

Personal Liability Remains High Priority for U.S. Justice Department in Corporate Investigations

On May 10, 2016, Deputy Attorney General Sally Yates, the second-ranking official at the U.S. Department of Justice (“DOJ”), delivered remarks at the New York City Bar Association’s White Collar Crime Conference concerning the effects of the controversial “Yates Memo.” The Yates Memo, issued in September 2015, provided criminal and civil prosecutors with new guidance concerning individual accountability for corporate wrongdoing. Since the release of the Memo last year, it has been the subject of much analysis and concern in the corporate compliance and white collar defense communities. In her remarks to the New York City Bar, Deputy Attorney General Yates addressed some of these concerns and provided insight into DOJ’s current views on the role of individual accountability in corporate prosecutions.

The Yates Memo

The [Yates Memo](#) announced a DOJ priority of ensuring that individuals who engage in misconduct are held responsible in investigations of corporations. The Memo announced six principles to give life to this priority.

The first and most significant principle announced in the Yates Memo is that a corporation under investigation must disclose “all relevant facts about the individuals involved in corporate misconduct” in order to receive any cooperation credit. This rule applies to both criminal and civil investigations.

Second, the Yates Memo announced that prosecutors should focus on individual accountability from the inception of corporate investigations. Again, this principle applies in both criminal and civil investigations.

Third, the policy calls for criminal and civil prosecutors handling corporate investigations to be in routine contact. This is intended to facilitate pursuing criminal and civil proceedings in parallel and to aid DOJ in comprehensively evaluating all of its potential remedies.

The fourth and fifth principles articulated in the Yates Memo concern the resolution of corporate investigations. The Memo creates a DOJ policy that, aside from exceptional cases, corporate resolutions will not shield individuals from criminal or civil liability. Furthermore, corporate investigations are not to be resolved by prosecutors unless there is a clear plan in place to resolve related cases against individuals.

The sixth and final principle announced in the Yates Memo relates specifically to DOJ civil investigations. The policy specifically calls for civil prosecutors to focus on individuals as well as the company in corporate investigations and to make decisions on whether to file civil actions against individuals “based on considerations beyond that individual’s ability to pay.”

Effects of the Yates Memo on Corporate Prosecutions

In the eight months since it was issued, the Yates Memo has been the subject of much discussion, with members of the defense bar expressing concerns that the rules of engagement in corporate investigations had shifted dramatically and that the focus on individual accountability made cooperation less likely. In her [remarks](#) to the New York City Bar Association, Deputy Attorney General Yates sought to provide some clarity as to the on-the-ground impact of the new policy.

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First, Ms. Yates addressed the most noteworthy shift caused by the Yates Memo, the requirement that companies fully disclose individual involvement in order to be eligible for cooperation credit. Ms. Yates argued that this has not caused a monumental shift, as she is not aware of any company refusing to cooperate based on the new policy. Nevertheless, her remarks highlight the added burdens associated with this policy, noting that companies under investigation have often prepared “Yates Binders” containing the emails and other relevant documents of individuals of interest to the government.

Despite these added burdens, the Deputy Attorney General emphasized that the “determination of the appropriate scope and how to proceed is always case specific,” and thus each investigation should be individually tailored depending on its unique circumstances. Ms. Yates thus sought to ensure companies that they do not need to conduct overly broad investigations and that they are not required to produce a “vice president in charge of going to jail” to take the fall for the company. Nonetheless, she also made clear that to receive cooperation credit, the internal investigations conducted by companies must be thorough.

Deputy Attorney General Yates’ remarks also confirm that the Yates Memo did mark a significant shift in civil investigations. In the past, DOJ’s focus in such investigations was on recovering the largest amount of money possible, which often meant focusing on the corporation itself. Under the policy announced in the Yates Memo, civil claims are more likely to be brought against individuals as well, even if bringing such a claim will not significantly add to the government’s recovery. In navigating a DOJ investigation of their employer, officers and employees must thus be aware that they may be named in a civil case brought by the government, even if the government is able to reach a resolution with the company.

Conclusion

Under the policies announced in the Yates Memo, it is clear that both criminal and civil investigations of corporations by the DOJ will involve an increased focus on individual accountability. It is important for companies facing such investigations to conduct thorough internal reviews to uncover the relevant facts. Such internal investigations should be guided by experienced counsel to ensure that they are appropriately tailored to ensure that the company is eligible for cooperation credit from DOJ.

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