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by Frank Sheeder, Esq., CCEP

# DOJ's pursuit of individual liability for corporate misconduct: The Yates Memo

- » The DOJ has made it a priority to hold individuals accountable for organizational misdeeds – both civil and criminal.
- » The DOJ has sent a message of deterrence to corporate leaders and their governing bodies.
- » This policy shift will present a number of challenges for organizations that are trying to do the right thing.
- » This development should be communicated to the board and senior leaders.
- » Prudent organizations will respond by enhancing their compliance programs.

Cooperation credit is a critical issue for corporations that become embroiled in investigations or enforcement activity.

In both the criminal and civil contexts, it is the only way to mitigate the financial impact of corporate wrongdoing. It can mean the difference between surviving a government investigation and staying in business at all. Now, the corporation's very existence could hinge on its ability—and willingness—to turn in its leaders and other personnel.



Sheeder

available to government attorneys, this policy emphasis poses significant challenges for organizations and those who work for them. It is the first major policy pronouncement in this realm under the recently appointed Attorney General.

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## Background

The Department of Justice (DOJ) has made many headlines recently with the promulgation of a September 9, 2015 Memorandum from Deputy Attorney General Sally Quillian Yates to all DOJ attorneys (the Yates Memo).<sup>1</sup> The Yates Memo announced a DOJ initiative to hold individuals responsible for corporate misdeeds, both criminal and civil. Although the Yates Memo does not change any laws or tools

The Yates Memo is the most recent in a series of DOJ memoranda that began in 1999 with the Holder Memo,<sup>2</sup> which related to bringing criminal charges against corporations. The DOJ's approach evolved with the Thompson Memo<sup>3</sup> (2003), the McNulty Memo<sup>4</sup> (2006), and the Filip Memo<sup>5</sup> (2008). The principles that emerged were placed in the United States Attorney's Manual in the Principles of Federal Prosecution

of Business Organizations.<sup>6</sup> Government attorneys are required to adhere to the policies set forth in those Memos, the United States Attorney's Manual, and now the Yates Memo. These pronouncements also provide insight and guidance for corporations addressing potential organizational wrongdoing, internal investigations, privileges and protections from discovery, dealings with the government, and compliance activities.

Although the DOJ announced the principles in the Yates Memo as if they were new, they do not involve any new laws or tools. Rather, those principles support a broad-based DOJ policy initiative aimed at deterring corporate misconduct by putting individuals at risk of criminal prosecution or civil action. In fact, the Assistant Attorney General for the Criminal Division, Leslie Caldwell, publicly foreshadowed this policy earlier this year: "If you choose to cooperate with us, we expect that you will provide us with those facts, be they good or bad. Importantly, that includes facts about individuals responsible for the misconduct, no matter how high their rank may be."<sup>7</sup> That statement is now official DOJ policy, and the United States Attorney's Manual will be updated to reflect this emphasis.

The Yates Memo was apparently developed in response to issues in the financial services industry, but it is not limited to that sector. The Yates Memo makes no distinctions about particular kinds of entities or activities. Rather, it applies to all of the DOJ's civil and criminal investigation and enforcement efforts. It is also notable that while a DOJ

workgroup developed the Yates Memo, the DOJ apparently did not consult the corporate defense bar before promulgating it. This is of concern because, as the DOJ acknowledged in the Yates Memo, "The Department makes these changes recognizing the challenges they may present." In reality, the aggressive policies in the Yates Memo pose many difficulties for organizations that are trying to do the right thing.

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### Key steps

The Yates Memo contains six "key steps" that encourage government lawyers "to most effectively pursue the individuals responsible for corporate wrongs." The titles of the key steps are set forth verbatim below, along with a brief discussion of each.

**1. "To be eligible for *any* cooperation credit, corporations must provide to the [DOJ] all relevant facts about the individuals involved in the corporate misconduct."**

This is perhaps the most impactful aspect of the Yates Memo. It is an all-or-nothing prerequisite for a corporation to receive any benefit from cooperating with the DOJ; there is no intermediate position. "Companies cannot pick and choose what facts to disclose." This high threshold, ironically, may discourage corporate cooperation with the DOJ in the first place. If they do cooperate, they will have to seek out facts and theories aimed at establishing individual exposure. The extent of cooperation credit a corporation receives will depend on the timeliness of the cooperation; the diligence, thoroughness, and speed of the internal investigation; the proactive nature of



the cooperation; and all of the other various factors that the DOJ has traditionally applied.

In explaining this element, the DOJ has indicated that its attorneys should not simply wait for a company to deliver information about individual wrongdoers and then merely accept it. Rather, they should proactively investigate individuals at every step of the process—before, during and after any corporate cooperation.

They should ensure that the corporation has not downplayed individual responsibility for wrongdoing. Moreover, any corporate settlement agreement should require the corporation to provide information about individuals, with penalties for failing to do so.

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

The DOJ reasons that this maximizes its ability to ferret out the full extent of corporate misconduct. Because corporations act only through people, investigating their conduct is the most efficient and effective way to determine the facts and extent of corporate misconduct. Additionally, by focusing on individuals, it can increase the likelihood that lower-level personnel will cooperate against those who are higher in the corporate hierarchy. This also ensures that both corporations and individuals will be charged for wrongdoing.

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

This also enhances the DOJ’s ability to pursue individuals because it allows DOJ

attorneys to consider the full array of civil and criminal options available to the government, along with the corresponding remedies. The DOJ’s criminal attorneys should notify civil attorneys as early as possible if they see potential criminal liability, and vice versa. Moreover, even if the DOJ could not make a criminal case, it might be able to pursue a civil action.

**If the DOJ resolves a matter with a corporation, it must still leave its options open with respect to individual liability.**

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

If the DOJ resolves a matter with a corporation, it must still leave its options open with respect to individual liability. DOJ attorneys will not be able to decline pursuit of individuals just because a corporation has settled. Any deviations from this policy must be approved at high levels.

**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.”**

If a DOJ attorney seeks to resolve corporate liability, he/she must include in the written memorandum supporting that resolution a discussion of potential individual liability and the plan for addressing it. Any decisions not to pursue civil claims or criminal charges against individuals who committed corporate misconduct must be approved at high levels.

**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 DOJ’s civil enforcement efforts are designed to return money to the public fisc, but they are also aimed at holding wrongdoers accountable and at deterring future misconduct. The DOJ says that these twin aims are equally important, even though they may be in tension with each other. The DOJ has now made it clear that an individual’s inability to pay, standing alone, is not a justification for not bringing a civil suit.

**Implications for corporations**

The Yates Memo has many challenging implications for corporations and their people. A few of the more salient implications include the following.

**Increased risks to corporations**

The DOJ will now require corporations to provide “all relevant facts about the individuals involved in corporate misconduct” in order to “be eligible for *any* cooperation credit.” This has two separate implications for corporations. First, they might choose not to cooperate at all under these circumstances, which could lead to enhanced penalties in the event of adverse findings. Second, the government might determine not to give corporations credit for cooperating, on the basis that the cooperation did not go far enough. It seems that if a corporation is to cooperate, it will need to be “all in” and prepared to help the government target the individuals involved in the circumstances

in question. The DOJ (or a corporation seeking credit, for that matter) could end up taking too expansive a view of individual involvement in the context of cooperation credit, thereby needlessly putting individuals at risk of criminal or civil liability. Finally, DOJ lawyers could take advantage of the leverage that potential individual liability creates to convince corporate decision-makers to agree to unduly large settlements on behalf of corporations.

**The Yates Memo has many challenging implications for corporations and their people.**

**Incentives to lower-level personnel**

The DOJ is clearly endeavoring to go after the highest-ranking business leaders when it investigates and resolves instances of corporate wrongdoing.

In order to do so,

the DOJ has historically given lower-level personnel incentives for providing information about those who are above them on the corporate ladder. Of course, such incentives can have the perverse effect of encouraging cooperating witnesses to stretch the truth or to go to extremes in characterizing high-level involvement or knowledge.

**Reluctance to be forthcoming**

When organizations learn of potential wrongdoing, they routinely conduct internal investigations to identify, prevent and mitigate risks. Often, they decide to cooperate with the government in resolving non-compliance with applicable standards. In doing so, corporations must be able to rely on receiving complete and accurate information from company personnel. The DOJ’s emphasis on identifying and pursuing individual responsibility for corporate acts will have a chilling effect on company personnel. They might decide not to

come forward or to fully share information for fear that their employer would turn them into the DOJ. Likewise, corporations may decide not to serve up their personnel (especially senior leaders) to the DOJ, and decide not to cooperate, choosing instead to compel the DOJ to prove its case. Or they may serve up individuals in an effort to buy peace with the DOJ for the corporation. In any event, individuals may

- (a) have to make decisions about whether to be loyal to the corporation,
- (b) need to consider quitting their jobs,
- (c) face termination of their employment, and
- (d) need to worry about criminal and civil exposure.

### **Potential conflicts of interest**

Corporations usually endeavor to conduct internal investigations of potential misconduct efficiently and expediently. At the onset of an investigation, they do not usually secure, pay for, or recommend counsel for individuals, because they do not have enough information pointing toward that need. They use one law firm (or in-house counsel) to conduct the investigation, and if an actual or potential conflict of interest between the corporation and an individual arises, they address the person's need for separate counsel. In light of the Yates Memo, however, corporations will need to assess the potential for conflicts of interest earlier, and err on the side of separate representation for one or more individuals. Of course, this approach also increases costs, decreases efficiencies, and may make it harder for the corporation to get to the facts.

## Corporations' activities and investigations regarding potential misconduct are usually done under the confidential cloak of the attorney-client privilege and the attorney work product doctrine.

Moreover, corporate decision-makers may now be influenced by the heightened risk of individual liability. Might they sell the company or their colleagues short to protect themselves? To avoid this conundrum, corporations will need to determine at the onset of an investigation whether and how to exclude key stakeholders from the investigative team to ensure that any strategic,

defensive, or settlement decisions are made independently and in the corporation's best interests. One can also see how there could be differences in opinion on strategy and defenses between corporate stakeholders and the lawyers, compliance professionals, and others with whom they work on sensitive matters. Such matters

should be anticipated, acknowledged, and planned for in advance, to the extent possible.

### **Threats to attorney-client privilege and the attorney work product doctrine**

Corporations' activities and investigations regarding potential misconduct are usually done under the confidential cloak of the attorney-client privilege and the attorney work product doctrine. When corporations decide to turn over the results of their investigative efforts, along with findings and analysis, they can waive these venerable protections. This can expose their confidential efforts to do the right thing and to seek informed legal advice to hostile third parties—even beyond the DOJ. The decision to cooperate and to make such disclosures always requires the balancing

of competing interests. But the Yates Memo accelerates the decision-making process and raises the stakes, because a corporation that is not fully prepared to turn over its investigative work product may not get any cooperation credit at all. This policy seems to be a marked departure from the Filip Memo from August 2008, because it conflicts with its provision that the DOJ should not request the results of an internal investigation.

### What corporations should do

A number of steps should be taken now, in order to hedge against the individual risks and corporate conundrums arising from this focused DOJ policy initiative.

#### Communicate and educate

First, the contents and implications of the Yates Memo should be communicated appropriately to corporations' senior leaders and governing boards. Second, they need to know that the DOJ is pursuing individual liability and creating new conditions for cooperation credit. Third, they need to know what they should do to protect the corporation in light of the Yates Memo, especially regarding a renewed focus on the organization's compliance program.

#### Focus on the compliance program

Of course, the best way to prevent and to mitigate corporate and individual risks is to have a robust compliance program. Prudent corporations will respond to the Yates Memo by:

- ▶ **Commissioning an independent assessment** of their compliance program to validate whether it has the resources, priorities, and activities necessary to prevent risks in the current environment. The results of such an assessment, which should be done under the attorney-client privilege and the attorney work product protection, can serve as a template for

enhancing the compliance program appropriately.

- ▶ **Educating the board, senior leadership, and other key stakeholders** on the personal liability implications of the policies in the Yates Memo.
- ▶ **Garnering further management and governing board support** for, and awareness of, compliance program activities. They must be highly engaged in processes designed to prevent, identify, and mitigate risks to the organization and its personnel.
- ▶ **Ensuring that potential non-compliance is addressed** promptly and appropriately. This includes establishing work plans, deadlines, and assigned accountability for compliance investigations and other key processes.
- ▶ **Developing and maintaining evidence** that leaders and key stakeholders are engaged in processes aimed at doing the right thing.

### Conclusion

The message should not be that the sky is falling. Rather, the Yates Memo presents an opportunity for corporations—through their board, leaders, compliance professionals, and counsel—to renew their focus on the compliance program and the many risks it can help to eliminate. \*

1. Department of Justice: Sally Quillian Yates, Memorandum Re Individual Accountability for Corporate Wrongdoing, September 9, 2015. Available at <http://bit.ly/justice-dag>
2. Department of Justice: Eric H. Holder, Jr., Memorandum Re Bringing Criminal Charges Against Corporations, June 16, 1999. Available at <http://bit.ly/justice-criminal>
3. Department of Justice: Larry D. Thompson, Memorandum Re Principles of Federal Prosecution of Business Organizations, January 20, 2003. Available at <http://bit.ly/americanbar-larry>
4. Department of Justice: Paul J. McNulty, Memorandum Re Principles of Federal Prosecution of Business Organizations, July 5, 2005. Available at <http://bit.ly/justice-mcnulty>
5. Department of Justice: Mark Filip, Principles of Federal Prosecution of Business Organizations, August 28, 2008. Available at <http://bit.ly/justice-filip>
6. Department of Justice: Title 9: Principles of Federal Prosecution of Business Organizations, Chapter 9-28.000. Available at <http://bit.ly/justice-corp-charging>
7. Attorney General Leslie R. Caldwell: Address at the American Bar Association's 25th Annual National Institute on Health Care Fraud, May 14, 2015. Available at <http://bit.ly/assist-ag-caldwell>

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