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COMMENTARY

U.S. Department of Justice Announces Updated Guidelines on Individual Accountability for Corporate Wrongdoing

Implications for Internal and Government Investigations

On September 9, 2015, after years of criticism by Congress and commentators about the paucity of prosecutions of individuals in major white collar cases, Deputy Attorney General ("DAG") Sally Yates announced six changes to policies and practices governing investigations of corporate misconduct in a memorandum (the "Yates Memo") to prosecutors throughout the United States Department of Justice ("DOJ").[1] The next day, DAG Yates delivered a speech amplifying the new policies and practices at New York University Law School.[2] The changes, which cover virtually all criminal and civil investigations of corporate wrongdoing, result from the DOJ's internal examination of its approach to building cases against individuals at all levels in white collar cases. The six changes will be incorporated into the Department's governing policies contained in the U.S. Attorneys' Manual, and they are effective for all new investigations, as well as on existing investigations "to the extent … practicable …."

The Memo itself promises no sea change in individual prosecutions and acknowledges that there will remain "many substantial challenges unique to pursuing individuals for corporate misdeeds." Stepping back from the rhetoric associated with the rollout of the changes, what is really changing?

One thing that won't change: it will still be the case that developing proof beyond a reasonable doubt of criminal wrongdoing by senior corporate employees in corporate cases will often be difficult.

Nevertheless, as this *Commentary* describes, aspects of the Yates Memo bear particular attention.

Of primary interest to companies will be the Yates Memo's effect on internal investigations of potential misconduct by corporate personnel, company decisions to self-report (or not) potential violations of law, and resulting impacts on related government investigations. The Memo appears to alter the preexisting "disclose all relevant facts" standard for receiving cooperation credit. It explicitly requires that all relevant facts "about the individuals involved" be disclosed to the DOJ as the baseline for receiving "any" cooperation credit.[3] In practical terms, this may not

represent a substantial change for cooperating companies but may have a chilling effect on employees with knowledge of, or involvement in, misconduct.

The Six Policy Changes

The Yates Memo sets forth the six policy changes as follows:

1 In order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct;
2 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 or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;
5 Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases and should memorialize any declinations as to individuals in such cases; and
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.[4]

Three of these—(1), (2), and (5)—are most likely to have consequences for every case involving corporate misconduct and merit further explanation.

Qualifying for Credit. In detailing this change, the DOJ explained: "[c]ompanies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved or responsible for the misconduct at issue, regardless of their position, status, or seniority, and provide … all facts relating to that misconduct." The Yates Memo goes on to highlight that this obligation is "subject to the bounds of the law and legal privileges" and that the Department will proactively test the evidence provided by the company and seek out evidence through other sources.[5]

Focusing on Individuals from the Outset. The Yates Memo directs prosecutors to "focus on individual wrongdoing from the very beginning of any investigation …." In the Department's view, doing so is the efficient and effective way to conduct investigations, will cause lower-level employees to cooperate and provide information against more senior employees, and will maximize the chance of successful individual prosecutions.[6]

Requiring Plans to Resolve Individual Cases Before Resolving Corporate Cases. Prosecutors will be required to present "clear plans" for concluding individual cases as part of seeking authorization to resolve cases against corporations. Even when civil claims or criminal charges are not being sought against individuals, prosecutors will be required to document and obtain approval from their superiors before resolving the corporate case.[7]

In our experience, two changes in the Yates Memo—items (3) and (4) above—are less likely to materially alter current practice. Defense counsel should already have been assuming that civil and criminal prosecutors are in "routine communication" with each other within the bounds of Federal Rule of Criminal Procedure 6(e) governing grand jury secrecy. In cases where the company has decided to cooperate, often civil and criminal prosecutors participate jointly in meetings and communications with company counsel and otherwise engage in joint information-collection and case-resolution activities. We also regularly encounter substantial reluctance or outright refusals to condition corporate resolutions on individual releases, other than where Department policy is explicitly contrary.

The Likely Practical Changes Resulting from the Yates Memo

Is It Appreciably Harder for Companies to Receive Cooperation Credit? This is perhaps the most important and puzzling question for corporate subjects of investigation.

Viewed one way, there is nothing new here. Since at least 1999, DOJ policy has required that cooperating companies disclose all relevant, nonprivileged facts.[8] Indeed, once a company decides to cooperate, it is foolhardy to do otherwise. There is little to be gained and much to be lost by seeking to withhold incriminating facts about employees at

any level. After the company opens the floodgates through partial cooperation, the government's ability to develop independent evidence through subpoenas to third-party sources, or informal interviews of employees, as well as the prospect of whistleblowers or other cooperators acting for their own interests, create substantial risks that selective disclosure of facts to benefit employees or senior management will backfire. These same dynamics have always required thorough corporate internal investigations, without pulling punches as to sensitive issues or favored corporate constituencies. As a result, most companies that cooperate already try to do so to the same extent as the "new" Department policy will require.

If there is something new here, it may be an implication that in order to qualify for cooperation credit, a corporation *must* serve up a prosecutable case against individuals:

> The rules have just changed. Effective today, if a company wants any consideration for its cooperation, it must give up the individuals, no matter where they sit within the company. And we're 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.[9]

But that implication itself overlooks the fact, acknowledged by DAG Yates herself, citing former Attorney General Eric Holder, that many cases of *corporate* misconduct do not present evidence of *individual*, *criminal* responsibility:

> In modern corporations, where responsibility is often diffuse, it can be extremely difficult to identify the single person or group of people who possessed the knowledge or criminal intent necessary to establish proof beyond a reasonable doubt. This is particularly true of high-level executives, who are often insulated from the day-to-day activity in which the misconduct occurs.[10]

This is not always because evidence of *individual*, *criminal* responsibility is hidden from investigators, or because prosecutors fail to discover it, but equally often because it simply does not exist. The DOJ has properly cited this phenomenon in defense of the "imbalance," if it be viewed as such, between corporate and individual convictions. It remains to be seen whether the DOJ will now require from corporations, as a condition of cooperation credit, results that are often not supported by the facts.

Does the Yates Memo Change Whether Companies Should Self-Report? Since the early 2000s and the Enron/WorldCom era, the DOJ and other governmental agencies broadly and frequently have encouraged companies to self-report suspected wrongdoing in order to receive cooperation credit.[11] Vigorous exercise of Section 10A of the Securities Exchange Act of 1934,[12] as well as the reforms of the Sarbanes-Oxley Act,[13] created structural changes that reinforced that message. The advent of the post Dodd-Frank whistleblower economic incentives[14] add substantial risk that unreported corporate misconduct would nonetheless come to the attention of the government. Increased enforcement and financial penalties at all levels of government on corporate America has made the benefits of self-reporting seemingly less clear. As a result, making a corporate decision to self-report is often already complicated and challenging for senior managers and corporate boards. The individual prosecution priority may make corporate decision-makers more reluctant to self-report, particularly where personal financial consequences[15] and relationships may be implicated. In the end, consistent with their corporate duties and responsibilities, decision-makers will need to set aside those concerns and strive to act in the best long-term interests of the company and shareholders, and nothing in the new policies will make that easier.

How Will the New Policies Affect the Conduct of Internal Investigations? The DOJ's ongoing vocal prioritization of individual prosecutions is likely to further heighten tensions in internal investigations. Most importantly, concerns about their own exposure not just to personnel action, but also to criminal charges, as a consequence of providing information to internal investigators, brought into sharper focus with the Yates Memo, may very well result in fewer employees choosing to cooperate with internal investigations. And presumably any such trend will be more evident with respect to corporate personnel who have the most potential exposure to indictment (i.e., the most knowledge of and involvement in the offense(s) at issue).[16]

Corporate employees, of course, are frequently required to cooperate with duly authorized internal probes and may be

subject to termination or discipline for refusing to so cooperate. The rock-and-a-hard place predicament that criminally culpable corporate employees can find themselves in with internal investigations (i.e., not cooperating and facing discipline versus cooperating and potentially facing prosecution) is more clearly defined with the Yates Memo. If there was previously any ambiguity as to whether a company could hold back material information relating to individuals from the DOJ and still get cooperation credit, the Memo, on its face, eliminates that ambiguity.

One of the first questions that many employees ask during internal investigations is whether they need their own lawyers. The wide publicity concerning the Yates Memo can only increase and accelerate the rush to separate counsel. Employees, especially those represented by counsel well versed in this area of criminal practice, will now think longer and harder about submitting to an interview with internal investigators or otherwise cooperating with the internal investigation. At the barest minimum, the new policies highlight for employees the risk of prosecution when they do cooperate.

The Yates Memo requires that prosecutors consider evidence of individual liability from the outset. This is not a new policy. Such evidence in companies generally comes from electronically stored communications and records, as well as witness statements. Companies understand the financial and technological resource costs of retaining, retrieving, and reviewing voluminous electronic records during investigations. In her September 10 speech, DAG Yates stated that the new policies should not be interpreted to require additional investigation in terms of cost, breadth, depth, or duration.[17] Seasoned investigators may be skeptical of this claim. Companies seeking to cooperate will need to carefully assess the extent to which they review electronic records at an early stage of the investigation at the least, and they may well need to expend more resources earlier to satisfy the new policy requirements to obtain cooperation credit. If nothing else, the Yates Memo policies provide additional leverage for prosecutors to pressure companies to act quickly to remediate wrongdoing, including terminating culpable employees.

Will the New Policies Lead to Quicker Resolutions of Government Investigations? Probably the opposite. The need to develop evidence addressing individual liability during the investigation will add some burden, despite DAG Yates's expressed contrary view. Further, the requirement that prosecutors resolve or include a "clear plan" for completing investigation of individual conduct before resolving the corporate case cannot shorten the time to resolution of the company case, whether that resolution means bringing charges or claims, settling, or closing the company case.

How Do the New Policies Apply to Non-U.S. Companies? The new policies apply to all DOJ investigations, civil and criminal. By definition, that includes investigations related to U.S. laws that apply both within and outside the United States. Foreign companies and individuals otherwise already subject to U.S. jurisdiction and U.S. laws that have extraterritorial application, such as economic sanctions, the Foreign Corrupt Practices Act, antitrust, and conspiracies to violate U.S. laws, therefore will be subject to the new policies.

During her speech, DAG Yates also noted that multinational investigations encounter "restrictive foreign data privacy laws and a limited ability to compel the testimony of witnesses abroad [which] make it even more challenging to obtain the necessary evidence to bring individuals to justice." It remains unclear how the DOJ will view cooperation by multinational companies that seek to cooperate fully with criminal investigations, while also seeking to comply with local laws that restrict companies' ability to produce such evidence to the DOJ.

Conclusion

The new policies contained in the Yates Memo are designed at least in part to address criticism of the DOJ's efforts to criminally punish executives following the financial crisis of the last decade.

Whether these new policies will ultimately make it easier for the DOJ to overcome the hurdles to individual prosecutions, or merely shift to cooperating corporations the adverse consequences, is far from clear. But at least some of the new policies will further complicate the already very difficult process of conducting internal investigations and of dealing with the government in moving corporate cases to resolution.

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For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

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Endnotes

1 Sally Q. Yates, "Individual Accountability for Corporate Wrongdoing" (Sept. 9, 2015).

2 "Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing" (Sept. 10, 2015).

3 Yates, *supra* note 1, at 3.

4 *Id*. at 3-7.

5 *Id*. at 4.

6 *Id*.

7 *Id*. at 6.

8 *See* Eric H. Holder, "Bringing Charges Against Corporations" (June 16, 1999) (the "Holder Memorandum").

9 *Supra* note 2, ¶ 14.

10 *Id*. at ¶ 7; *see also* "Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law" (Sept. 17, 2014).

11 *See* Larry D. Thompson, "Principles of Federal Prosecution of Business Organizations" (the "Thompson Memorandum") (Jan. 20, 2003), and Paul J. McNulty, "Principles of Federal Prosecution of Business Organizations" (the "McNulty Memorandum") (Dec. 12, 2006), and Mark Filip, "Principles of Federal Prosecution of Business Organizations" (the "Filip Memo") (Aug. 28, 2008); *see also* Exchange Act Release No. 44969, "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions" (Oct. 23, 2001) (the "Seaboard Report").

12 15 U.S.C. § 78j-1(b) (requiring auditors to report illegal acts and management failure to take remedial action to public company boards, and in some instances resign and notify the SEC).

13 E.g., Sections 302 and 404, 15 U.S.C. §§ 7241, 7262.

14 *See* Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F (2011).

15 *See* Forfeiture of certain bonuses and profits, 15 U.S.C. § 7243(a) (2002); *see also* Recovery of erroneously awarded compensation policy, 15 U.S.C. §78j-4(b) (2010).

16 As such, in the world of federal corporate criminal law, where resource-strapped enforcement agencies are, and will continue to be, heavily dependent upon internal corporate investigations for fact-gathering, the Yates Memo may undermine, rather than facilitate, the DOJ's efforts to ferret out and prosecute corporate misconduct and culpable individuals, at least in certain instances.

17 *Supra* note 2, ¶ 20 ("The purpose of this policy is to better identify responsible individuals, not to burden corporations with longer or more expensive internal investigations than necessary.")