ROPES & GRAY ALERT

Government Enforcement / White Collar Crime

March 29, 2016

The Yates Memo: Have the Rules Really Changed?

A. Introduction

Attorneys
Laura G. Hoey
David Nordsieck
Dara A. Reppucci

On September 9, 2015, Deputy Attorney General Sally Quillian Yates issued a memorandum to all federal prosecutors regarding "Individual Accountability for Corporate Wrongdoing" (the "Yates Memo").[1] The Yates Memo built upon many years of guidance from the Department of Justice ("DOJ") and announced certain policy shifts and best practices for prosecutors in their pursuit of civil and criminal actions against individuals in the context of investigations of corporate misconduct. While many of the guiding principles and policy pronouncements sounded strikingly similar to prior DOJ guidance, the Yates Memo contains at least two significant changes that companies should bear in mind when conducting internal investigations: (1) companies are now required to "identify all individuals involved in the wrongdoing"[2] in order to qualify for consideration of *any* cooperation credit in the resolution of a matter (previously companies were able to obtain partial cooperation credit for significant cooperation), and (2) the DOJ is directing prosecutors to consider, build, and bring criminal *or civil* cases against individual defendants to hold them liable for misconduct.

In DAG Yates' speech accompanying the release of the memorandum, she underscored the principle that "Americans should never believe, even incorrectly, that one's criminal activity will go unpunished simply because it was committed on behalf of a corporation."[3] DAG Yates emphasized the new threshold for cooperation credit, stating that corporations are expected to identify responsible individuals if they wish to be eligible to receive any cooperation credit. She clarified that the DOJ is "not going to let corporations plead ignorance. If they don't know who is responsible, they will need to find out. If they want any cooperation credit, they will need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals."[4]

The Yates Memo is not a sea change in DOJ policy but perhaps represents a bridge farther in a long line of efforts to deter corporate crime by prosecuting culpable individuals. The following article reviews the historical guidance on which the Yates Memo builds, analyzes the Yates Memo directives as they have been incorporated in the United States Attorney's Manual ("USAM"), and offers some practical guidance for corporations going forward.

B. For Over 15 Years, the DOJ Has Directed Prosecutors to Pursue Cases Against Culpable Individuals.

The Yates Memo is the latest in a series of pronouncements from the DOJ, stretching back to 1999, that direct prosecutors to seek to hold culpable individuals responsible for corporate misconduct.

---

[1] Memorandum from Sally Quillian Yates, Deputy Attorney General, U.S. Dep't of Justice, to All United States Attorneys (Sept. 9, 2015) [hereinafter *Yates Memo*].
[2] *Id.* at 3.
[3] Sally Quillian Yates, Deputy Attorney General, U.S. Dep't of Justice, Remarks at the New York University Program on Corporate Compliance and Enforcement (Sept. 10, 2015).
[4] *Id.*

1. The 1999 Holder Memo

On June 16, 1999, DAG Eric Holder issued a memorandum entitled "Bringing Criminal Charges Against Corporations" (the "Holder Memo"). The Holder Memo noted the DOJ's commitment to "prosecuting both the culpable individuals and, when appropriate, the corporation,"[5] and laid out a framework for prosecutors to use in assessing whether to charge a corporation. Specifically, the Holder Memo provided that:

- "Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation."[6]
- "Prosecutors should consider the corporation, as well as the responsible individuals, as potential criminal targets."[7]
- "In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target, [including] the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."[8]
- "Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees."[9]

2. The 2003 Thompson Memo

On January 20, 2003, DAG Larry Thompson issued a memorandum entitled "Principles of Federal Prosecution of Business Organizations" (the "Thompson Memo"). The Thompson Memo revised and clarified some aspects of the Holder Memo, while reiterating that prosecutions of corporations will not absolve individual liability. The Thompson Memo went a bit further, emphasizing that "[o]nly rarely should provable individual culpability not be pursued, even in the face of offers of corporate guilty pleas."[10] The Thompson Memo also inserted a new consideration for prosecutors: "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance."[11]

3. The 2008 Filip Memo

On August 28, 2008, DAG Mark Filip issued a memorandum entitled "Principles of Federal Prosecution of Business Organizations" (the "Filip Memo"). The Filip Memo is best known for its recitation and enumeration of the factors to be considered when applying prosecutorial discretion in charging decisions (the "Filip Factors"). However, with respect to individual responsibility in the context of corporate misconduct, the Filip Memo was yet another recapitulation of the same sentiments that the Holder Memo had announced nine years prior. Specifically, Filip Factor number eight echoes Holder's comments and the language added by the Thompson Memo, stating that

[5] Memorandum from Eric H. Holder, Jr., Deputy Attorney General, U.S. Dep't of Justice, to All Component Heads and United States Attorneys, p. 1 (June 1, 1999) [hereinafter *Holder Memo*].
[6] *Id.* at 2.
[7] *Id.*
[8] *Id.* at 3.
[9] *Id.* at 10.
[10] Memorandum from Larry D. Thompson, Deputy Attorney General, U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys, p. 2 (Jan. 20, 2003).
[11] *Id.* at 3. The 2006 McNulty Memo restated the same language and did not change any policy with regard to the prosecution of individuals. *See* Memorandum from Paul J. McNulty, Deputy Attorney General, U.S. Dep't of Justice, to Heads of Components and United States Attorneys, p. 4 (Dec. 12, 2006).

prosecutors should consider "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance."[12]

4. The DOJ Laying the Groundwork for the Yates Memo

The DOJ foreshadowed the policies of the Yates Memo through public statements in the year leading up to its release. In remarks made on September 17, 2014, Marshall Miller, Principal Deputy Assistant Attorney General for the Criminal Division, stated that "[i]f you want full cooperation credit, make your extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door to make your presentation…. Make those efforts the last thing you talk about before you walk out."[13] Miller directly linked a company's cooperation credit to the robustness of its pursuit of individuals, stating "[e]ven the identification of culpable individuals is not true cooperation, if the company fails to locate and provide facts and evidence at their disposal that implicate those individuals."[14]

Similarly, Assistant Attorney General Leslie Caldwell reiterated on October 1, 2014 that companies must identify responsible individuals to receive cooperation credit, adding that "a company that interviews its employees in an effort to whitewash the facts or spread the company's narrative spin risks receiving any cooperation credit."[15] Caldwell's comments previewed the possibility that deficient cooperation with respect to individuals could result in the wholesale forfeiture of any cooperation consideration.

C. The Six Key Steps in the September 2015 Yates Memo Largely Stay the Course, With A Few Notable Exceptions.

Although it is too early to appreciate fully the implications of the Yates Memo in the DOJ's resolutions, it is clearly an attempt to address individual accountability straightforwardly in order to strengthen federal prosecutors' ability to investigate and resolve corporate misconduct. The Yates Memo outlines the "six key steps" prosecutors should take in all future investigations of corporate wrongdoing. Some of these steps represent significant—though not drastic—policy changes, whereas others are simply a memorialization of best practices that have already been in place in various United States Attorney's Offices across the country.

The following subsections are captioned according to the Yates Memo's "six key steps," and are accompanied by a brief explanation and analysis. The DOJ revised the section of the USAM titled "Principles of Federal Prosecution of Business Organizations" in November 2015 to reflect these steps; some observations on the implementing edits are also included below.

1. "To be eligible for <u>any</u> cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct."

The most significant policy shift in the Yates Memo concerns the relationship between a company's cooperation with respect to individual wrongdoers and the company's eligibility to receive cooperation credit. Previously, the fourth Filip Factor weighed the provision of information regarding culpable individuals as one consideration among many. Following the Yates Memo's directives, the identification of responsible individuals is now a "threshold requirement" for receiving any cooperation credit consideration.[16] This change is discussed at length in the USAM,

[12] Memorandum from Mark Filip, Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components and United States Attorneys, p.4 (August 28, 2008) [hereinafter *Filip Memo*].
[13] Marshall L. Miller, Principal Deputy Assistant Attorney General, Dep't of Justice – Criminal Division, Remarks at the Global Investigation Review Program (Sept. 17, 2014).
[14] *Id.*
[15] Leslie R. Caldwell, Assistant Attorney General, Dep't of Justice – Criminal Division, Remarks at the 22nd Annual Ethics and Compliance Conference (Oct. 1, 2014).
[16] U.S. Attorneys' Manual § 9-28.700 (2015).

which states that "[i]f a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals involved, its cooperation will not be considered a mitigating factor under this Section."[17]

By making full cooperation with regard to individuals a prerequisite for any cooperation credit for the company, the DOJ has raised the stakes. Already faced with difficult decisions about when to disclose matters voluntarily and to cooperate fully in investigations, boardrooms and executives now must grapple with the additional risk that the company's cooperation is an all-or-nothing proposition.

DAG Yates emphasized that a failure to conduct a robust internal investigation is not an excuse, stating that "[c]ompanies may not pick and choose what facts to disclose."[18] At face value, the Yates Memo and DAG Yates' accompanying remarks suggest that a company could conduct a diligent and thorough investigation that still fails to identify culpable individuals, despite the best efforts of the company to do so. Denying a company any consideration for cooperation credit under such circumstances would seem a draconian application of the Yates Memo, as well as counterproductive to the DOJ's stated objectives and interests in encouraging corporate cooperation. Subsequent public statements by DAG Yates have emphasized the DOJ's willingness to use appropriate discretion but have also reflected DAG Yates' view that in only the rarest case will a proper investigation fail to identify all responsible individuals.

Assistant Attorney General Leslie Caldwell, perhaps anticipating this quandary, stated in comments at the Global Investigations Review Conference on September 22, 2015:

> "We recognize … that a company cannot provide what it does not have. And we understand that some investigations – despite their thoroughness – will not bear fruit. Where a company truly is unable to identify the culpable individuals following an appropriately tailored and thorough investigation, but provides the government with the relevant facts and otherwise assists us in obtaining evidence, the company will be eligible for cooperation credit. We will make efforts to credit, not penalize, diligent investigations."[19]

The Yates Memo's directives were later incorporated into the USAM, which echoed this sentiment: "There may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is actually prohibited from disclosing it to the government."[20] However, the USAM is clear that in such cases "the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor."[21] Consequently, the importance of thorough and properly scoped internal investigations has never been greater.

2. "Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation."

The second directive of the Yates Memo does not represent a major change in DOJ policy. The focus on individuals in both civil and criminal investigations is already the standard practice in many areas. Rather, the directive establishes the best practice that such focus should be present from the outset of every investigation.[22] With this

[17] U.S. Attorneys' Manual § 9-28.700.
[18] Yates Memo at 3.
[19] Leslie R. Caldwell, Assistant Attorney General, Dep't of Justice – Criminal Division, Remarks at the Second Annual Global Investigations Review Conference (Sept. 22, 2015).
[20] U.S. Attorneys' Manual § 9-28.700.
[21] *Id*.
[22] This portion of the Yates Memo is reflected in the relevant USAM chapter's introductory section and the section titled "Focus on Individual Wrongdoers." *See* U.S. Attorneys' Manual §§ 9-28.010, 9-28.210.

announcement, companies might see employees less forthcoming in interviews and requesting individual counsel, even in the early stages of an investigation.

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

Cooperation between criminal and civil teams at USAOs is already a common practice and does not represent a major policy change. A new section in the USAM now explicitly requires civil attorneys to follow the same guidelines as criminal prosecutors when pursuing individuals[23] and emphasizes the need for communications between civil and criminal attorneys.[24] The benefit to the government of increased cooperation between civil and criminal attorneys is twofold. Increased cooperation may result in an increase of civil actions where evidence does not satisfy the higher criminal burden of proof, and the increased cooperation in civil matters could also increase the likelihood of criminal charges resulting from civil investigations.

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

Prior to the Yates Memo, the release of all individuals was a fairly common component of corporate resolutions.[25] Going forward, the default position as announced in the Yates Memo is that culpable individuals will be pursued regardless of the company's resolution, unless "extraordinary circumstances" are present. The revised USAM states that "[p]rovable individual culpability should be pursued . . . even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the company . . . . In other words, regardless of the ultimate corporate disposition, a separate evaluation must be made with respect to potentially liable individuals."[26]

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 USAM now requires approval by a senior DOJ official "if a decision is made at the conclusion of the investigation to pursue charges or some other resolution but not to bring criminal charges against the individuals who committed the misconduct."[27] This requirement is likely to draw out the length of investigations. Corporate investigations may stagnate and grow more expensive as resolutions are withheld pending the DOJ's decisions about responsible individuals. Furthermore, the need to memorialize and obtain approvals for declinations for individuals will add to the timeline. It is likely that the corporation's cooperation will be expected to continue beyond the official resolution, with the possibility for revocation of the agreement in the event of a breach.[28]

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 final directive of the Yates Memo represents a slight shift in attitude towards the pursuit of civil charges against culpable individuals. Formerly, an individual's inability to pay a monetary penalty generally served to deter civil attorneys from bringing suit against the individual. The prevailing rationale had been that it would be a poor use of resources to pursue a case with little to no prospect of a payout. However, civil authorities are now being encouraged

[23] *See* U.S. Attorneys' Manual §§ 9-28.210, 9.28-300.
[24] *See* U.S. Attorneys' Manual § 9-28.1200.
[25] Note that the practice was common notwithstanding the directive present since the 1999 Holder Memo that "prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees." Holder Memo at 10.
[26] U.S. Attorneys' Manual § 9-28.210.
[27] U.S. Attorneys' Manual § 9-28.210.
[28] *See* U.S. Attorneys' Manual § 9-28.700.

to consider the non-monetary value of general deterrence and individual punishment. In making decisions about civil cases, government attorneys will now weigh numerous factors, including the individual's misconduct, history, and the circumstances of the misconduct, alongside the individual's ability to pay.

D. The Yates Memo Will Have Practical Implications on Companies' Internal Investigation Practices and Personnel Relationships.

1. Compliance Considerations

The Yates Memo contemplates that corporations will closely monitor their compliance programs and encourage senior leaders to embrace the company's compliance culture. Prudent companies will review and enhance their compliance programs, including consideration of an independent compliance assessment. All instances of noncompliance should be promptly addressed, investigated, escalated, and remediated, with clear documentation of each step of the process. When faced with allegations of misconduct, a robust compliance program is often a company's best defense.

2. Investigations

The Yates Memo will likely impact corporate investigations in several ways. First, the renewed focus on individual liability and the DOJ's reluctance to resolve matters with a corporation before a plan is established for individuals may result in longer and more costly investigations. Second, the Yates Memo raises the stakes for all corporate investigations. Under the new policy, a company may wholly disqualify itself from any cooperation credit if its internal investigation is later found to be anything less than thorough, or the company to be anything short of fully cooperative.

The Yates Memo does not change the hallmarks of a good investigation, but it does highlight the importance of several steps. In light of the potentially severe consequences for missing key facts, investigators should take particular care in defining the appropriate scope of the investigation to ensure the discovery of all relevant information and should follow all leads reasonably calculated to inform the material issues. To facilitate a timely and thorough investigation, investigators should create work plans, set deadlines for each step, establish reporting lines with relevant internal and external audiences, and document the process, including key investigatory decisions. Depending on the severity of the allegations and the seniority of those involved, companies should consider retaining experienced outside counsel to define the scope at the outset of the investigation.

3. Employees

The Yates Memo has already increased the tension between employers and their employees, and unsurprisingly, the result may be a decrease in the candor and cooperativeness of employee witnesses. The renewed zeal with which the government and companies will work to identify culpable individuals is likely to be in direct conflict with the interests of certain employees involved in or knowledgeable about the alleged misconduct. At earlier stages and with increased frequency, employees may request individual counsel and decline to be interviewed without their counsel present. Accordingly, the need for clear and documented *Upjohn* warnings is especially salient given the increased possibility that the interests of employer and employee may diverge. Finally, there may also be a rise in director and officer litigation costs as individuals require separate counsel for both the investigation and any ensuing litigation, such as shareholder suits. Companies may wish to review their D&O insurance policies to ensure that they have sufficient coverage to manage these potentially increasing costs.

4. Attorney-Client Privilege

Pursuant to the DOJ's Principles of Federal Prosecution of Business Organizations, corporations are *not* required to disclose privileged materials to the government as a condition for cooperation credit, and eligibility for cooperation

credit is not tied to a company's decision regarding waiver.[29] Instead, companies are more likely to face challenges surrounding waiver in situations where individual employees wish to waive in order to defend themselves, but where the company wishes to maintain its privilege. In her November 2015 remarks, DAG Yates acknowledged that the new policies do not infringe on attorney-client privilege. She did, however, state that "legal advice is privileged" while "[f]acts are not."[30] As an example, she explained that law firm memoranda and notes from employee interviews may be protected by the attorney-client privilege, but to earn full cooperation credit "the corporation does need to produce all relevant facts – including the facts learned through those interviews."[31] Accordingly, investigators should memorialize relevant facts in a way that provides the company with the option of later sharing them with outside parties; for example, an interview memorandum that inextricably weaves attorney comments together with relevant facts may present difficult waiver questions for the company if it later hopes to share the information from that interview.

5. Conflicts of Interest

In a system where both the corporation and numerous individual employees may incur civil and criminal liability, there are more opportunities for conflicts to arise. In the wake of the Yates Memo, board members, executives, and audit committees will need to assess carefully whether it is appropriate to use a single law firm to investigate matters and provide counsel regarding resolutions with the government. With various constituencies facing the possibility of serious consequences, even from the early stages of an investigation, the interests among them are likely to diverge more often than in years past.

E. Conclusion

The Yates Memo represents a codification of the Department's increased focus on individuals in corporate cases. The revisions to the USAM standardized the principles of the Yates Memo and extended these principles to apply to both criminal and civil enforcement. The implementation of these policy shifts will play out across the country over the coming months and what will be required for a corporation to receive full cooperation credit will take shape. As a practical matter, these policies are playing out in U.S. Attorney's Offices across the United States, and the long-term impact on corporate investigations and incentives for cooperation is in flux. However, one thing is certain, in the words of DAG Yates, "[t]he rules have just changed."[32]

[29] *See* U.S. Attorneys' Manual § 9-28.720.
[30] Sally Quillian Yates, Deputy Attorney General, U.S. Dep't of Justice, Remarks at American Banking Association and American Bar Association Money Laundering Enforcement Conference (Nov. 16, 2015).
[31] *Id.*
[32] Sally Quillian Yates, Deputy Attorney General, U.S. Dep't of Justice, Remarks at the New York University Program on Corporate Compliance and Enforcement (Sept. 10, 2015).