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DOJ's 'Yates Memo' intensifies scrutiny of corporate management

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In September 2015, the Department of Justice issued a policy statement that places individual accountability at the centre of its efforts to combat corporate misconduct. The Memorandum of Individual Accountability for Corporate Wrongdoing, issued by Deputy Attorney General Sally Yates (dubbed the 'Yates Memo'), outlines six 'key steps' or requirements of any investigation into corporate wrongdoing. The stated rationales for the increased focus on individual accountability are to punish responsible individuals, deter future corporate wrongdoing, and promote public confidence in the justice system. While some of the steps outlined in the Yates Memo are not entirely novel DOJ policies, others are, and, in the aggregate, they will have a significant impact on future corporate investigations. DOJ's sustained focus on individual accountability will result in significant scrutiny of corporate management and may lead to an increase in criminal convictions and the imposition of significant civil financial liability.

The six key steps outlined by the Yates Memo require that, firstly, corporations provide all relevant facts relating to individuals responsible for the misconduct



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in order to qualify for any cooperation credit. Secondly, DOJ investigations, whether criminal or civil, must focus on holding individuals accountable from the outset. The third step requires DOJ criminal and civil attorneys to regularly communicate with one another when handling parallel corporate investigations. The fourth step decrees that corporate resolutions should not include releases of criminal or civil liability for individuals, absent extraordinary circumstances. The fifth step stipulates that DOJ attorneys should not resolve matters with a corporation without providing a clear plan to resolve cases against individuals and securing approval for and memorialising declinations of individual prosecution. According to the final step, DOJ civil attorneys should also focus on individual accountability and evaluate whether to bring suit against an individual based on considerations other than only an individual's ability to pay.

Linking a company's cooperation credit to the identification of responsible individuals has generated the most discussion in the legal community. The connection between cooperation credit and identifying individuals is not entirely new, however. In assessing the level of cooperation of

a company, the DOJ has long instructed its line prosecutors to consider the extent to which the corporation has investigated the conduct of its own employees and identified culpable individuals, including executives, or whether the company appears to be protecting its employees. Also, the US Sentencing Guidelines assess the quality of cooperation that may merit a sentencing reduction based on whether the information provided by the company "is sufficient for law enforcement...to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct". What differentiates the Yates Memo's directive on this point is the fact that corporate cooperation will not be factored unless and until a company discloses who was involved with and is responsible for the alleged misconduct. Cooperation is no longer assessed on a sliding scale unless responsible individuals have been identified to the DOJ. Initially, it was feared that this policy sought to require corporate counsel to assume the role of prosecutor and determine which employees are legally responsible and present a prosecutable case to the government. Two months after the release of the Yates Memo, and likely in response to this concern,

DAG Yates clarified that "we're not asking companies to pin a scarlet letter on their employees or provide us with prosecutable cases against them in order to get the benefits of cooperation. Cooperation does not require a company to characterise anyone as 'culpable'". Other statements from Yates and the head of the Criminal Division at the DOJ, Leslie Caldwell, explain that whether DOJ has received a prosecutable case is not the trigger for receiving cooperation credit. Nevertheless, if a company decides to cooperate, a recitation of the factual findings and a selection of key documents require some assessment of culpability. Thus, during an internal investigation, companies need to be cognisant of potential conflicts of interest with senior employees and the need to secure separate counsel when appropriate.

Beyond heightening the requirements to receive cooperation credit, the Yates Memo also creates a structural momentum at DOJ toward enforcement actions against individuals. Requests for authorisation to enter a corporate settlement must now be accompanied by a plan for prosecution of involved individuals or an explanation for a declination of prosecution. Also, individuals will not



receive legal releases as a result of a larger, global corporate resolution. Pre-Yates Memo, settlements of corporate investigations would often include at least civil releases for individuals affiliated with a company (i.e., employees, directors, shareholders, etc.). According to the Yates Memo, this type of resolution should no longer be available, except in rare circumstances. (Interestingly, the US Attorney's Office for the Southern District of New York secured a \$390m settlement with Novartis for alleged violations of the False Claims Act in November 2015 that did include a civil release for individuals at Novartis. Whether this settlement was assessed under the new Yates Memo's policies is unclear.)

Finally, the structural bias in favour of pursuing individuals exists in civil investigations as well. Previously, it was rare that the DOJ would seek to impose civil liability on corporate employees and request payment from them, in large part due to the inability of any individual, even a wealthy one, to pay

anything close to the amount at issue. In a corporate False Claims Act case, for example, a settlement would typically engulf an individual's finances. Now, factors like deterrence, punishment and egregiousness of the misconduct are also to be considered when deciding whether a civil case should be initiated against an individual. In fact, the ability to pay may not even be that important of a factor anymore. Consider that just after the release of the Yates Memo, Yates said in a speech at NYU "[w]hile we may not be able to satisfy the entire judgment with an individual's resources, if that individual is liable, we can take what they have and ensure that they don't benefit from their wrongdoing". All of these policies place a company's executives and other employees in the DOJ's crosshairs when a company is under investigation.

While not every pronouncement in the Yates Memo is new, the Yates Memo is important because it evidences the DOJ's continued focus on holding the individuals involved

in alleged corporate misconduct accountable. As a result, companies (and their managers and executives) facing DOJ scrutiny should expect that government investigators will hone in on answering the 'who' question of an investigation early. A company's decision on whether to cooperate or not will have to be based on whether it is willing to name names. If pursuing a path of cooperation, a company will need to consider the likelihood that the DOJ will target key members of management, and the business impact of such DOJ focus, company counsel must be vigilant to spot potential conflicts of interest between the corporate entity and senior management and know when to bring in individual counsel to represent senior executives and others in management. The full impact of the Yates Memo remains to be seen, but it would not be unreasonable to expect more prosecutions of individuals and the imposition of significant civil financial penalties against such defendants. ■