

Client Alert

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Three Key Takeaways from DOJ's New Yates Memo on Individual Accountability for Corporate Wrongdoing

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During a September 10, 2015 conference at New York University, Deputy Attorney General (DAG) Sally Quillian Yates announced new Department of Justice (DOJ or the Department) policy that could significantly affect the way that companies cooperate with DOJ in criminal and civil investigations.¹ DAG Yates expressly acknowledged the difficulties of bringing cases against individuals for corporate misdeeds and implicitly addressed the chorus of critics who have faulted DOJ for what they view as a failure to hold individuals accountable for the 2008 financial crisis and other recent corporate scandals.² Yates then revealed that she had issued a new policy memo regarding "Individual Accountability for Corporate Wrongdoing" (the Yates Memo³), the provisions of which will eventually be incorporated into two parts of the U.S. Attorney's Manual (USAM) that govern criminal and civil corporate investigations—the Principles of Federal Prosecution of Business Organizations and the USAM's civil litigation provisions.

The Yates Memo sets forth "six key steps," some reflecting policy changes and others reflecting "best practices that are already employed by many federal prosecutors," designed to ensure that federal prosecutors most effectively hold individuals to account for illegal corporate conduct:

1. To be eligible for *any* cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.
2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.
3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.
4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

¹ The text of the DAG's speech can be found here: <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.

² For example, in January 2014, Southern District of New York Judge Jed Rakoff prominently asked in an editorial "Why have no high-level executives been prosecuted" in the wake of 2008's financial crisis? *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?* THE NEW YORK REVIEW OF BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/>. More recently, and in the face of historically large settlements and guilty pleas with financial institutions, Senator Elizabeth Warren expressed concern for what she considered a "timid enforcement strategy" devoid of prominent individual convictions, most recently slamming DOJ's \$5.6 billion deal over traders' alleged manipulation of the foreign exchange market, saying it was "business as usual—and it stinks." *Elizabeth Warren Blasts Bank Punishment: 'It Stinks'*, POLITICO (May 20, 2015), <http://www.politico.com/story/2015/05/elizabeth-warren-response-bank-punishment-foreign-exchange-markets-118145>.

³ The Yates Memo can be found at: <http://www.justice.gov/dag/file/769036/download>.

Client Alert

5. Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires, and declinations as to individuals in such cases must be memorialized.
6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond the individual's ability to pay.

These new DOJ policies are sure to change the dynamics between DOJ and corporations in investigating and litigating alleged wrongdoing in a number of important ways. Also, in some practice areas, such as antitrust, it will be important to watch how much the new policies change existing practices.⁴ In the short run, companies will have to make difficult choices and the calculus and judgment of both experienced prosecutors and defense counsel will be challenged and at a greater premium as they work through the implementation of these standards. Here are the top three takeaways from DOJ's new policy.

1. THE BAR FOR COOPERATION CREDIT JUST GOT A LOT HIGHER

The first and most consequential impact of the Yates Memo is that receiving credit for cooperating with DOJ just got harder, as the Memo makes clear:

In order for a company to receive *any* consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. . . . That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their positions, status or seniority, and provide to the Department all facts relating to that misconduct.

To be sure, DOJ has long considered cooperation against individuals as a mitigating factor in fashioning a corporate criminal resolution. According to the pre-Yates Memo version of the Principles of Federal Prosecution of Business Organizations, "In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, . . . the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives."⁵ What is new about the Yates Memo is that cooperation against individuals goes from being one factor to being the "threshold" factor: "If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor" pursuant to the Principles of Federal Prosecution of Business Organizations. In her speech, DAG Yates described this new policy as "all or nothing."

Although designed to spur companies to cooperate more completely against their officers and employees, this policy change may actually turn out to be a disincentive to corporate cooperation. Companies must now weigh the risk that DOJ will, at the conclusion of a lengthy, expensive, and intrusive investigation, conclude that the cooperation has not been complete enough to pass the threshold for cooperation credit. For example, one can imagine a situation where a company, acting in good faith, determines based on the evidence available to it that a

⁴ The Yates Memo explicitly notes that it does not affect the leniency policy of the Antitrust Division.

⁵ USAM 9-28.700 ("The Value of Cooperation"). This principle is also built into the U.S. Sentencing Guidelines, which provide that a "prime test of whether the organization has disclosed all pertinent information" as part of its cooperation "is whether the information is sufficient . . . to identify . . . the individual(s) responsible for the criminal conduct." United States Sentencing Guidelines § 8C2.5(g), app. n. 13.

Client Alert

particular individual was not “involved in or responsible for the misconduct at issue,” but DOJ determines, based on a difference of opinion or perhaps evidence uniquely available to it (like personal emails obtained by a search warrant, individual bank records obtained by a grand jury subpoena, or immunized testimony), that he or she was involved. In this situation, has the company failed to meet the Yates standard of identifying and providing evidence against a wrongdoer? Will it be seen as having “decline[d] to learn” of an individual’s wrongdoing? And, if so, does that really mean the company will get zero cooperation credit? Faced with this “all or nothing” possibility, some companies may now choose to forego the burdens of cooperation and simply respond to subpoena requests if called upon. Raising the stakes of the game this high may convince some that it’s simply not worth playing.

A company that does choose to cooperate must now take extra steps to ensure that its cooperation against individuals is deemed sufficient to meet the new, higher standard, and defense counsel will be called upon more than ever to make difficult judgment calls when conducting an internal investigation and advising their clients as to the costs and benefits of self-reporting and cooperation. Here is a sample of some of the practical difficulties potentially created by the Yates Memo:

- **Scoping the Investigation.** Although DAG Yates stated in her speech that the new policy does not mean that companies should “boil the ocean” when conducting an investigation, the policy nevertheless raises the stakes if an investigation is later deemed to have been too narrow. DAG Yates suggests that companies simply call and discuss the investigation with prosecutors. But what if the company has yet to decide whether to self-report the misconduct? Moreover, even helpful prosecutors are reluctant to fully “bless” someone else’s investigative plan, meaning that any initial understandings reached with DOJ regarding scope may not win the day if a prosecutor later decides that the scope was too narrow. And how much, if at all, can a company push back on what it sees as “scope creep” from the prosecutor without risking the loss of cooperation credit?
- **Producing Documents.** In the past, one way to demonstrate cooperation in an investigation was to provide only relevant documents and to avoid giving the prosecutors a “data dump.” But now judgments regarding relevancy can be risky, as they could result in the failure to produce documents regarding an individual DOJ later determines was “involved in or responsible for” wrongdoing. Companies may need to be over-inclusive in producing documents out of an abundance of caution, though that decision has several drawbacks, such as potential “scope creep” if prosecutors become interested in documents unrelated to the specific conduct under investigation. In any event, companies will likely have to be very responsive to any request for documents regarding specific individuals.
- **Waiving the Privilege and Work Product Protection.** One of the best ways for a prosecutor to make a case is to know which witnesses will be able to testify against wrongdoers. Many defense attorneys, however, take the position that they cannot reveal the identities of witnesses who made specific statements during an internal investigation without waiving important protections. These defense attorneys may need to rethink this position and companies may have to make difficult decisions, lest they be seen as withholding “complete factual information.”

Client Alert

- **Dealing with Employees.** Given the increased pressure to serve up individuals, companies should be prepared to make and memorialize even more robust *Upjohn* warnings early on to ensure that employees are informed of the scope of the attorney–client relationship between the company and its counsel and that the company controls disclosure to the government at its discretion. Companies may be faced with the prospect of employees choosing to retain their own counsel—often paid for by the company—at a much earlier stage of an investigation or disclosure. Moreover, employees simply may be less willing to cooperate with an internal investigation.

Over time, companies and DOJ prosecutors will likely come to an understanding on these issues, and the Yates Memo won't likely result in the sky falling. But given DOJ's stated "all or nothing" approach, companies and their counsel will need to consider these potential issues when deciding how to respond to potential corporate misconduct.

Finally, it is worth noting that the changes to DOJ's cooperation policy cut across both criminal and civil contexts. For example, the Yates Memo states that the same heightened cooperation rules will apply to the False Claims Act's reduced damages provision. And there will likely be cascading effects in other civil contexts where a company has a duty to self-report misconduct, even where it does not have to report to DOJ—like under the Federal Acquisition Regulation's mandatory disclosure requirements. Across the board, the calculus for choosing to cooperate has changed, and the need for defense counsel to conduct a thorough and credible investigation, especially for a company that wishes to preserve the opportunity to receive cooperation credit, has never been greater.

2. SETTLEMENT MAY NOT BE THE END OF THE ROAD

As the burden to cooperate rises, so too do the length of time a company must cooperate and the potential scope of the cooperation. In her remarks, DAG Yates warned that a company should not assume that its cooperation ends as soon as it settles its case. Going forward, corporate plea agreements and settlement agreements will include provisions that require companies to continue providing relevant information to the government about any individuals implicated in the wrongdoing. Many agreements already include such provisions. However, the Yates Memo makes clear that these provisions will be given more teeth and future agreements will make "explicit" that a failure to continue cooperating against individuals will be considered a "material breach" and grounds for revocation or stipulated penalties.

Similarly, the time it takes to reach a corporate resolution itself may be more drawn out. The Yates Memo includes an implicit preference that investigations of individual misconduct be concluded by the time authorization is sought to resolve the case against the corporation and provides for specific procedures if this does not happen. This will likely result in DOJ waiting to finalize its resolution with the company until it resolves or charges culpable individuals. Indeed, earlier this year we noted an emerging trend of "packaged" resolutions in the FCPA context, after DOJ twice announced simultaneous corporate and individual resolutions. Based on the Yates Memo, companies can expect to see the same trend in many other enforcement contexts, the result being that corporate pleas and settlements may take longer to finalize while DOJ pursues and resolves associated individual cases.

3. THE YATES MEMO EXPANDS THE THREAT OF CIVIL ENFORCEMENT AGAINST INDIVIDUALS

Looming at the forefront of this discussion is the threat of increased civil enforcement and civil penalties against individuals. For all corporate investigations, the Yates Memo creates a presumption that there will be individual

Client Alert

criminal charges or civil claims by requiring a senior official, either the relevant United State Attorney or Assistant Attorney General, to sign off on decisions not to pursue individuals. This is despite DAG Yates's acknowledgment that, where corporate responsibility is diffuse, it can be extremely difficult to identify the single person or group of people who possessed the knowledge or criminal intent necessary to establish proof beyond a reasonable doubt to warrant criminal conviction.

The Yates Memo's third and sixth policy steps—which require involving civil enforcement attorneys in all investigations and pursuing civil actions even if individuals don't have the resources to pay money judgments—focus on this difficulty. Together these policy steps mean that, even where DOJ determines that it cannot secure a criminal conviction, its civil attorneys should be ready and willing to bring civil charges against individuals, for which the government's burden of proof is less strenuous. Although not entirely new, the Yates Memo's focus on these techniques may lead to an increase in civil claims against individuals. Whether or not this materializes, companies need to focus on whether they are willing and able to cooperate fully, including providing detailed information targeting individuals. Once a company cooperates, individuals who are potential targets need take even more seriously efforts to defend against looming charges.

CONCLUSION

As implementation of the Yates Memo rolls out, companies will need to revise their calculus in choosing whether to self-report and cooperate, and prosecutors and defense lawyers will need to adapt to the new dynamic of enhanced focus on individual accountability. Experience and judgment in challenging circumstances will be tested and placed at a higher premium.

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