

White Collar Update: The Department of Justice Codifies Focus on Individuals in Corporate Cases

September 11, 2015

Yesterday, Deputy Attorney General Sally Quillian Yates gave a [speech](#)¹ concerning the Department of Justice's [guidance memorandum](#) issued on September 9, 2015 that further underscores DOJ's focus on investigating and prosecuting individuals for their role in corporate misconduct. The memorandum (the "Yates Memo") provides six policy initiatives aimed at strengthening the DOJ's pursuit of individuals "involved in or responsible for" corporate wrongdoing. In her speech, Ms. Yates emphasized that the DOJ's policy will now require that companies provide all relevant facts about all individuals involved in or responsible for the corporate misconduct in order to receive "any cooperation credit" (emphasis in Yates Memo). In addition, the Memo, which applies to both criminal and civil enforcement matters:

- Directs DOJ criminal and civil attorneys to focus on individuals at the outset of every investigation and to be in "[e]arly and regular communication" with each other ("as permissible");
- Prohibits the use of corporate resolutions that provide "protection from criminal or civil liability for any individuals . . . absent extraordinary circumstances or approved department policy such as the Antitrust Division's Corporate Leniency Policy";
- Instructs prosecutors not to resolve corporate cases "without a clear plan to resolve related individual cases" and requires that declination decisions as to individuals must now be "memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees";
- Promotes civil prosecutions of individuals regardless of their ability to pay penalties; and
- Directs that the DOJ's Principles of Federal Prosecution of Business Organizations, which have not been amended since 2008 when they were revised by then-Deputy Attorney General Mark Filip, be revised to reflect the changes announced in the Yates Memo.

In many respects, the policies announced are not new, as DOJ officials have previously noted their interest and intention to prosecute individuals responsible for corporate misconduct and have targeted their efforts accordingly. Instead, the Yates Memo serves as a directive to DOJ lawyers to remain focused on individual actors in corporate investigations. The policies outlined in the Yates Memo will apply to all future investigations of corporate wrongdoing, as well as to all matters pending as of September 9, 2015, "to the extent it is practicable to do so."

The Yates Memo's Practical Impact

Although the Yates Memo intensifies the DOJ's focus on the investigation and prosecution of individuals involved in corporate wrongdoing, this focus is not new. DOJ officials have publicly and repeatedly noted their interest in and intent to prosecute culpable individuals and the need for companies to disclose

¹ Deputy Attorney General Sally Quillian Yates, Remarks at New York University School of Law on behalf of the NYU Program on Corporate Compliance and Enforcement (September 10, 2015).

information about individual wrongdoers. In a September 2014 [speech](#),² for example, then-Principal Deputy Assistant Attorney General for the Criminal Division Marshall Miller similarly tied a company's cooperation credit to the company's disclosure of relevant information about individuals involved in the wrongdoing. Miller instructed companies facing government investigations that, "[i]f 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."

One potentially significant development of the Yates Memo is its instruction that a company's disclosure of information about individuals involved in or responsible for the wrongdoing is now a threshold requirement to receiving any cooperation credit at all, rather than simply a factor that the DOJ considers when deciding whether to give a company full cooperation credit as described in Mr. Miller's speech. As Ms. Yates explained in her speech and highlighted in the Memo, cooperation credit is now intended to be an "all or nothing" proposition, with no partial credit given to companies that are perceived by the DOJ to have disclosed some—but not all—relevant information about individual bad actors. Additionally, by requiring companies to disclose information about individuals involved in or "responsible for" the alleged misconduct, the Yates Memo underscores DOJ's focus on supervisors at various levels in a company. Another particularly notable development is the requirement that there be written declination memos, approved by DOJ senior leadership or their designees, when the DOJ decides not to bring criminal charges or civil claims against individuals who committed the misconduct. Only time will tell, but this new requirement may further foster, among other things, discussion within the DOJ about the appropriateness of pursuing corporate cases in which no individual case will be brought.

The Yates Memo delivers the message that the DOJ will aggressively seek prosecution of individuals responsible for corporate wrongdoing. One year ago, and in the same forum as Ms. Yates's speech, then-Attorney General Eric Holder [acknowledged](#)³ the difficulty in pursuing individuals involved in corporate misconduct: "[A] criminal prosecution of an individual can be difficult" and "more complicated" for a number of reasons ranging from "possible advice-of-counsel defenses; to the adequacy or inadequacy of written disclosures; to the difficulty [of] establish[ing] materiality and intent." And while those obstacles remain, as acknowledged by Ms. Yates in her speech, the DOJ again seeks to correct any public misconception "that one's criminal activity will go unpunished simply because it was committed on behalf of a corporation."

² Principal Deputy Assistant Attorney General Marshall Miller, Remarks at the Global Investigation Review Program (September 17, 2014).

³ Attorney General Eric Holder, Remarks on Financial Fraud Prosecutions at New York University School of Law (September 17, 2014).

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