

The DOJ's New Policy of Prosecuting Individuals

On September 9, 2015, Deputy Attorney General Sally Yates of the United States Department of Justice ("DOJ" or the "Department") issued a new policy memorandum (the "**Yates Memo**") entitled "Individual Accountability for Corporate Wrongdoing." This short memorandum states a series of "six key steps to strengthen [the] pursuit of individual corporate wrongdoing, some of which reflect policy shifts[.]"

The Yates Memo seems to represent a response by DOJ to public criticism that while some large financial institutions have recently been subject to significant financial penalties, few individuals at these institutions have been prosecuted. The memo apparently grew out of the efforts of a working group within the Department that considered the particular challenges involved in individual prosecutions. The Yates Memo and the recent news coverage related to it suggest that DOJ will increase its focus on the prosecution of individuals.

As background, the Yates Memo begins by describing the "substantial challenges" faced by DOJ when prosecuting individuals. The memo explains that in large corporations, "responsibility can be diffuse and decisions are made at various levels," which makes it "difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt." The memo states that "investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions."

The policies described in the Yates Memo are designed to standardize the conduct of all attorneys across DOJ and will apply to currently pending and future investigations of corporate misconduct. The United States Attorney's Manual will be revised to reflect the contents of the memo. The new standards that should be applied when conducting a corporate investigation, be it criminal or civil, are summarized below:

1. In order to receive any cooperation credit, corporations must provide the DOJ all relevant facts about the individuals responsible for illegal corporate conduct.

The Yates Memo emphasizes that to be eligible for any credit for cooperation, the company must not only disclose all facts relating to corporate misconduct, but also identify all individuals involved in or responsible for the misconduct, regardless of their seniority or position in the company. The Department attorneys will "proactively investigat[e]" and "vigorously review" all the information provided by the company to ensure that the information is complete and does not seek to lessen the role of potentially culpable corporate actors. The company's failure to ensure continued cooperation with respect to corporate individuals after the resolution of the corporate case will result in specific penalties and/or material breach of the plea or settlement agreement.

2. Criminal and civil corporate investigations should focus on individuals at the outset of the investigation.

The memo explains that building cases against individual wrongdoers from the beginning of an investigation accomplishes multiple goals, including ensuring cooperation with the investigation from corporate insiders with relevant knowledge and maximizing the chances that the final resolution of the investigation will include charges not only against the company, but against culpable individuals.

3. DOJ's criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

The memo promotes early coordination and cooperation between the Department's criminal and civil attorneys in order to analyze the full range of remedies which may be available to the government. Recognizing the importance of parallel investigations, the memo instructs Department attorneys to pay close attention to circumstances where concurrent criminal and civil investigations should be pursued.

4. Absent extraordinary circumstances or approved departmental policy, DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation.

The Yates Memo prohibits Department lawyers from agreeing to a corporate resolution that relieves individual corporate wrongdoers from criminal or civil liability. The new policy requires the relevant Assistant Attorney General or United States Attorney to personally approve in writing any release of liability due to extraordinary circumstances. The memo exempts approved departmental policy, such as the Antitrust Division's Corporate Leniency Policy, which often provides leniency with respect to antitrust prosecutions to employees at a corporation that is cooperating with the government.

5. DOJ's 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.

Where the investigation of individual misconduct is ongoing at the time of corporate resolution, the Yates Memo instructs Department attorneys to include a discussion of the potentially liable individuals, the status of investigation, and an investigative plan in the prosecution or corporate authorization memorandum. The reasons for not pursuing civil or criminal charges against individual wrongdoers must be memorialized and approved by the United States Attorney or the Assistant Attorney General whose office handled the investigation.

6. Civil attorneys should evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

The memo emphasizes that an individual wrongdoer's ability to pay should not control the decision on whether to pursue a civil or criminal action against that individual. The Yates Memo identifies the following four factors for consideration when making charging decisions: (i) "whether the person's misconduct was serious"; (ii) "whether it is actionable"; (iii) "whether the admissible evidence will probably be sufficient to obtain and sustain a judgment"; and (iv) "whether pursuing the action reflects an important federal interest."

The Yates Memo raises several interesting questions. First, it is something of a surprise for DOJ to acknowledge, even implicitly, that the prosecution of culpable individuals may not have been the primary focus of the Department's work for the past several years. In other words, it should not have been necessary for senior DOJ officials to write a memo telling the staff to prosecute culpable individuals.

Second, the Yates Memo makes a disturbing aside when it states (in relation to civil actions) that "cases against individuals may not provide as robust a monetary return on the Department's investment," but are worth bringing nonetheless. Such a statement should be unnecessary. The Department should never operate based on a "return on investment" mindset, but should bring only those prosecutions and civil actions that will advance justice, whether against individuals or institutions.

Third, “point one” of the memo discusses the need for corporations to provide all information about culpable individuals. Based on this, an uninformed reader of the Yates Memo might reasonably infer that DOJ has not prosecuted individuals because corporations are protecting their executives. In reality, corporations often spend millions of dollars conducting detailed internal investigations and then present the results of those investigations to the government. Far from preventing prosecutions of individuals, these internal investigations have been essential to the Department’s work. Whatever reasons explain the paucity of individual prosecutions, it seems incorrect to pin this responsibility on the corporations.

Fourth, not all of the “new” policies in the Yates Memo are actually new. For example, the Department has long required institutions to provide full cooperation in connection with a nonprosecution agreement or deferred prosecution agreement. The Department ordinarily does not release from criminal or civil liability the employees of an institution that has entered into such an agreement with the government. To the extent that existing practices are being repackaged as new policies, it may be the case that the Yates Memo will have little practical effect on the work of the Department.

Finally, the Yates Memo creates a risk that prosecutors will now be pressured to bring cases against individuals in order to demonstrate a new “get-tough” policy, even when the facts or the law do not support such prosecutions. The criminal law is not the proper place for the testing of new legal theories or new approaches to regulation. Prosecuting individuals in borderline cases where the evidence is as consistent with innocence as with guilt cannot be reconciled with the Department’s highest ideals.¹ Nor is justice served by corporations being told that they have not provided sufficient cooperation unless they identify specific individuals who should be prosecuted. In many cases, corporations settle disputes with the government in order to avoid the risks and costs attendant with criminal prosecution or civil litigation, rather than because the corporation and its lawyers believe that there has been criminal wrongdoing.

In short, criminal prosecutions, as well as civil actions, should be brought by the government only where appropriate, and not in order to respond to public perceptions or commentary in the business and legal press. Time will tell whether the Yates Memo has any impact on how the Department conducts its business or on whether it will advance the “true administration of justice.”

¹ See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”).

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