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### Corporate Crime

# Analyzing Early Returns On the Yates Memo

By  
**William F.  
Johnson**



Almost six months ago, on Sept. 9, 2015, U.S. Deputy Attorney General Sally Quillian Yates issued a Justice Department memorandum titled “Individual Accountability for Corporate Wrongdoing” (Yates Memo or Memo).<sup>1</sup> In the short time that the Yates Memo has been in operation, the early returns are troubling for practitioners representing both companies and individuals. Among other things, it appears that the government may be attempting to use the Yates Memo for maximum political effect—in an effort to show that individuals are being held accountable for corporate wrongdoing. In practical terms, the Yates Memo can operate to sacrifice individuals—whether or not truly culpable under legal standards required in court—as the collateral damage of corporate resolutions in which the government has considerable leverage over corporate entities. This article will explore some early experience with the Yates Memo, including how it may forecast defense counsel’s future dealings with the government on behalf of both companies and individuals, and suggest tips for practitioners to best advise clients who are subject to the Memo’s guidelines.

A full description of each of the fundamental elements of the Yates Memo is beyond the scope of this article. The Memo lists “six key steps,” some of which change existing DOJ policy: (1) to be eligible for any cooperation credit, corporations must disclose to DOJ all relevant facts about the individuals involved in corporate misconduct; (2) both 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, no corporate resolution will provide protection from criminal or civil liability for any individuals; (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; and (6) civil attorneys should consistently focus on individuals as well as companies and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability

to pay.<sup>2</sup> This article will focus primarily on Items 4 and 5 above. Thus far, it appears that these two policy changes are creating some serious issues for individuals as well as companies.

#### Early Results

To be sure, the full impact of the Yates Memo on future investigations of corporate wrongdoing will not be fully visible for some time. However, in the first six months since the Memo’s issuance, we have been given a glimpse of the initial consequences of the policy shift. We have now seen DOJ settlements with corporations since Sept. 9, 2015 that did *not* include releases for individuals. For example, in a settlement with Vericare Management on Oct. 29, 2015, DOJ released liability for conduct allegedly in violation of the False Claims Act but expressly

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limited the released parties to the Vericare entity.<sup>3</sup> Another example is the Franklin American Mortgage settlement on Dec. 2, 2015, in which the release of liability for conduct surrounding Franklin American’s FHA lending program extended only to “Franklin American, together with its current and former parent corporations, predecessor and successor corporations, divisions, affiliates and direct and indirect subsidiaries.”<sup>4</sup> The agreement’s language expressly reserved the possibility of future claims for “[a]ny liability of individuals.”<sup>5</sup> In contrast, before the issuance of the Yates Memo, releases of individuals were commonplace in many entity settlements.<sup>6</sup>

One issue that has emerged from recent post-Yates Memo settlement discussions is the question of who within the Justice Department will exercise the ultimate authority to release individuals at the conclusion of a corporate investigation. There are conflicting signals emanating from investigations: some indicating that the local U.S. Attorney has the full authority to release individuals, and others indicating that Main Justice intends to wield ultimate

control of that authority. The specific language of the Yates Memo provides for a dual authority, but certainly indicates that the release can be approved by the United States Attorney handling the investigation.<sup>7</sup> The Memo also provides for parallel declination authority.<sup>8</sup> Time will tell as to whether a pattern emerges regarding which DOJ entity exercises the authority to release individuals.

In addition, just last month, the Justice Department indicated that it will require corporations to provide a certificate of cooperation at the conclusion of an investigation in order to comply with the Yates Memo’s directive that a company disclose all relevant information to be eligible for any cooperation credit.<sup>9</sup> It is interesting, however, to note the following statement by Deputy Attorney General Yates herself shortly after issuing the Memo in September 2015: “Going forward, corporate plea agreements and settlement agreements will include a provision that requires the companies to continue providing relevant information to the government about any individuals implicated in the wrongdoing. A company’s failure to continue cooperating against individuals will be considered a material breach of the agreement and grounds for revocation or stipulated penalties.”<sup>10</sup> If a company is required to and will be actively cooperating with the government after a corporate resolution, requiring the finality of a cooperation certification at the conclusion of the investigation of the company (presumably to evaluate the company’s cooperation for resolution purposes) is a curious procedure.

In light of this new certification requirement and the provisions of the Yates Memo, counsel representing corporate entities would be wise to document fully the steps taken to ferret out wrongdoing in the internal investigation. The Yates Memo may not have a significant impact on the basic steps in which counsel *conducts* an investigation, as diligence and thoroughness have always been paramount. But the Yates Memo is likely to have an impact on how counsel memorializes the methodology of an *investigation*, as companies will inevitably have to “prove” to the government that they have taken (and continue to take) all necessary steps to identify accountable individuals.

#### Consequences

Beyond these issues, the Yates Memo’s policy shifts extend deep into the underlying dynamics

WILLIAM F. JOHNSON is a partner in the special matters and government investigations practice group at King & Spalding. Associate NICOLE M. PEREIRA assisted in the preparation of this article.

of the investigatory process and the interaction between the government, the corporation, any individuals viewed as potentially culpable, and even pure witnesses.

Perhaps the most significant early consequence of the Yates Memo has been its effect on the interaction between the company and its current and former employees. The government's views of what steps a company must take to receive credit for "cooperation" can create tension between company and employee. One example of this point relates to the fairly routine practice of companies sharing with their employees certain information produced to the government during investigations, such as custodial emails and other documents pertaining to individual employees. The government has, post-Yates Memo, requested that companies not share certain information with counsel for their employee-witnesses during the investigation. The request is made as part of the government's communication with company counsel regarding the company's cooperation with the investigation.

But this "request" should be seen for what it is—a clear message to the company that it is in jeopardy of receiving less credit for cooperation if it shares information. The practice is unfair to the individuals who, in order to defend themselves from potential charges, should be permitted access to the information available to them at the time of the events under investigation (such as their own emails, documents, and even company-made recordings of their phone calls). This type of request also prevents the company from fully defending itself because it cannot review the evidence in the investigation with its own employees or former employees. After all, as the Yates Memo points out, the evidence relating to the conduct of individuals is directly relevant to the liability of the company. This type of artificial restriction on information sharing also has the effect of chilling the relationship between a corporation and the individuals in its employ, which can harm the goal of internal cooperation. Although requests not to share information were not entirely unheard of prior to the existence of the Yates Memo, they were rarely made and were usually narrowly tailored to address particular law enforcement objectives such as preventing an ongoing fraud or obstruction of justice where there was a specific and credible basis to believe that obstruction was occurring.

Another important consideration for practitioners involves the timing of the corporate settlement. There is a growing concern that when a corporate settlement is reached before liability of individuals has been resolved, the "facts" incorporated into the corporate settlement can have a severely limiting effect on the individual's ability to defend himself or herself. When the corporate resolution references the actions of individuals in a specific manner, the individual may be unable to contest the appropriateness or strength of those references at a meaningful time. The timing issue arises because the individual often lacks full transparency into the status and details of settlement discussions between the company and the government. An individual's opportunity to challenge facts and inferences baked into the settlement is lost when a settlement with the company is reached before the investigation of all individuals is "complete." Of course, one may

wonder how the investigation of the company could be complete if the investigation of all individuals is not yet complete, but Item 5 of the Yates Memo seems to contemplate exactly that.<sup>11</sup>

The Yates Memo's instructions for resolving corporate and individual liability have created yet another tension. On the one hand, the Yates Memo states that there can be no corporate resolution that includes a release of culpable individuals absent "extraordinary circumstances."<sup>12</sup> On the other hand, the Memo goes on to say that a corporate resolution must be coupled with 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.<sup>13</sup> Thus, there appears to be some question as to whether the Yates Memo contemplates that in any case where a corporate resolution is reached (which itself is not a finding of corporate liability, since many settlements do not contain any admissions of legal liability), individual liability must also exist.

Practitioners representing individuals must ensure that a proper assessment of their clients occurs independent of the government's view of the "evidence" against the company and the language of any corporate settlement agreement.

If so, that is the wrong analysis. To begin with, a corporate resolution is just that, a resolution. Many companies settle with DOJ to put the matter behind them, and avoid additional distraction and legal expense, even where the evidence against them is weak (and may not be sufficient in court to prove a violation of law). As noted, in many instances, corporations do not admit liability. Thus, corporate resolutions are not the same thing as proven trial court verdicts. Similarly, the "facts" that are "admitted" or "acknowledged" in such settlements are not equivalent to proven trial court findings. They are the product of the particular negotiations unique to that matter and the company's willingness to resolve the investigation. In all instances, the question of whether individual liability exists should stem from an independent assessment of whether the facts and the law applicable to the particular individual support a finding of liability. That assessment should not be presumed to result in a finding in favor of liability unless "extraordinary circumstances" exist, as the Yates Memo seems to suggest. Put another way, the assessment either supports liability or it doesn't—it should not have to be "extraordinary" to support the decision not to charge an individual.

Senior DOJ officials appear to agree. According to remarks by Assistant Attorney General Leslie Caldwell just weeks after the Yates Memo was released, "[o]bviously there are cases in corporate fraud ... where no one individual has the requisite intent. It's sort of somebody has a piece in the chain, somebody has the next piece in the chain, and maybe not any one person has enough to have criminal intent. We recognize that. We're not looking to lower the standards that are required for criminal intent and individual liability."<sup>14</sup> Time will tell if these

sentiments are applied to assessments of individual liability made pursuant to the Yates Memo.

### Takeaways

The Yates Memo has stimulated a great deal of debate in the corporate defense bar. The Memo's directives have not yet been fully interpreted or tested. But several themes for practitioners have emerged. Advocates for companies should ensure that the government remains mindful that although cooperation credit hinges on disclosing all relevant facts, the Yates Memo does not prohibit a company from advocating that the facts it has disclosed are insufficient to support a finding of corporate or individual wrongdoing. Practitioners representing individuals must ensure that a proper assessment of their clients occurs independent of the government's view of the "evidence" against the company and the language of any corporate settlement agreement. Counsel for individuals should also be prepared to advocate, in appropriate circumstances, that just because a corporate resolution has been reached does not automatically mean that relevant individuals at that company must have engaged in conduct giving rise to individual liability. Now, perhaps more than ever, counsel for companies and individuals must be fully prepared to respond to the leverage that DOJ is imposing on them.

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1. Available at <https://www.justice.gov/dag/file/769036/download>.

2. Yates Memo at 2-3.

3. See Settlement Agreement between United States of America and Vericare Management (Oct. 29, 2015) at ¶ 9 ("This Agreement is intended to be for the benefit of the Parties only. The Parties [defined as the United States and Vericare Management, Inc.] do not release any claims against any other person or entity..."), available at <http://www.justice.gov/usao-nj/file/789156/download>.

4. See Settlement Agreement between United States of America and Franklin American Mortgage Co. (Dec. 2, 2015) at ¶ 3, available at <http://www.justice.gov/opa/file/796731/download>.

5. Id. at ¶ 4(f).

6. See, e.g., Stipulation and Order of Settlement and Dismissal, *U.S. ex rel. Edwards v. JPMorgan Chase Bank, N.A.*, 13 Civ. 0220 (S.D.N.Y. Feb. 4, 2014) at ¶ 7 (releasing defendants' "current and former officers, directors, employees, ..."), available at <http://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/U.S.%20v%20JPMorgan%2013%20Civ%20%200220%20-%20Executed%20Stipulation%20of%20Settlement%20and%20Judgment.pdf>.

7. See Yates Memo at 5, §4 ("Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney").

8. See Yates Memo at 6, §5 ("If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees").

9. See Stephen Dockery, "U.S. Justice Dept to Require Certification of Cooperation in Investigations," WALL STREET JOURNAL RISK & COMPLIANCE REPORT (Feb. 5, 2016), available at <http://blogs.wsj.com/riskandcompliance/2016/02/04/u-s-justice-dept-to-require-certification-of-cooperation-in-investigations/>.

10. See Sally Q. Yates, Deputy Attorney General, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), transcript available at <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.

11. Yates Memo at 6, §5.

12. Yates Memo at 5, §4.

13. Id. at 6, §5.

14. Leslie R. Caldwell, Assistant Attorney General, Remarks at the Second Annual Global Investigations Review Conference (Sept. 22, 2015), transcript available at <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-second-annual-global-0>.