

CLIENT MEMORANDUM

U.S. Department of Justice Issues New Guidance to Encourage the Prosecution of Individuals in Corporate Cases

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On September 9, 2015, Deputy Attorney General Sally Quillian Yates, the second-highest ranking official at the U.S. Department of Justice (the “DOJ”), issued new guidance instructing DOJ prosecutors and civil attorneys to place a greater focus on charging individuals involved in corporate wrongdoing.¹ The Yates Memo outlines six specific “key steps” to “maximize [the DOJ’s] ability to deter misconduct” and “hold those who engage in it accountable.” The Memo appears to have been issued at least in part in response to criticism from various quarters that the DOJ did not prosecute enough individuals in the wake of the financial crisis, even as it prosecuted and levied huge fines against corporations. The Yates Memo does not purport to represent a sea change in DOJ enforcement policy: “Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors.” Nevertheless, the Memo contains several new policies that are likely to impact the ways in which corporations investigate, report, and seek to resolve instances of corporate misconduct.

First, the Yates Memo sets out a new standard that requires corporations to provide all relevant facts relating to individuals responsible for misconduct in order “to be eligible for any cooperation credit.” Although it has long been the case that cooperating corporations would provide fulsome information regarding the culpability of individuals involved in

¹ Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep’t of Justice, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) (the “Yates Memo” or the “Memo”).

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corporate wrongdoing—and rare that a cooperating company would decline, expressly or impliedly, to provide all information about culpable employees—the DOJ has never made the disclosure of such information an express threshold requirement to qualify for “any” cooperation credit. The new guidance likewise makes this condition applicable to corporations seeking credit for cooperation in civil investigations.

Second, the Memo states that prosecutors should focus on the conduct of individuals from the outset of an investigation and that corporate cases should not be resolved without a clear plan to resolve related cases against individuals. Historically, the DOJ has directed its investigative attention and resources in the first instance on the company and focused on charging individuals only toward the end, or even after, the resolution of the corporate investigation. This new emphasis on investigating with an eye toward prosecutions of individuals earlier in the process may have practical implications for corporate internal investigations. More executives and employees may need separate counsel during internal investigations, thereby increasing the costs to companies and delaying corporate investigations, already criticized by some as too long.

Third, the Yates Memo directs civil attorneys to focus on bringing civil actions against individuals even in circumstances in which an individual does not have sufficient resources to satisfy a significant judgment. In this regard, the Memo directs civil attorneys to consider, irrespective of an individual’s ability to satisfy a money judgment, whether “the person’s conduct was serious, whether it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest.”

The DOJ’s express focus on prosecuting culpable corporate executives is not new. DOJ policy has long provided that when assessing a corporation’s cooperation, a prosecutor may consider “the corporation’s willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives.”² Nevertheless, the Yates Memo brings a greater degree of formality and emphasis to the issue. This, coupled with the treatment of the disclosure of all relevant facts about individuals involved in corporate misconduct as a “threshold requirement” for a company to receive any cooperation credit, should cause companies investigating corporate wrongdoing to be mindful that prosecutors will be more focused on individuals from the outset of an investigation and to take this into account when designing internal investigations, deciding whether to make a voluntary disclosure, and seeking to cooperate with the government.

A discussion of each of the six “key steps” outlined in the Yates Memo continues below.

² U.S. Dep’t of Justice, Principles of Fed. Prosecution of Bus. Orgs., U.S.A.M. § 9-28.700 (Aug. 28, 2008).

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1. *To be eligible for any cooperation credit, corporations must provide to the DOJ all relevant facts about the individuals involved in corporate misconduct.*

As noted above, in order to receive any credit for cooperation in a criminal or civil investigation, a company must identify all individuals involved in the relevant wrongdoing, “regardless of their position, status or seniority in the company,” and “disclose all relevant facts [regarding the] individual misconduct.” Once a company meets this “threshold requirement,” the degree of credit for its cooperation will be assessed under the multifactor analysis that has traditionally governed. In her speech accompanying the Memo’s release, Yates referred to this policy as a “substantial shift from [the government’s] prior practice” and stated that the “rules have just changed.”³

2. *Both criminal and civil corporate investigations should focus on individuals from the beginning.*

Having acknowledged “substantial challenges unique to pursuing individuals for corporate misdeeds,” Yates explained that the DOJ’s direction to focus on individuals early on is at least in part to “increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy.” Whether the policy will have the desired effect remains to be seen. Individuals facing imminent prosecution and a potential prison sentence are often less likely, not more likely, to cooperate with prosecutors. The DOJ may need to make greater use than it traditionally has of various forms of immunity if it wishes employees to provide evidence against their corporate superiors.

3. *Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.*

The Memo states that “[e]arly and regular communication” between criminal and civil DOJ attorneys will enable the DOJ to consider the full range of the government’s potential remedies. In her speech announcing the new guidance, Yates indicated that the DOJ would be formalizing lines of communication between the criminal and civil divisions.

4. *Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.*

This point largely embodies longstanding DOJ policy and practice under which, except for certain criminal antitrust cases, corporate liability or penalties cannot be used to bargain away the individual liability of culpable employees. The DOJ has long had a standard carve-out in its corporate criminal resolutions expressly reserving the right to prosecute company employees. The Yates Memo expressly states, however, that this will not alter any preexisting DOJ policies such as the Antitrust Division’s Corporate Leniency Policy, which allows a company to avoid criminal convictions and fines and obtain a grant of immunity for its employees by being the first to report participation in illegal cartel conduct.

³ Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep’t of Justice, Remarks at the New York University Program on Corporate Compliance and Enforcement (Sept. 10, 2015) (“Yates Speech”).

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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.*

In a new policy, if prosecutors seek authorization to resolve a case against a corporation before they have concluded the investigation of individuals, they will be required to include in the memorandum seeking authorization for the corporate resolution a “discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to a resolution prior to the end of any statute of limitations period.” The Yates Memo also requires that any decision not to bring charges be documented and approved by the United States Attorney or Assistant Attorney General. In her speech, Yates explained that the DOJ “will be monitoring these approval processes closely, in no small part so [it] can more readily identify whatever trends are limiting [its] ability to pursue individual cases.”

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.*

As noted above, this guideline directs civil attorneys to bring charges against individuals based on considerations beyond that individual’s ability to satisfy a civil judgment.

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