

Yates Memo Revisions Encourage Cooperation, but Fail Fully to Achieve a Common-Sense Approach to Civil Enforcement

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Key Points

- Recent *Justice Manual* changes roll back Yates memo requirements for corporations seeking cooperation credit in enforcement actions, including civil enforcement actions.
- Corporations can now receive maximum cooperation credit in civil cases by identifying individuals who are “substantially involved in” or “responsible for” alleged misconduct, and they can even receive partial cooperation credit in civil cases for less than full cooperation if such credit “serves the public interest and furthers the administration of justice.”
- DOJ civil attorneys are now permitted to negotiate releases for individuals as part of a resolution of a corporate case, provided that the DOJ attorney requesting the releases receives written supervisory approval.

On November 29, 2018, Deputy Attorney General Rod Rosenstein **announced** a number of major changes to the Department of Justice’s (DOJ) *Justice Manual* (formerly known as the *United States Attorneys’ Manual*) to reflect DOJ’s updated policies on corporate enforcement and individual accountability. The revisions reflect a continued focus on individual accountability as established by the Yates memo, but they notably roll back a number of the Yates memo requirements for corporations seeking cooperation credit in enforcement actions, including civil enforcement actions. The **Yates memo**, issued in September 2015, directed DOJ attorneys to offer cooperation credit to only corporations that identified and shared with DOJ all relevant facts about individual misconduct, and it prohibited corporate resolutions that offer individuals protection against civil or criminal liability absent extraordinary circumstances, among other policies. The revisions that Mr. Rosenstein announced reflect a good first step in restoring some discretion to DOJ attorneys in civil enforcement settlement negotiations and in easing the burden for cooperation credit borne by corporations facing DOJ civil investigations. However, to better facilitate resolution of civil fraud cases, DOJ should have simply repudiated the Yates

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memo approach of linking the resolution of action against corporate entities to any specific actions taken against individuals.

As Mr. Rosenstein noted, “[t]he primary goal of affirmative civil enforcement cases is to recover money, and [DOJ has] a responsibility to use the resources entrusted to [it] efficiently.” Given that this is not an “all or nothing” goal, the overarching message in the revisions to the *Justice Manual* is an emphasis on the value of company cooperation and rewarding companies that accept responsibility for their perceived conduct. This approach conserves limited government resources, rather than unnecessarily prolonging the civil enforcement process by requiring companies that are hoping to receive cooperation credit to chase down every individual who might have been involved in the alleged misconduct.

Indeed—given the principle that Mr. Rosenstein correctly articulated, that is, that “[t]he primary goal of affirmative civil enforcement cases is to recover money, and [DOJ has] a responsibility to use the resources entrusted to [it] efficiently”—DOJ should have completely renounced the Yates memo. Historically, before promulgation of the Yates memo, the reason that DOJ did not typically pursue individuals in the context of civil enforcement is that the action against the corporate entity, by itself, would make the government whole. Moreover, the pursuit of an action against individuals, who frequently lacked the ability to make any meaningful repayment, only delayed resolution against the corporate entity, or made it more likely that the corporate entity would elect to fight the allegations, rather than point fingers at individuals who were only tangentially involved.

While not perfect, at least Mr. Rosenstein’s proposed revisions are a good first step in reforming DOJ practices under the Yates memo. In contrast to the requirements in the Yates memo, a corporation now need not identify **every** individual who might face civil liability in order to receive maximum cooperation credit in civil cases, but rather only those individuals who were “substantially involved in” or “responsible for” the alleged misconduct. Further, DOJ attorneys now have discretion to award **partial** cooperation credit in civil cases, even if cooperation is less than full, provided that the partial credit “serves the public interest and furthers the administration of justice.” Although it remains to be seen what this partial cooperation credit will look like, it is particularly useful for companies facing civil False Claims Act (FCA) investigations, which can be costly and burdensome. As Mr. Rosenstein noted in his remarks, a company that makes a voluntary disclosure and provides valuable assistance to DOJ in a civil FCA case can now receive some credit “even if the company is either unwilling to stipulate about which non-managerial employees are culpable, or eager to resolve the case without conducting a costly investigation to identify every individual who might face civil liability in theory, but in reality would not be sued personally.” However, DOJ will not award **any** credit to a corporation that “conceals involvement in the misconduct by members of senior management or the board of directors” or that “otherwise demonstrates a lack of good faith in its representations regarding the nature or scope of the misconduct.”

Another revision to the *Justice Manual* permits DOJ civil attorneys to negotiate releases for individual employees as part of a resolution of a corporate case. While the Yates memo prohibited DOJ from releasing individuals from civil or criminal liability absent extraordinary circumstances, the revisions to the *Justice Manual* ease this restriction and allow the release of civil claims against individuals, provided that the DOJ attorney requesting the releases receives written supervisory approval.

These revisions to the *Justice Manual* are further evidence of DOJ's recent focus on encouraging corporate cooperation in civil enforcement actions by rewarding companies for meaningful and practical assistance. The renewed flexibility for DOJ civil attorneys in awarding cooperation credit and negotiating corporate resolutions allows DOJ, to a limited degree, to prioritize its civil enforcement resources. A better result, and one that would allow DOJ to fully prioritize its civil enforcement resources, would be to renounce the Yates memo altogether and return to the practices that existed before promulgation of the Yates memo.