. Passive compliance with the government's grand jury subpoena is not generally recognized as cooperation.
- **The strength of the government's case against the entity and the likelihood of prosecution if the entity does not cooperate.** If the government has already obtained the guilty pleas of an entity's employees, counsel may recommend that the entity cooperate to avoid indictment. Counsel should also assess whether any known cooperators may be able to provide credible testimony against the entity.
- **The amount and type of requested cooperation.** In some cases, the government limits its demands of an entity to document requests. In other cases, the government expects to see the results of a full-scale internal investigation, which may entail a work plan, employee interviews, and real-time reporting to the government.
- **The potential business interruption and financial cost to the entity, including the use of employee resources.** Cooperation involves a significant investment of resources, both to uncover the relevant facts and to respond to the government's requests. Moreover, internal investigations can significantly disrupt the entity's day-to-day functions and are especially costly if the entity hires outside counsel to conduct the investigation. (For more information on using outside counsel, search [Working Effectively with Outside Counsel Checklist](#) and [Outside Counsel Evaluation Process Checklist](#) on Practical Law.)
- **The entity's employees, officers, directors, or business partners who have potential civil or criminal exposure.** Because the entity must be completely transparent about others' potential liability, counsel should carefully consider whether the entity should cooperate if an employee with potential exposure is so intertwined with the entity's identity that an action against the individual is likely to put the entity out of business.
- **The agency, division, office, or section investigating the entity and the possible dispositions available.** Local cooperation practices may vary. For example, agencies use different standards of eligibility for NPAs or DPAs. Other dispositions may include a guilty plea to certain charges and financial penalties.

**Because the entity must be completely transparent about others' potential liability, counsel should carefully consider whether the entity should cooperate if an employee with potential exposure is so intertwined with the entity's identity that an action against the individual is likely to put the entity out of business.**



#### **TENSION BETWEEN JOINT DEFENSE AGREEMENTS AND COOPERATION**

If an entity has entered into a joint defense agreement with an employee, the employee controls the information she discloses to the entity and, in turn, can prevent the entity from disclosing that information to the government (see, for example, *United States v. Weissman*, 1996 WL 737042, at \*6, \*13, \*18, \*32 (S.D.N.Y. Dec. 26, 1996)). Therefore, a joint defense agreement with an employee may impact an entity's cooperation credit in a white collar criminal investigation (see above *Cooperation Credit for Entities*).

When deciding whether to cooperate, if an entity has already entered into a joint defense agreement with potentially culpable employees, the entity should evaluate whether it may be precluded from receiving some or all cooperation credit because it cannot disclose all relevant facts that the DOJ requires (see DOJ, Justice Manual § 9-28.730).

#### **FAILURE TO COOPERATE**

If a client decides not to cooperate in a federal white collar criminal investigation, counsel should consider whether:

- The court may increase the client's sentence because of the refusal to cooperate.
- The government may seek a court order to compel testimony from the client.

#### **SENTENCING INCREASES**

The Sentencing Guidelines prohibit judges from viewing a defendant's refusal to cooperate as an aggravating sentencing factor (US Sentencing Guidelines § 5K1.2). Although courts agree that a sentencing increase based on the refusal to cooperate may not go above the Sentencing Guidelines range, they have taken varying approaches when considering whether the refusal to cooperate may drive an increase within the applicable range. For example:

- The Second Circuit held that a court can consider a refusal to cooperate in deciding not to grant leniency but cannot use it as a reason for a sentencing penalty (*United States v. Rivera*, 201 F.3d 99, 101-02 (2d Cir. 1999)).
- The Seventh Circuit held that if an increased sentence stays within the applicable range, it should be not conceptualized as a penalty (*United States v. Klotz*, 943 F.2d 707, 710-11 (7th Cir. 1991)).

(See *United States v. Gaynor*, 167 F. App'x 346, 347-48 (4th Cir. 2006) (discussing the circuit split); see also *Roberts v. United*

*States*, 445 U.S. 552, 559-61 (1980); *United States v. Gerby*, 41 Fed. App'x 312, 317-18 (10th Cir. 2002).)

#### **ORDER TO COMPEL TESTIMONY**

If an individual refuses to cooperate, the government can obtain a court order of immunity that compels the witness to testify before or after the individual pleads guilty or is convicted. The individual must then testify and cannot invoke the Fifth Amendment privilege against self-incrimination. The government cannot use the individual's testimony or any information directly or indirectly derived from the testimony against the individual. (18 U.S.C. § 6002.)

An order to compel testimony requires a showing that:


- The testimony is necessary to the public interest.
- The individual refuses or is likely to refuse to testify based on the Fifth Amendment privilege against self-incrimination. (18 U.S.C. § 6003.)

 Search [Fifth Amendment Protection Against Self-Incrimination](#) for more on asserting the Fifth Amendment privilege.

The government considers the following non-exhaustive list of factors when determining whether immunity is necessary to the public interest:

- The importance of the investigation or prosecution.
- The value of the individual's testimony or information.
- The likelihood of prompt and full compliance with a compulsion order and the effectiveness of available sanctions if there is no compliance.
- The individual's relative culpability in connection with the investigation and the individual's criminal history.
- The possibility of successfully prosecuting the individual before compelling her testimony.
- The likelihood of adverse collateral consequences to the individual if she testifies under a compulsion order.

(DOJ, Justice Manual § 9-23.210.)

 Search [Immunity](#) for more on immunity in white collar cases.