

INSIGHTS

## Cooperation Credit: What Are the Rules Now?

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By: [Matthew G. Nielsen](#) and [Seth D. DuCharme](#)

On this episode of The Bracewell Sidebar, hosts [Matthew Nielsen](#) and [Seth DuCharme](#) share their thoughts on the ABA White Collar Conference, held in Miami, Florida, March 1-3, 2023.

**We saw some policies coming from a couple of US attorney offices. Because US attorney's offices ought to be following Department of Justice policies, what did you see the need there for the US attorney's offices to step out and promote their own early self-disclosure policies?**

There's always a little bit of a dance between the US attorney's offices out in the field all around the United States and the Main Justice components, which frequently have overlapping or complimentary equities in what those offices are doing. Depending on your perspective, sometimes the independence of the US attorney's offices are celebrated and sometimes maligned, depending on how those offices are operating.

To be empathetic to the corporations and counsel that have to deal with the Department in one form or another, initially there can be a concern about who am I really dealing with? You know, I'm dealing with an assistant United States attorney from my local US attorney's office today. But then will I be dealing with a trial attorney from a Main Justice component tomorrow, and is there going to be consistency in messaging?

**There's a lot of hesitation out in the defense community of there's a wait and see approach, as they don't want to be the first one to test this new policy to see if they're really going to get a better result. What are your thoughts on that? What are you seeing?**

There's got to be a mutual understanding of expectations, both with the corporation, the outside counsel and the Department. That's always where the churn comes from. The Department is essentially saying, look, we've got a carrot, we've got a stick. We're going to start from the point where we want corporations to act like good corporate citizens and to invest time, energy, money and resources into compliance programs, to empower compliance departments, to give real teeth to these things so that there is integrity and law-abiding behavior in the way our corporations conduct their business.

Most corporations, I think, would say, of course, we are good corporate citizens. We conduct our business lawfully; we take compliance seriously. But on this notion of voluntary self-disclosure, there's certainly room for discretion. On the one hand, I don't think the Department or the corporations benefit if every in-house or outside counsel is calling some DOJ lawyer, whether assistant United States attorney member of the Fraud Section, on a weekly basis to say, hey, I just want to check in.

**I think we all agree that companies cannot know everything that's going on. They rely on people to find problems and most of the time those problems are discovered not from some kind of internal audit or some kind of legal review but through informal sources. I think that's really what the department is trying to underscore here. That you've got to have an effective compliance program so that you can learn about potential misconduct internally before we learn about it externally, right?**

Like so many things, it depends on people knowing what their area of responsibility is. Being able to communicate in both a disciplined way but also a candid way. And the discipline in communication and creating the environments within the company where people can speak freely so that they truly do understand what their responsibilities are. Human nature, and all law enforcement to some degree, is about managing human behavior, incentives and consequences for things. And there's a little bit of suspicion on both sides. Clearly, the government is a little suspicious about how seriously, at least some corporations are taking their compliance obligations and some corporations are a little suspicious about, well, what's going to happen if I do report?

Have questions about this podcast? Email [Matthew Nielsen](#) or [Seth DuCharme](#).

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