

DOJ Guidance Prioritizes Individuals in Criminal and Civil Corporate Enforcement Actions

A serious shift of focus to individual accountability may impact traditional corporate defense and settlement tactics.

On September 9, 2015, the Department of Justice (DOJ) issued a set of guidelines that formally revise certain policies and procedures relating to individual accountability for corporate misconduct. The policy was laid out in a memorandum authored by Deputy Attorney General Sally Quillian Yates (Yates Memo). The general tone of the Yates Memo, along with recent public statements by government officials, reflects a noticeably aggressive stance regarding the pursuit of individual charges in white collar enforcement actions. Several of the guidelines are well known best practices that government attorneys already employ. However, a few reflect significant changes to institutional policies, such as the requirement to disclose all information and facts relating to individual misconduct to receive any cooperation credit. While the application of these guidelines remains somewhat unclear, the guidelines will likely require thoughtful consideration from corporate leaders regarding how corporations approach future enforcement actions.

The Yates Memo contains several new measures that may significantly impact corporate enforcement actions going forward. DOJ's new requirement that cooperation credit be contingent on disclosure of *all* facts relating to individual misconduct to receive *any* cooperation credit will require corporations and counsel to carefully think through scope and timing for internal investigations and investigations in response to government inquiries. For example, considering and analyzing individual liability early on, and determining how to approach those issues, will be important. Likewise, prioritizing individual accountability may impact internal information sharing and joint defense agreements. In addition, a broader application of an aggressive approach to civil enforcement against individuals may impact corporate strategies for responding to and defending against civil actions.

Brief Overview of the Yates Memo

The Yates Memo is the product of an internal working group of DOJ attorneys who identified policies and practices that could be amended to pursue what DOJ refers to as individual corporate "wrongdoers."

The Yates Memo highlights individual accountability as an effective means to combat corporate misconduct, and outlines six areas of focus for DOJ investigations.

1. Disclosure of Individual Misconduct Required for Cooperation Credit

During the course of a corporate enforcement action, government attorneys typically consider a number of factors in reaching a decision as to the proper treatment of a corporate target. Known as the "Filip Factors," the government uses these factors to assist in determining whether to file charges against corporations or employees. One particular factor is the target's cooperation during the course of the enforcement action. A corporation's voluntary disclosure of wrongdoing and willingness to cooperate in

the government's investigation make it eligible to receive cooperation credit, which can be a mitigating factor in a matter that might otherwise lead to an indictment or prosecution.

Previously, the government granted cooperation credit along a spectrum, ranging from zero credit for a refusal to submit information and cooperate, to significant credit for disclosure of all relevant information and full cooperation. While DOJ often encouraged corporations to submit evidence of individual misconduct during an investigation, credit was not contingent on such disclosures. This is no longer true. As per the Yates Memo, such disclosures are now *required* to receive *any* consideration for cooperation under the Filip Factors. Thus, to receive cooperation credit, a corporation now must "identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the [DOJ] all facts relating to that misconduct."¹

2. Individual Accountability Considered from Outset of Civil and Criminal Investigations

The Yates Memo requires government attorneys to focus on individual wrongdoing from the beginning of an investigation of corporate misconduct. While criminal attorneys often focus on individual misconduct from the outset of an investigation, such focus reflects a significant change in policy for civil enforcement actions. During remarks on September 10, 2015, Deputy Attorney General Yates clarified that inquiries into individual misconduct should proceed in tandem with broader corporate investigations, and without delay.²

3. Coordination Between Criminal and Civil Attorneys Should Be the Rule Not the Exception

The Yates Memo encourages criminal and civil attorneys within DOJ and federal agencies to regularly communicate and coordinate during the course of corporate investigations. Such coordination requires government attorneys to promptly notify their criminal or civil counterparts of potential claims, and identify opportunities to pursue parallel investigations of individual misconduct.

4. Prohibition on Dismissal of Individual Charges in Corporate Settlements

Absent extraordinary circumstances or approved departmental policy, the Yates Memo instructs government attorneys to refrain from entering into corporate resolutions that include agreements to dismiss charges against or provide immunity for individual actors. The Yates Memo provides for some exceptions based on "extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy."³ Thus, future settlements of corporate enforcement actions will rarely include individual releases, regardless of the settlement amount.

5. Consideration of Individual Cases During Corporate Resolutions

The Yates Memo also instructs government attorneys to (i) conclude corporate enforcement actions only if a clear plan to resolve related individual cases has been developed, (ii) seek tolling agreements if necessary and (iii) memorialize any declinations to pursue individual charges. If government attorneys ultimately determine not to charge such individuals, the government must memorialize that decision in writing and secure approval from the United States Attorney or Assistant Attorney General, or their designees.

6. Emphasis on Individual Liability in Civil Context

The Yates Memo instructs civil attorneys to consistently focus on individuals during corporate enforcement actions and evaluate whether to bring suit against an individual based on considerations beyond the ability to pay a financial penalty. Factors to consider include the seriousness of the alleged misconduct, whether the alleged misconduct is actionable, whether the admissible evidence will be

sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest.

The Yates Memo also states that DOJ will revise certain guidance documents (such as the United States Attorney's Manual) to reflect these policy changes. Thus, these factors will apply to all future enforcement actions as well as pending matters, to the extent practicable.

The Yates Memo in Context: DOJ's Continued Emphasis on Individual Accountability

The Yates Memo is the culmination of a series of procedural guidelines and statements that have increasingly emphasized the importance of individual accountability in corporate enforcement actions.

As early as 1999, then-Deputy Attorney General Eric Holder attempted to prioritize individual convictions in DOJ's pursuit of corporate enforcement actions, and encouraged corporations to conduct internal investigations and disclose any information regarding individual misconduct.⁴ A similar memo issued by Deputy Attorney General Thompson in 2003 (and subsequently revised by Deputy Attorney General Paul McNulty in 2006 and Deputy Attorney General Mark Filip in 2008) stressed that prosecuting corporations is not a substitute for prosecuting individuals, and imposing individual criminal liability may prove the strongest deterrent against future corporate wrongdoing.⁵ More recently in September 2014, Attorney General Eric Holder stated that DOJ will continue to pursue civil and criminal actions against corporations and individuals alleged to have engaged in financial fraud.⁶ In May 2015, Assistant Attorney General Leslie Caldwell indicated the need to obtain individual information as part of corporate cooperation, foreshadowing DOJ's new policy on cooperation credit.⁷

DOJ's focus on individual accountability has been a recurring theme for some time, and the Yates Memo reflects yet another DOJ effort to respond to criticism of its perceived failure to prosecute individuals in white collar matters, following the recent financial crisis.⁸ That said, the Yates Memo does contain several new measures that could reshape the corporate enforcement landscape going forward.

Key Considerations and Implications

Impact of More Stringent Approach to Cooperation Credit

The most significant change set forth in the Yates Memo is the mandate that *any* cooperation credit requires disclosure of all relevant individual misconduct. In her recent remarks, Deputy Attorney General Yates emphasized that credit will be withheld if a corporation refuses to disclose or declines to learn of relevant information, and partial credit will no longer be given for cooperation lacking disclosure of individual misconduct. This "all or nothing" approach may place corporations in an uneasy position during the course of an enforcement action, as the DOJ will grade the breadth and depth of a corporation's investigation to determine whether the corporation has met the revised requirements for cooperation credit.

While a more stringent approach to cooperation credit may be designed to increase successful individual prosecutions, DOJ's new policy may have implications for multiple interested parties, including corporations and their counsel, senior executives and employees, and government attorneys and investigators.

First and foremost, DOJ's new policy burdens corporations with the risk that failure to meet the complete disclosure standard could ultimately render submissions moot for the purpose of cooperation credit. In addition, the absence of a sliding scale acknowledging a corporation's cooperation efforts may chill

voluntary disclosures *ex ante* given the corporation's fear that efforts will be judged inadequate *ex post*. Furthermore, lower-level individuals may now be improperly incentivized to tell government attorneys and investigators what they want to hear in order to implicate more senior corporate officials.

Corporations may determine that the benefits of voluntary disclosures are outweighed by the risk that (i) cooperation will not be credited and (ii) submissions deemed inadequate for credit could be used by the government in later proceedings. Deputy Attorney General Yates acknowledged that this could be a collateral consequence of DOJ's new policy.⁹ This in turn, may affect DOJ's recent reliance on deferred prosecution agreements and non-prosecution agreements to resolve corporate matters.

Additional Considerations for Scope and Timing of Internal Investigations

DOJ's emphasis on disclosure of individual misconduct may require a new and thoughtful approach to internal investigations. As per Deputy Attorney General Yates's remarks, DOJ expects corporations to conduct thorough investigations specifically tailored to the scope of the alleged wrongdoing.¹⁰ This is easier said than done, particularly in cases in which DOJ's investigation goals remain general or ambiguous. This new policy may require corporate cooperation on a wide range of topics, issues, and relevant individuals — the identification of which may increasingly shift to the corporation and away from the investigating government attorneys.

Corporations should consider how the Yates Memo will impact the scope and timing of internal investigations. Investigations will now likely take longer to complete, as government attorneys must justify declinations to pursue individual charges, and receive approval from the United States Attorney or Assistant Attorney General, or their designees. In addition, corporations will need to develop specific practices and procedures addressing early identification of key employees, thoroughness of reviews relating to individual conduct, and the timing of disclosures to the government.

Changes to Employer-Employee Dynamic

DOJ's focus on individual action from the outset of an investigation, in combination with the requirement that cooperation credit hinges on full disclosure, may impact internal information sharing and require a retooling of joint defense agreements.

Cooperation credit now arguably requires corporations to go some way in developing government cases against individuals. Credit does not merely necessitate the submission of information of individual wrongdoing, but more specifically requires disclosure of *all facts* relating to individual misconduct. While evidence is frequently used to inform or support conclusions in litigation generally, white collar enforcement matters are often determined by the existence and acceptance of specific facts relating to alleged misconduct. An increased risk of individual liability exposure could impact internal cooperation with an investigation.

In addition, DOJ's new policy may require corporations to rethink the scope and function of joint defense agreements, which corporations and executives have often used to exchange confidential information and communications, and to achieve common goals. The policy also raises questions about the provision of legal representation for employees, indemnification and advancement of legal fees.¹¹ Further, ambiguity surrounding whether DOJ will demand particular disciplinary or remedial action at the corporate level may also require thoughtful consideration.

Ultimately, DOJ's new approach to corporate enforcement actions may create a significant amount of stress very early in the internal investigation process.

Broadening the Scope of Civil Enforcement

While DOJ's focus on individual accountability is not new, the Yates Memo is in part a response to the perceived failure of federal authorities to prosecute individuals after the 2008 financial crisis. However, the government did rely on several statutes, including the Financial Institutions Reform, Recovery, and Enforcement Act and the False Claims Act, to aggressively pursue financial institution cases in the wake of the economic crisis. By addressing *all* corporate enforcement actions, the Yates Memo can be interpreted as emphasizing a continued need for similarly robust efforts by DOJ's civil attorneys, but in *all* subject matter areas. As such, civil attorneys are being directed to broadly apply a relatively aggressive enforcement approach in spaces and industries that may sit outside of established areas of expertise.

In addition, focusing on individual misconduct from the outset of an investigation and during matter resolution reflects a significant policy change for civil enforcement actions. This may change the dynamics of civil settlements, which often tend to focus on corporations. Further, collaboration between criminal and civil attorneys during enforcement actions may raise questions regarding document and information sharing between criminal and civil sides. Further guidance may be necessary for handling typically confidential materials, such as records of federal grand jury proceedings.

Ultimately, corporations will need to consider how the Yates Memo may require new or updated strategies for responding to and defending civil enforcement actions going forward.

Practical Application of New Policies May Vary

The extent to which various government attorneys and agencies adopt and follow DOJ's guidance remains uncertain. While the Yates Memo was issued to all US Attorneys and select groups within DOJ, government attorneys (and particularly different US Attorneys' Offices) often have different styles and positions regarding the manner in which enforcement actions are conducted and resolved. In addition, because the discussions leading to these policy changes did not include greater diversity in perspectives, the manner in which the changes are implemented may vary. DOJ may find that insurmountable barriers to the implementation of their new policy may arise and some collateral consequences of the new approach may be difficult to work through. While DOJ intends to formally incorporate these policies into the US Attorney's Manual and also provide additional relevant training and guidance, how DOJ and other agencies will apply these policies in practice remains to be seen.

Conclusion

The Yates Memo demonstrates that the investigation and prosecution of individual actors for corporate wrongdoing is now formal DOJ policy. While how certain practices and procedures will be applied or implemented remains unclear, this new approach to criminal and civil enforcement actions may result in significant changes relating to voluntary disclosures, internal investigations and internal corporate dynamics. Corporations should carefully consider how these new policies may impact strategies relating to future investigations, settlement negotiations and government litigation.

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Endnotes

- 1 Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys, regarding Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), available at <http://www.justice.gov/dag/file/769036/download> [hereinafter Yates Memo].
- 2 See Deputy Attorney General Sally Quillian Yates, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), available at <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school> [hereinafter Yates Remarks].
- 3 Yates Memo, supra note 1.

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- 4 See Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys, regarding Bringing Criminal Charges Against Corporations (June 16, 1999), available at <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> ("Charging a corporation . . . does not mean that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Further, imposition of individual criminal liability on such individuals provides a strong deterrent against future corporate wrongdoing.").
 - 5 See Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys, regarding Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf; see also Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys, regarding Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), available at http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf; Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys, regarding Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), available at <http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>.
 - 6 See Attorney General Eric Holder, Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), available at <http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law> ("[W]henver we have resolved these cases – whether they were civil or criminal in nature – we have almost always reserved the right to continue our civil and criminal investigations into individual executives at the respective firms. This is because, when it comes to financial fraud, the department recognizes the inherent value of bringing enforcement actions against individuals, as opposed to simply the companies that employ them."); see also Deputy Assistant Attorney General Marshall L. Miller, Remarks at the Global Investigation Review Program (Sept. 17, 2015), available at <http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller> ("When you come in to discuss the results of an internal investigation to the Criminal Division and make a Filip factor presentation – expect that a primary focus will be on what evidence you uncovered as to culpable individuals, what steps you took to see if individual culpability crept up the corporate ladder, how tireless your efforts were to find the people responsible. . . . If 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.").
 - 7 See Assistant Attorney General Leslie R. Caldwell, Remarks at the Compliance Week Conference (May 19, 2015), available at <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-compliance-week-conference> ("To receive cooperation credit, a company must do more than comply with subpoenas or other compulsory process. Companies must provide a full accounting of the known facts about the conduct or events under review, and affirmatively must identify responsible individuals (and provide evidence supporting their culpability), including corporate executives and officers – and they must do so in a timely way.").
 - 8 See, e.g., Jed S. Rakoff, The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?, N.Y. Review of Books (Jan. 9, 2014), <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/>.
 - 9 See Yates Remarks, *supra* note 2 ("Some corporations may decide, for example, that the benefits of consideration for cooperation with DOJ are not worth the costs of coughing up the high-level executives who perpetrated the misconduct. Less corporate cooperation could mean fewer settlements and potentially smaller overall recoveries by the government.").
 - 10 See *id.*
 - 11 Corporations will likely need to review relevant internal policies and corporate by-laws, as well as applicable D&O insurance policies. Notably, several years ago, an attempt by government attorneys to undermine the employer-employee relationship by encouraging corporate abandonment of employees proved unsuccessful. See Lynnley Browning, U.S. Improperly Pressured KPMG, Judge Rules, N.Y. TIMES (June 27, 2006), <http://www.nytimes.com/2006/06/27/business/27cnd-kpmg.html?pagewanted=all>.