

Litigation Alert

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Justice Department Issues New Policy Prioritizing Prosecution of Individuals in Corporate Cases

On September 9, 2015, the U.S. Department of Justice issued guidance regarding the prosecution of individuals in cases involving criminal and civil corporate wrongdoing. The first major policy memorandum issued since Attorney General Loretta Lynch was confirmed to the position, the memorandum marks a renewed commitment to prosecuting individuals in cases of corporate fraud and wrongdoing and introduces subtle, but potentially important, changes in the way the Department will investigate and handle these cases.

Applicable to all criminal and civil attorneys at the Department and the U.S. Attorney's Offices, the memorandum sets forth six specific steps "to strengthen . . . pursuit of individual corporate wrongdoing." The [memorandum](#), issued by Deputy Attorney General (DAG) Sally Quillian Yates (the "Yates Memo"), asserts that some of the measures "reflect policy shifts," "while others reflect best practices that are already employed." Through these measures, according to the Yates Memo, the Department will "combat corporate misconduct" by "seeking accountability from the individuals who perpetrated the wrongdoing." Ms. Yates echoed these thoughts in a recent [speech](#) at NYU Law School.

According to the Yates Memo, seeking accountability by prosecuting individuals has several important results: "it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system."

I. The Six Key Steps to Corporate Accountability

According to the Yates Memo—and as experienced practitioners can attest—the Department has historically faced challenges in pursuing individuals for corporate wrongdoing. In large corporations, "responsibility can be diffuse and decisions are made at various levels," sometimes making it difficult to determine those individuals who had the requisite knowledge and criminal intent to prove criminal culpability. The Yates Memo asserts that this "is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs," making the job of the prosecutor and investigator more difficult. The guidance set forth in the Yates Memo is intended to address these challenges through the six "key steps" it sets out:

1. To receive any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct.
2. 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 or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation.
5. Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and they should memorialize any declinations as to individuals in such 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.

The Yates Memo discusses each of these steps in some detail. Some of them (e.g., the mandate that department attorneys communicate with one another) merely reflect common sense. Others restate established practice (e.g., the statement that the Department will not immunize or release culpable individuals when a corporation enters into a resolution, except pursuant to well-established programs such as the Antitrust Division's Corporate Leniency Policy). However, several aspects of the Yates Memo warrant closer analysis.

II. Discussion

A. Prosecutors Cannot Enter Into a Corporate Settlement Without a Written Plan for Investigating and Prosecuting Culpable Individuals.

The Yates Memo introduces a new requirement under which prosecutors must articulate, in writing, their plan to investigate and prosecute individuals at the time they enter into a corporate settlement. Further, if the prosecution team ultimately concludes that individuals should not be charged, it must prepare a written memorandum justifying its decision, and the memo must be approved by a senior Department official.

At first blush, these requirements might appear to be relatively insignificant. They are applicable to only internal department procedures and decision-making, and it may turn out, in the fullness of time, that the changes are not consequential.

However, we have some concerns that the requirement of written investigation plans focused on individuals and written declination memos (which must be approved at senior levels of the Department) may tend to introduce rigidity and bureaucracy into a process—the decision whether or not to indict an individual—that should be immune from such influences. Bringing criminal charges against an individual is perhaps the most extreme exercise of government power in civilian life (short of the application of deadly force by a police officer). The decision to pursue individual charges in white collar cases—or to refrain from doing so—is often nuanced and difficult. The Department has a long-standing and noble tradition of making charging decisions based on fair-minded, objective consideration of the evidence, the law, and a thoughtful, case-by-case assessment of relevant facts and circumstances. Over the years, Department attorneys have rightly taken as much pride in their principled decisions to decline prosecutions as in their trial victories.

In recent years, we have been troubled by the incessant—and in our view, often politically motivated—demands in some quarters for more “scalps” in corporate investigations. We have concerns that the

drumbeat of pressure on the Department may erode the traditional process of sober and objective consideration that has traditionally attended charging decisions. As in many areas of government, procedures matter a great deal, and we are concerned that changes in the Department's internal procedural processes may tend to alter the balance in ways that are not consistent with the Department's traditional practices and values.

B. A Corporation Must Identify Individuals to Obtain Cooperation Credit.

Perhaps the most heralded aspect of the Yates Memo is the requirement that a corporation must provide to the Department **all** relevant facts relating to **all** individuals responsible for the misconduct in order to obtain **any** cooperation credit. In other words, a fulsome disclosure of all facts relevant to individual misconduct is a gating factor that must be satisfied for a corporation to obtain any cooperation credit. This marks a change in Department policy.

Under the *Principles of Federal Prosecution of Business Organizations*, the Department's guidelines for investigating and prosecuting criminal cases against corporations and other organizations, the Department has long evaluated the kind and quality of cooperation that a company provides in determining an appropriate disposition of corporate wrongdoing and an appropriate sentence, where applicable. The most recent version of the *Principles* sets forth the government's key measure of cooperation: "has the party timely disclosed the relevant facts about the putative misconduct?" *Principles*, at 10. So long as this question was answered in the affirmative, "the corporation [could] receive due credit for such cooperation." *Id.* Implicit in this statement is that the more fulsome the cooperation from the corporation, the greater cooperation credit the corporation was likely to receive. Under this framework, companies and their counsel conducted internal investigations to gather the facts related to the wrongdoing being investigated by the Department (which may have been self-disclosed by the company) and disclosed all "relevant facts" concerning the wrongdoing, including information regarding the responsible individuals.

With the changes announced in the Yates Memo, however, corporations now must disclose to the Department all relevant facts specifically focused on the individuals responsible for the misconduct. Moreover, as stated in the memorandum, "[i]f a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers," it will not be considered to have provided the cooperation required to obtain mitigation credit. Only upon meeting this threshold requirement will the cooperation of the corporation be fully assessed under the various factors that have traditionally applied in making a cooperation assessment and that are included in the *Principles*.

Further, in instances where the Department finds it appropriate to resolve a case before the corporation's cooperation is complete, the Yates Memo requires prosecutors to include a provision in the agreement making the failure to provide information about all culpable individuals a trigger for stipulated penalties or a material breach of the agreement.

Notably, the difficulties that the Yates Memo recognizes that prosecutors have in investigating and prosecuting individuals in corporate cases are the same ones that often make it challenging—and sometimes impossible—for companies themselves (and their counsel) to identify which individual(s) are responsible for corporate wrongdoing. Indeed, the peculiar characteristics of corporate investigations (i.e., shared and diffuse decision-making responsibility; siloed information flows; reliance on lawyers, accountants or other professionals; and long-standing business practices, coupled with a lack of clear legal or regulatory standards) in many cases are precisely the factors that would tend to make an individual prosecution unjust and ill-founded. In particular, the dividing lines between negligence, recklessness and criminal intent can often be murky and difficult to discern. Experienced corporate counsel have traditionally been cautious about drawing overly definitive inferences from facts that can be ambiguous or uncertain.

For companies, there is sometimes a tension between seeking to be a good corporate citizen and disclosing wrongdoing to the government (with the benefit of prosecution and/or sentencing credit for the company's cooperation) and the inherent difficulties of identifying specific individuals responsible for the conduct. Nonetheless, with the changes imposed by the Yates Memo, corporations now should expect that, in addition to self-disclosing wrongdoing, they will be under pressure to deliver the identification of responsible individuals to the prosecutors—or to justify the lack of evidence of culpable behavior by individuals. Understanding how Department attorneys may use the results of internal investigations may impact the manner in which company counsel manage and conduct them.

C. Increased Coordination Between Civil and Criminal Prosecutors, and Increased Use of Civil Enforcement Against Individuals, May Result in More Cases.

In addition, the focus on coordination and communication between civil attorneys and criminal prosecutors from the outset of an investigation also signals a focus on coordination between these two divisions. Although coordination between the Department's civil and criminal divisions is not a new concept, the stated priority placed on this coordination is new. Although the effect of this pronouncement remains to be seen, the focus on coordination early in an investigation, and more intentionally, may mean more criminal cases brought in matters that might have previously been handled civilly. It could also mean more parallel proceedings in which both criminal and civil cases are brought.

For corporations considering self-disclosing conduct or cooperating in an ongoing investigation, this “key step” may be significant in terms of these choices. Similarly, knowing that civil attorneys and criminal prosecutors are communicating early in an investigation may impact the manner and level of coordination with which companies and their counsel seek to resolve civil and criminal investigations.

Finally, the Yates Memo mandates that the Department seek to pursue civil enforcement charges, even in situations where a defendant lacks the ability to satisfy a judgment. This, too, may result in expanded use of civil enforcement against individuals. It remains to be seen whether suing and obtaining judgments against individuals who cannot pay will materially advance the Department's law enforcement objectives.

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