

Client Update

The “Yates Memorandum”: Has DOJ Really Changed Its Approach to White Collar Criminal Investigations and Individual Prosecutions?

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In response to criticism in some circles that the Department of Justice (DOJ) had failed to bring criminal prosecutions arising out of the financial crisis of 2008 and high-profile corporate criminal settlements in which the companies admitted to misconduct, then-Attorney General Eric H. Holder, Jr., and other DOJ officials gave speeches last year emphasizing that, going forward, DOJ would take an aggressive approach towards prosecuting individuals in white collar cases.¹

Last week, on September 9, 2015, DOJ issued a memorandum by Deputy Attorney General Sally Q. Yates – now being called “the Yates Memorandum” – detailing how DOJ expects prosecutors to hold individuals accountable for criminal wrongdoing.

As with most policy developments of this nature, the distribution of the Yates Memorandum poses both risks and opportunities for companies and individuals alike, and its actual impact will be seen only when it is implemented.

If taken seriously, and those firms and individuals potentially subject to investigation by DOJ should assume it will be, the Yates Memorandum could alter the outcomes in certain cases by increasing the cost of cooperation, accelerating the timetables under which internal investigations must be completed, and deterring individuals within companies from cooperating to the extent they have previously.

¹ A discussion of those speeches can be found here:
<http://www.debevoise.com/~media/files/insights/publications/2014/09/provocative%20doj%20proposal%20aims.pdf>.

But at the same time, by causing DOJ to focus early – and, at a minimum, at the time when a corporate resolution is definitively proposed – on whether and how individuals can and should be prosecuted, DOJ’s new focus could deter DOJ from the pattern of coercing large-scale monetary settlements from those individuals’ employers in cases in which marginal theories of liability based on novel applications of the law or weak evidence form the basis of a settlement.

In terms of its specifics, the Yates Memorandum identifies six principles that, going forward, are to guide all DOJ investigations of corporate misconduct:

- Corporations are eligible for “cooperation credit”² only if they identify culpable individuals and all relevant factual information about their misconduct. As Yates explained, companies previously could gain partial cooperation credit by voluntarily disclosing improper corporate practices while declining to identify who engaged in wrongdoing and what they did. DOJ’s new policy no longer allows for such partial credit.
- Criminal and civil investigations should focus on individual wrongdoing from the start of the investigation. DOJ aims to uncover wrongdoing by senior executives and to maximize the chances that the resolution of the investigation will involve charges brought against individuals.
- Criminal and civil investigators should routinely communicate with each other. In particular, criminal prosecutors are supposed to notify civil prosecutors early on in the investigation about potential civil liability. This gives DOJ the opportunity to pursue civil charges if it is not feasible to bring a criminal prosecution because of questions about criminal intent or satisfying the burden of proof in criminal cases.
- Except in rare circumstances, DOJ will not enter into criminal or civil resolutions with companies that provide protection against civil or criminal liability for individuals.
- 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. DOJ is henceforth to make “every effort . . . to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception.”

² If DOJ believes that a company has cooperated with its investigation, the company is supposed to receive “cooperation credit,” which is a mitigating factor in DOJ’s decision about whether a company should be subjected to criminal charges or, alternatively, DOJ’s assessment of the size of an appropriate settlement or financial penalty.

- DOJ civil enforcement attorneys should focus on bringing actions against individuals as well as companies. Going forward, DOJ will view the purpose of civil actions as not only to return money to the government but also to hold wrongdoers accountable and to deter future wrongdoing. The decision about whether to bring a civil action should not be based exclusively on whether an individual can afford to pay the remedy sought, but also on other factors, such as whether the misconduct was serious; whether the misconduct is actionable, *i.e.*, can form the basis for civil charges; and whether there is sufficient admissible evidence to support a judgment.

At first glance, the Yates Memorandum is unlikely to lead to a sea change in the pattern seen recently in criminal prosecutions of individuals in white collar prosecutions. First and foremost, in most criminal cases the government must prove that the defendant knowingly and intentionally violated the law.³ This often creates a significant problem for prosecutors. As the Yates Memorandum acknowledges, “[i]n large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt.”

While knowledge and intent requirements apply equally to charges against corporations and individuals, DOJ has, at times, circumvented the need to prove these elements in enforcement actions against companies by entering into corporate settlements, in which companies enter into plea agreements or Deferred or Non-Prosecution Agreements, under which they agree to pay substantial fines, and admit to detailed statements of wrongdoing.⁴

But while companies may have reasons to enter into such settlements, even in marginal cases, individuals often do not.⁵ Prosecutors are fully aware that in gray area cases, where the evidence is thin or the legal theory is novel or weak, many defendants will risk trial rather than plead guilty to even relatively “minor”

³ The importance of this requirement was reiterated by the United States Supreme Court in its recent decision in *Elonis v. United States*, No. 13-983 (U.S. June 1, 2015), in which the Court reversed the conviction of a defendant on the basis that his violent and graphic posts on the Internet were objectively threatening. The Supreme Court explained that the government had failed to prove that the defendant subjectively intended to violate the law.

⁴ Those statements, however, generally do not identify the names of individuals who may have violated the law.

⁵ Matthew E. Fishbein, “The DOJ’s New Position on Corporate Cooperation,” 48 Rev. of Securities & Commodities Reg. 14 (Aug. 19, 2015); Matthew E. Fishbein, “Why Individuals Aren’t Prosecuted for Conduct Companies Admit,” N.Y.L.J. (Sept. 19, 2014).

charges, so as to avoid potential incarceration, financial ruin and personal humiliation. Therefore, if DOJ determines to prosecute an individual, its allegations will likely be scrutinized by a neutral fact finder, which, of course, might result in DOJ failing to prove the facts to the satisfaction of a judge or jury – even in situations in which the company has admitted to those facts as part of its settlement agreement. Because of this fundamental dynamic in which corporations are far more likely to settle a DOJ proceeding than are individuals, there are serious doubts about whether the Yates Memorandum can, even if implemented as intended, achieve a greater number of convictions of (or civil judgments against) individuals, which the Memorandum candidly acknowledges.

The Yates Memorandum, however, could result in individuals becoming more frequent targets of civil actions, particularly in those cases acknowledged not to be the subject of prosecution now because of the defendant's lack of means to pay a resulting civil judgment. Civil actions are a much more attractive vehicle for DOJ to hold individuals "accountable" for alleged wrongdoing because the burden of proof is lower and because the government under at least some civil legal regimes is not required to prove intent.

DOJ already has made extensive use of civil actions to seek large penalties from corporations. For example, in response to criticism that DOJ had not brought criminal charges against financial institutions for their conduct related to the sale of mortgage-backed securities that became worthless, DOJ developed the novel theory of using the Financial Institution Reform, Recovery, and Enforcement Act (FIRREA) to bring against several banks civil charges seeking – and obtaining – billions of dollars in payments. DOJ civil prosecutors have also made extensive use in recent years of the False Claims Act to bring actions in cases involving improper billing of the government and the Racketeer Influenced and Corrupt Organizations Act (RICO) if firms have engaged in a pattern of fraudulent behavior. Use of these laws as well as other civil enforcement tools to obtain remedies against individuals is likely to increase under the Yates Memorandum.

Important additional questions will also arise as to how, systemically, the DOJ's new guidance will influence the dynamic of white collar enforcement and the process of internal investigations conducted by companies seeking to cooperate with the government and/or discharge their duties to shareholders and other stakeholders. On the one hand, the Yates Memorandum makes clear that cooperation credit, which can lead to significant reductions in potential fine or penalty amounts, will now come at a potentially steeper price. To deliver "actionable evidence" of individual wrongdoing within the statute of limitations, moreover, internal investigation plans are likely to require accelerating a number

of steps that previously could be delayed. And, in accelerating those steps, it is entirely possible that the kind of sustained, organized investigative effort that, in the past, might have led to greater understanding of what led to a particular event of alleged wrongdoing will be less likely to occur. Individuals, who will now face a greater risk of prosecution, might be less willing to cooperate, and the kinds of reforms and remediation possible under prior policy may become more difficult to achieve. In this respect, the Yates Memorandum could have unanticipated outcomes that lead to less robust compliance responses in some cases, and less evidence coming to light in others. In acknowledging that some companies may not choose to cooperate in the face of DOJ's new demands, the Yates Memorandum acknowledges this possibility, but not its full significance.

But the Yates Memorandum may restrain DOJ from some of the more controversial practices of recent years in which large monetary settlements have been extracted from corporations based on marginal legal or factual theories. By focusing new attention on the situation in which no individuals are prosecuted, the Yates Memorandum could well lead DOJ to focus more intently on the reasons why no individuals are charged, including the lack of the kind of evidence necessary to lead a judge or jury to find guilt beyond a reasonable doubt or liability under a civil law standard. If the DOJ's true desire is to achieve genuine and fair parallel outcomes for employees and the companies for whom they work, the lack of evidence to charge individuals should likewise lead to a conclusion that the company should not be pursued, at least under most laws. Because, as the Yates Memorandum emphasizes, corporations act through their employees and agents, and, generally speaking, cannot be found guilty or held liable unless at least one director, officer, employee, or agent is liable himself or herself, the Yates Memorandum may bring balance back to the world of enforcement against firms, and reduce the number of cases in which companies might be coerced to settle what is otherwise a winnable case.

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Please do not hesitate to contact us with any questions.