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The Yates Memo and the DOJ's Focus on Individuals

On September 9, 2015, the Department of Justice issued a memo ("Individual Accountability for Corporate Wrongdoing") to federal prosecutors nationwide implementing new policies that—for the first time—prioritize the prosecution of individual corporate employees in "any investigation of corporate misconduct." The clamor for individual prosecutions has intensified since the 2008 financial crisis, but holding individuals accountable has occasionally proven difficult. (The DOJ's dismissal of the criminal investigation of Countrywide CEO Angelo Mozilo comes to mind.) The new policies are intended to increase scrutiny of high-level executives and pressure corporations to turn over evidence against their employees, in both criminal and civil proceedings. The memo is Attorney General Loretta E. Lynch's first major policy announcement since taking office in April.

The so-called "Yates Memo"—named for Deputy Attorney General Sally Yates, a career prosecutor and former U.S. Attorney for the Northern District of Georgia—reaffirms the principle that corporations can commit crimes only through "flesh-and-blood people." It asserts that individual corporate wrongdoers must be held personally accountable for the actions that they cause corporations to take.[1] The memo instructs DOJ attorneys not to give corporations credit for cooperation unless they first identify all people responsible for the corporate actions under investigation, regardless of position, status or seniority, and produce all facts relating to the alleged misconduct.

The Yates Memo

Specifically, the memo outlines "six key steps" prosecutors will adopt to strengthen the DOJ's pursuit of individual corporate wrongdoing.

1. **To be eligible for *any* cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.** The DOJ will now demand identification of all involved individuals in criminal *and* civil investigations; companies that refuse or fail to do so will not be considered for cooperation credit. The DOJ may also require a company's

[1] Deputy Attorney General Sally Yates, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

continued cooperation against relevant individuals even after the company has resolved the matter. Deputy Attorney General Yates told *The New York Times* that the DOJ won't "be accepting a company's cooperation when they just offer up the vice president in charge of going to jail."[2] Nor is corporate ignorance an excuse. As Deputy Attorney General Yates explained in a September 10, 2015, speech at NYU Law School about the new policies: "If [companies] want any cooperation credit, they will need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals."

2. **Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.** An early focus on individuals allows the DOJ to seek cooperation from individuals who will "provide information against individuals higher up the corporate hierarchy" and to coordinate charges against individuals and companies.

3. **Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.** Improving communication between criminal and civil teams facilitates parallel investigations, a recent DOJ focus. For example, every civil qui tam whistleblower complaint is now sent to the Criminal Division to determine whether a criminal investigation should also be opened.

4. **Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.** Unless a preexisting DOJ leniency policy (the Antitrust Division's Corporate Leniency Policy, for example) applies, corporate resolutions won't exempt individuals.

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.** The corporate authorization memorandum seeking corporate resolution must discuss the potentially liable individuals and describe the status of their investigations. Decisions not to prosecute or bring civil claims must be memorialized in writing and approved by the U.S. attorney or assistant attorney general (or their designees).

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 that individual's ability to pay.** The memo emphasizes that "accountability for and deterrence of individual misconduct" is just as important as "recovering as much money as possible." Therefore, decisions to pursue civil actions against individual wrongdoers should not turn on whether the individual can pay a significant judgment; rather, DOJ attorneys should consider whether the conduct was serious, actionable and sufficient to obtain and sustain judgment, as well as whether pursuing the action would reflect an important federal interest. The goal is "long-term deterrence" that will impact corporate culture.

The DOJ recognizes that the policies may result in "[l]ess corporate cooperation," "fewer settlements" and "potentially smaller overall recoveries by the government." The changes could also mean "fewer guilty pleas" as more individuals facing potential prison sentences "roll the dice before a jury." The DOJ's response? "[S]o be it."

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[2] *The New York Times'* report on the Yates Memo is available at http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html.

What Are the Implications? Many.

The implications for this policy shift are fairly staggering for companies, not to mention executives. Aside from calling for increased vigilance and corporate reinforcement of compliance programs, the Yates Memo raises many questions that will need clarification.

- What happens if a company does not agree with the DOJ's assessment that wrongdoing has occurred? Under the new policy, will the company not be viewed as "cooperating" even when it has provided full and complete information to the DOJ as part of its investigation? In other words, if the company does not agree with the DOJ's view of the facts and the culpability of the individuals involved, is it not cooperating? If so, cooperation with a DOJ investigation does not mean "cooperating" in any normal sense of the term. Rather, it would mean that—in addition to providing full and complete factual information to the government about the conduct at issue—the company must agree with the DOJ's view of the facts and theory of prosecution and not attempt to offer a factual defense on behalf of the individuals the DOJ views as culpable.
- What changes must occur to internal investigations by in-house or outside counsel when investigating compliance issues and responding to subpoenas? For example, in addition to standard "Upjohn" warnings in investigations, must there now also be a warning to individuals that a company is "cooperating" and anything the individual says will be turned over to the government because this is what the government requires? When will individuals' right to counsel now kick in during interviews?
- What will be the impact on Deferred Prosecution and Non-Prosecution Agreements, which the DOJ frequently uses to resolve investigations of corporate wrongdoing? The policy is silent on these tools and how they will be affected.
- Whither the attorney-client privilege and work product doctrine? Although facts are never privileged, the memo once again raises the issue of how companies can turn over the results of their internal investigations and a conclusion that certain individuals have committed wrongdoing without running the risk of waiving the attorney-client privilege. Indeed, the policy seems to be a return to the days when cooperation required a privilege waiver, or at least a waiver related to the company's attorney work product related to an investigation.
- What are the collateral consequences? The policy says that there will no longer be individual releases as a matter of course, even in civil fraud cases. Thus, a company settling a civil case may still face collateral consequences for it and for its executives in civil litigation (for which indemnification may very well be required by statute or the company's bylaws). There could also be collateral consequences in civil or regulatory matters related to any of the information that is turned over to the government as a part of the company's attempt to "cooperate."

The new policies are effective immediately (DOJ attorneys will be training on the new policies as early as September 16). And while the policies are unlikely to apply to open investigations that are already well underway, the memo "will … apply to those matters pending" as of September 9 "to the extent it is practicable to do so." Updates to the United States Attorneys' Manual (specifically, the Principles of Federal Prosecution of Business Organizations, USAM 9-28.000 *et seq*.) and the commercial litigation provisions in Title 4 (USAM 4-4.000 *et seq*.) are forthcoming.

There are many more questions than answers in the policy. And it will require a fundamental shift in how some aspects of a company's compliance program and internal investigations procedures operate.

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