

# Evaluating Whether an Individual or Entity Should Cooperate in a Federal White Collar Criminal Investigation

BRIAN A. JACOBS AND NICOLE L. BUSEMAN, MORVILLO ABRAMOWITZ GRAND IASON & ANELLO P.C. WITH PRACTICAL LAW LITIGATION

Search the [Resource ID numbers in blue](#) on Westlaw for more.

**A Practice Note examining key issues for counsel to consider in advising individuals and companies deciding whether to cooperate in federal white collar criminal investigations. Specifically, this Note explains the benefits and risks of individual and entity cooperation, the main differences between cooperation and whistleblowing, and considerations for counsel when determining whether to recommend cooperation.**

The government heavily relies on the cooperation of individuals and companies in federal white collar criminal investigations. Individual cooperating witnesses can help breathe life into otherwise document-heavy white collar cases and explain criminal schemes to juries from an insider's perspective (see *Kastigar v. United States*, 406 U.S. 441, 446 (1972) (observing that "many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime")). Companies that cooperate can help the government identify key documents and witnesses.

The government's ability to attract cooperators is driven by its authority to:

- Control the charging process, by deciding:
  - the types of criminal charges; and
  - the number of counts charged.
- Move at sentencing for a reduced sentence based on the cooperator's substantial assistance to the investigation and prosecution of others.

Before recommending that a client cooperate with a federal 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.

Individuals and entities facing criminal exposure can obtain substantial benefits by cooperating in investigations and prosecutions, 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.
- Reduced financial penalties.

Cooperation also carries significant risks because it often involves admitting criminal conduct with the hope, but not the guarantee, of a favorable outcome.

Individuals and entities contemplating cooperation face many unknowns because they often must decide whether to cooperate:

- At an early stage.
- Under short inflexible government deadlines due to:
  - the applicable statutes of limitations; and
  - the Speedy Trial Act of 1974 (18 U.S.C. §§ 3161-3174; and see US Attorneys' Manual Criminal Resource Manual § 628).

Potential cooperators also often 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 them.
- Whether others are likely to cooperate and provide incriminating evidence against them.
- The time and effort necessary to satisfy their cooperation obligations.

This Note examines key issues for counsel to consider when representing individuals and entities weighing cooperation with federal white collar criminal investigations.

## INDIVIDUAL COOPERATION

To even consider cooperation, an individual facing potential criminal exposure must be prepared to admit criminal conduct and generally must have information about others who have committed a crime.

Cooperators in white collar matters often fit one or more of the following profiles:

- An individual who is not the government's primary target.
- A low-level employee.
- A less culpable participant in the criminal conduct.
- An individual who can explain complex documents, such as accounting records, to the government and the jury.
- An individual who has close relationships with the government's primary targets.

In rarer cases, the government may rely on a more culpable individual as a cooperator to make cases against less culpable individuals. This is most likely to occur when an individual cooperates against some individuals more culpable than the she is and also cooperates against less culpable individuals. This also can occur when a single individual cooperates against numerous less culpable individuals. However, both the government and juries can find it off-putting for a culpable high-level employee to implicate only the employee's subordinates.

Individual cooperators may be eligible for two distinct kinds of substantial assistance departures at sentencing:

- Section 5K1.1 of the US Sentencing Guidelines authorizes the government to make a motion asking the judge to depart from the otherwise applicable Sentencing Guidelines range based on the defendant's substantial assistance to the government (US Sentencing Guidelines § 5K1.1). The Sentencing Guidelines are no longer binding, but 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) authorizes the government to make a motion to allow the judge to sentence a defendant below an otherwise applicable mandatory minimum sentence based on substantial assistance. Most white collar cases do not involve statutes with mandatory minimum sentences, except for the statute prohibiting aggravated identity theft, which occasionally comes up in white collar cases and carries a mandatory two-year consecutive sentence (18 U.S.C. § 1028A).

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

When determining the extent of a substantial assistance departure for an individual, 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 testimony.
- The nature and extent of the defendant's assistance.
- Any injury suffered or risk of danger resulting from the defendant's assistance.
- The timeliness of the defendant's assistance.

(US Sentencing Guidelines § 5K1.1.)

Although judges often grant Section 5K1.1 motions and impose lower sentences, they still retain discretion to impose any reasonable sentence up to the statutory maximum (see Practice Note, Navigating the Cooperation Process in a Federal White Collar Criminal Investigation: The Sentencing Hearing). A cooperator 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) and *United States v. Castellanos*, 904 F.2d 1490, 1497 (11th Cir. 1990)).

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. For example, 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.

In most cases, however, individual cooperators receive a benefit for cooperating when they help the government gather evidence and investigate a case, even if they are not called to testify and, in some cases, even if no arrests are made.

At a minimum, individual cooperators meet with the prosecutors and agents and provide information about crimes other people committed. Cooperation can include:

- Meeting with the government to provide information.
- Producing documents.
- Participating 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.
- Testifying:
  - before the grand jury;
  - at trial; or
  - at any pre- or post-trial hearing.

## INITIATING THE COOPERATION PROCESS

Individual cooperation can begin after the government:

- Approaches an individual for an interview.
- Serves an individual with a grand jury subpoena.
- Arrests an individual.
- Approaches an individual's employer for an interview.

## Drop-Ins

In some cases, the government approaches an individual who is unaware she is under investigation, commonly referred to as a drop-in. If the individual agrees, agents interview the individual and try to persuade her to cooperate before she 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 admitting guilt, cooperation may be the best option, because any compromising statements make it more difficult for counsel credibly to threaten to go to trial.

### Grand Jury Subpoenas

Sometimes federal agents serve grand jury subpoenas. Individuals, in turn, 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 her 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 (see Practice Note, Navigating the Cooperation Process in a Federal White Collar Criminal Investigation: Client Proffers). 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 (see Practice Note, Navigating the Cooperation Process in a Federal White Collar Criminal Investigation: Attorney Proffers).

### Arrests

In cases where the government has arrested an individual, after the individual's initial court appearance:

- She may ask her counsel to approach the government to discuss cooperation.
- The government may request counsel to discuss cooperation with her client.
- The government may conduct a reverse proffer, where the government lays out some or all of its evidence to demonstrate the strength of its case and the likelihood of a conviction to try to convince the defendant that cooperation with the government is her best option.

In any of these cases, because the government already has filed criminal charges, the defendant must make the decision to cooperate quickly, if possible, before discovery and motion practice, because, among other reasons:

- The timeliness of the defendant's assistance is one of the factors the sentencing court assesses under Section 5K1.1 of the Sentencing Guidelines (US Sentencing Guidelines § 5K1.1).
- The value of the defendant's information may be time-sensitive.
- There is value to being the first individual to cooperate in a case where multiple defendants end up cooperating.
- The government may be more likely to accept a defendant as a cooperator when the defendant's assistance helps the government avoid the burdens of producing discovery and litigating motions.

Where appropriate, counsel should immediately meet with the defendant to assess whether cooperation is an option and if so, whether cooperating is in the client's best interests (see Deciding Whether to Cooperate).

If the client wants to cooperate, counsel should request a meeting with the government to discuss cooperation as soon as possible (see Practice Note, Navigating the Cooperation Process in a Federal White Collar Criminal Investigation: Proffers).

### Employer Involvement

In some cases, the government may ask a company to help obtain the cooperation of its employees. For example, the government may ask a company to interview certain employees or make them available for government interviews. When this happens, the company typically has the leverage of terminating employees for failing to cooperate, depending on their employment status and the applicable federal, state, local, or foreign laws (see, for example, *Gilman v. Marsh & McLennan Cos., Inc.*, 826 F.3d 69, 73, 75 (2d Cir. 2016) (holding that the company's interview demands were reasonable and it had cause to fire the two employees for refusing to comply)). Counsel should discuss carefully with her client how to weigh the risk of criminal exposure in a government interview against the certainty of termination if the client refuses.

### DECIDING WHETHER TO COOPERATE

At the outset, counsel representing a potential cooperator should assess the client's:

- Usefulness to the government, including whether the potential cooperator is willing to provide investigative cooperation.
- Willingness to be truthful.
- Past criminal history.
- Other issues that may arise in government interviews or at trial, including any past:
  - employer disciplinary actions;
  - drug abuse;
  - alcohol abuse; or
  - psychiatric disorders.

The decision whether to cooperate is a fact-specific inquiry. Once the client decides to cooperate or to refuse to cooperate, that decision can be difficult to change. When cooperation begins, the client must make admissions to the government that likely preclude any trial defense. Conversely, if a client refuses to cooperate for a period of time, the government may no longer be interested in extending any benefits for cooperation (see Failure to Cooperate).

When determining whether to recommend cooperation, counsel should evaluate:

- **The quality of the client's information and potential assistance, including the client's opportunity for and willingness to engage in investigative operations.** Significant and useful assistance can result in a strong 5K1.1 motion and potentially 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, for example, 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 further.
  - **The strength of the government's case against the cooperator and the likelihood of prosecution if the client 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 otherwise weak, an individual who is well situated to cooperate and possesses valuable information may be better served going to trial.
  - **The agency, division, office, or section investigating the client.** Local practices may vary, for example, some US Attorney's Offices require a cooperating defendant to plead guilty to all crimes that the cooperator has ever committed, while others limit the guilty plea to just the crimes under investigation.
  - **If the government has charged the cooperator, the assigned judge's history of sentencing cooperators.** If the judge does not typically give much credit for cooperation, that may weigh in favor of taking a case to trial. Alternatively, if the judge generally imposes lenient sentences on both cooperators and non-cooperators, that may favor going to trial, as cooperation imposes significant personal costs and may not provide much additional benefit. Some district judges reward cooperation with a formulaic reduction, such as a 50% reduction in sentence for cooperation, while other district judges conduct a holistic assessment of the cooperation to determine the reduction. However, when considering this factor, counsel must be aware that there is no guarantee the judge initially assigned to either the client or a related defendant's case will be the judge ultimately sentencing the client.
  - **The client's personal characteristics and resources.** Some individuals, even if otherwise well situated to testify against others, may not be willing to do so. Other cooperators 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 for 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.
  - **The client's likely ability to comply with all terms of the anticipated cooperation agreement.** The client must be truthful and forthcoming, including disclosing relevant facts that the government was unaware of without being asked. (See Practice Note, Navigating the Cooperation Process in a Federal White Collar Criminal Investigation: Cooperation Agreements.)
  - **The likelihood that others choose to cooperate against the client.** If others can implicate the client, it is often beneficial for the client to be the first one to begin cooperating. If others are unlikely to agree to cooperate against the client and the case is otherwise weak, it may be worthwhile for the client to take her chances at trial.
  - **The amount and type of requested cooperation.** Prosecutors may require the cooperator to undertake many onerous tasks to fulfill the cooperation requirements, which may weigh against cooperating. In other instances, the forms of cooperation prosecutors require may make cooperating the best choice.
  - **The charges to which the cooperator must plead guilty.** The charges inform counsel regarding the Sentencing Guidelines range the client is likely to face. If the range is too high, cooperation credit may not make a significant difference. In this case, a client may be better off going to trial.
- ## ENTITY COOPERATION
- Unlike individual cooperators with knowledge based on their personal experiences, an entity seeking to provide substantial assistance to the government typically must first investigate the relevant facts by, for example:
- Reviewing its employees':
    - emails;
    - calendar entries;
    - recorded telephone calls;
    - client files;
    - disciplinary records; and
    - trading records.
  - Interviewing the relevant employees and agents acting on the company's behalf.
- In return for substantial assistance, the government can move for a downward departure on behalf of a cooperating entity under Section 8C4.1(a) of the Sentencing Guidelines (see Practice Note, Navigating the Cooperation Process in a Federal White Collar Criminal Investigation: The Sentencing Hearing). Under Section 8C4.1(a), judges evaluate 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(a).)
- To be eligible for any cooperation credit, corporations must provide the government with all relevant facts about individuals engaged in corporate misconduct (see the DOJ's Memorandum on Individual Accountability for Corporate Wrongdoing (Yates Memo)). A company that fails to learn the facts about individual misconduct or to provide the information to the government risks forfeiting all cooperation credit. For more information, see Practice Note, Criminal and Civil Liability for Corporations, Officers, and Directors: The Yates Memo ([6-501-9459](#)) and Article, Expert Q&A on the DOJ's Yates Memo ([w-001-6060](#)).
- To meet the Yates Memo's requirements, companies typically hire outside counsel to conduct an internal investigation. For more information related to conducting internal investigations, see Conducting Internal Investigations: SEC and DOJ Investigations Toolkit ([w-004-4887](#)).

## INITIATING THE COOPERATION PROCESS

Cooperation with an entity typically begins in response to an action by the government, often a grand jury subpoena or a document request from the SEC or another agency. In some instances, the government begins by obtaining guilty pleas from individual employees and then proceeds to request the entity's cooperation.

## DECIDING WHETHER TO COOPERATE

At the outset of a criminal case involving an entity, the entity must determine whether to cooperate with the government or whether to contest the charges and potentially go to trial. Only a small number of entities facing charges generally go to trial. Explanations for this may include:

- That the government has already obtained the convictions of individuals associated with an entity, which provides the government with a low bar to attribute those individuals' wrongdoing to the entity.
- That entities are dissuaded from going to trial because of the reputational harms associated with a protracted court battle.

On the other hand, several factors may lead an entity to pursue a trial, some of which are similar to the factors that lead individuals to go to trial, including:

- 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.

In determining whether to recommend cooperation, counsel for an entity should evaluate:

- **The strength of the client's information and potential assistance.** 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 strength of the government's case and the likelihood of prosecution if the entity does not cooperate.** If the government has already obtained the guilty pleas of a company's employees, for example, then cooperation may be the company's best option to avoid indictment. Counsel should also assess whether any cooperating witnesses may be able to provide credible testimony.
- **The agency, division, office, or section investigating the client.** Local practices may vary, for example, regarding whether NPAs or DPAs are available and what is required to obtain them.
- **The potential business interruption.**
- **The financial cost to the business, including the use of employee resources.**
- **The employees, officers, directors, or business partners who have potential civil or criminal exposure.** For example, companies should carefully consider whether to cooperate when an employee with potential exposure is so intertwined with the company's identity that an action against the individual is likely to put the company out of business.
- **The amount and type of requested cooperation.** The government sometimes limits its demands of an entity to document requests,

while in other instances the government may expect to see the results of a full-scale internal investigation.

- **The possible dispositions available.** Possible dispositions include an NPA, DPA, a guilty plea to certain charges, and financial penalties.

Entities weighing the prospect of cooperating must consider the costs to the business in time and money. Cooperation involves a significant investment of company resources, both to uncover the relevant facts and to respond to the government's requests for:

- A work plan.
- Information.
- Documents.
- Employee interviews in an order the government approves.
- Real-time reporting to the government of the results of the employee interviews.

The government requires entities to proactively identify information of which the government was unaware and about which the government may not have inquired. Simply complying with the government's grand jury subpoena is not recognized as cooperation.

Internal investigations can significantly disrupt a company's day-to-day functions. If the entity hires outside counsel to conduct the investigation, this also adds a significant cost. For more information on using outside counsel, see [Working Effectively with Outside Counsel Checklist \(7-617-8668\)](#) and [Outside Counsel Evaluation Process Checklist \(w-001-4083\)](#).

Under the Yates Memo, entities must also be prepared to be completely transparent about any potentially liable individuals or entities.

## Joint Defense Agreement Issues

Entities may see a tension between being in a joint defense agreement with its employees and cooperating with the government. According to the Yates Memo, an entity only receives cooperation credit if it cooperates fully with the government, including identifying employees with individual responsibility. If an entity has entered into a joint defense agreement with an employee, the employee controls the information she discloses to the entity. If the entity chooses to cooperate, the employee can prevent the entity from disclosing her 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).)

The DOJ does not view joint defense agreements between an entity and culpable employees favorably and is unlikely to waive the Yates Memo's requirements because a joint defense agreement prevented an entity from disclosing relevant information. 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 any cooperation credit because it cannot disclose all relevant facts that the Yates Memo requires. (See also *US Attorneys' Manual* § 9-28.730.)

## FAILURE TO COOPERATE

The Sentencing Guidelines prohibit judges from viewing the defendant's refusal to cooperate as an aggravating sentencing factor (*US Sentencing Guidelines* § 5K1.2). Courts take different approaches

when considering whether the failure to cooperate can increase a defendant's sentence within the Sentencing Guidelines range (compare *United States v. Rivera*, 201 F.3d 99, 101-02 (2d Cir. 1999) (holding that a court can consider a refusal to cooperate in deciding not to grant leniency but cannot use it as a reason to increase the defendant's sentence) and *United States v. Klotz*, 943 F.2d 707, 710-11 (7th Cir. 1991) (holding that the court's comments about the defendant's failure to cooperate in imposing a sentence within the Sentencing Guidelines range can be interpreted as a character trait relevant to sentencing as opposed to a penalty for failing to cooperate); and see *Roberts v. United States*, 445 U.S. 552, 559-61 (1980) and *United States v. Gerby*, 41 Fed. Appx. 312, 317-18 (10th Cir. 2002)).

Even if an individual refuses to cooperate, the government can seek to compel testimony from the individual under a use immunity order before or after the client pleads guilty or is convicted. The individual must then testify and cannot invoke her 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; but see US Attorneys' Manual Criminal Resource Manual § 718.)

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 her Fifth Amendment privilege against self-incrimination.

(18 U.S.C. § 6003.)

The government considers the following non-exhaustive list of factors when determining whether use 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 her 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.

(US Attorneys' Manual § 9-23.210.)

## COOPERATION VERSUS WHISTLEBLOWING

A whistleblower reports criminal activity (anonymously or otherwise), often in the hopes of receiving a financial reward. In some cases, the whistleblower may have criminal exposure for participating in the criminal activity.

The line between a whistleblower and a cooperator can be blurred. 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 receive nothing more than the government's promise to make a substantial assistance motion in exchange for what can be an extensive amount of work (see Individual Cooperation). Whistleblowers, on the other hand, usually do little beyond making the initial report of unlawful conduct. Whistleblowers also receive protections from employer **retaliation** (see Practice Note, Whistleblower Protections Under Sarbanes-Oxley and the Dodd-Frank Act: Proving a Retaliation Claim Under SOX ([7-501-7799](#)) and Dodd-Frank Protections Against Retaliation ([7-501-7799](#))).

Unlike cooperators, whistleblowers can receive multi-million dollar rewards for their help. For more information on whistleblower rewards under the Dodd Frank Act, see Practice Note, Whistleblower Protections Under Sarbanes-Oxley and the Dodd-Frank Act: Dodd-Frank Whistleblower Incentives ([7-501-7799](#)).

Early on, counsel should consider carefully whether her client may qualify as a whistleblower. If the client may be a whistleblower, counsel should inform the government at the outset. If a client is involved in criminal conduct, the client should consider carefully with counsel whether to come forward and weigh the risks of criminal exposure, which can lead to an indictment and guilty plea, against any benefits that may be obtained under whistleblower programs. If the whistleblower has criminal exposure and agrees to cooperate with the government, cooperation occurs in a similar manner to a cooperator who is not a whistleblower (see Individual Cooperation). The whistleblower award, however, is reduced to account for the whistleblower's participation in the criminal conduct.

## ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at [legalsolutions.com/practical-law](https://legalsolutions.com/practical-law). For more information or to schedule training, call **1-800-733-2889** or e-mail [referenceattorneys@tr.com](mailto:referenceattorneys@tr.com).