

DOJ Issues Guidance to Prosecutors to Facilitate Individual Prosecutions in Corporate Investigations

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On September 9, 2015, the Department of Justice (the Department) publicly announced that it had issued guidance to its criminal and civil prosecutors that purports to change, at least in part, the Department's approach to corporate investigations, to facilitate individual prosecutions for corporate misconduct. As the memorandum from Deputy Attorney General Sally Yates (the Yates Memorandum) setting forth the guidance explains, some of these measures are new, while others reflect practices already employed by many federal prosecutors. Below is a summary of the guidance, followed by our commentary.

Summary of the Yates Memorandum

The Yates Memorandum requires immediate application of the following six principles to all future investigations, and to pending investigations, where practicable:

1. **To be eligible for any cooperation credit — in civil or criminal investigations — a company must provide to the Department “all relevant facts about the individuals identified in the corporate misconduct.”**¹ In particular, “the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct.”² If the Department determines that a company has failed to discover these facts, or to provide them to the Department, the company's cooperation will not be considered a mitigating factor at the charging stage, or at sentencing.
2. **“Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.”**³ As the Yates Memorandum explains, this requirement serves multiple goals. Because corporations act through individuals, a focus on individuals is the most effective way to determine the extent of corporate misconduct. The Department believes that a focus on individuals will increase the likelihood that knowledgeable individuals will cooperate (presumably because they fear prosecution), and maximize the chances that the final resolution will include civil and/or criminal charges against individuals.
3. **“Criminal and civil attorneys handling corporate investigations should be in routine communication with one another,”** so that the full range of the potential penalties in any resolution can be considered — whether civil or criminal.⁴
4. **In criminal investigations, “absent extraordinary circumstances, . . . Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees.”**⁵ Similarly, in civil investigations, “absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases.”⁶
5. **“Corporate cases should not be resolved without a clear plan to resolve related individual cases. . . .”**⁷ Where investigations of individuals have not concluded by

¹ Yates Memorandum at 3 (emphasis in original).

² *Id.*

³ *Id.* at 4.

⁴ *Id.* at 4-5.

⁵ *Id.* at 5.

⁶ *Id.* Moreover, for both civil and criminal matters, those “extraordinary circumstances” must be personally approved by the relevant Assistant Attorney General or United States Attorney.

⁷ *Id.* at 6.

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the time a prosecutor seeks authorization for a corporate resolution, the prosecutor's memorandum must include "a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period." Furthermore, if a prosecutor decides at the conclusion of the investigation that civil or criminal charges should not be brought against individuals who committed misconduct, that determination and the reasons for it must be memorialized and approved.

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."**⁸

Commentary

We make the following observations with respect to the potential impact of the Yates Memorandum:

First, the Department's commitment to individual prosecutions for corporate crime is not new, and the Department has long articulated a number of the principles outlined in the Yates Memorandum. For several years following the financial crisis and particularly in late 2014, high-ranking Department officials emphasized that prosecutions of culpable individuals in corporations are a priority and that a corporation seeking to maximize credit for its cooperation must provide the government with factual information regarding such individuals, regardless of their seniority. For years, the Department's Principles of Federal Prosecution of Business Organizations have stated explicitly that a corporation's willingness to provide relevant evidence concerning individuals in or outside the corporation, including senior executives, may be considered in evaluating a corporation's cooperation.

Yet the Yates Memorandum states that the Department is now going further, as it directs prosecutors to withhold all cooperation credit from corporations that fail to discover or provide all relevant facts about individuals involved in corporate misconduct. Put another way, the Department will not give "partial" credit for "partial" cooperation. How this will work in practice is unclear, particularly because the Department decides whether and how much credit to give for cooperation, and how that credit impacts the nature of the resolution and the applicable penalty, and because there is no objective standard against which to measure full, partial or zero credit. In light of the fact that even fully cooperative institutions in recent years have been required to plead guilty, and have received substantial, even multibil-

lion-dollar penalties in some cases, it will be difficult to measure the effects of this pronouncement in future cases.

The Yates Memorandum principles should not be interpreted by the Department to remove its discretion to recognize that a corporation's attempts to identify and provide specific evidence of individual wrongdoing can constitute cooperation, even when those attempts come up short — in that they fail to provide sufficient evidence to support individual prosecutions. Indeed, the Department has acknowledged, including in a speech given by Deputy Attorney General Yates last week, and in the Yates Memorandum itself, that it can be difficult to prosecute corporate employees within large corporate entities where responsibilities can be diffuse and senior executives insulated from day-to-day activity. As a consequence, where a corporation seeks in good faith to assist the Department in its efforts to hold individuals accountable, the corporation should not be faulted — or denied cooperation credit — simply because its efforts fail in the face of those challenges.

Second, the Yates Memorandum places new burdens on line prosecutors, who now must present a plan to investigate potentially liable individuals when seeking authorization to resolve a case against the corporation, and must seek written authorization to conclude an investigation without bringing claims or charges against individuals who committed misconduct. In theory, at least, these more exacting requirements could foreshadow a decrease in the number of corporate resolutions, if the Department determines that it should not prosecute corporations — or require deferred or non-prosecution agreements that carry specific admissions of misconduct — in cases where it lacks and is unlikely to develop sufficient evidence to charge individuals.

If the Department so determines, we may see an uptick both in outright declinations and, to the extent the Department is able to criminally charge larger numbers of individuals, corporate guilty pleas, as the Department's Criminal Division Chief, Leslie Caldwell, predicted in April of this year. Indeed, making prosecutions of culpable individuals a threshold requirement for corporate prosecutions would logically follow from a key point in Ms. Yates' speech: that people responsible for corporate misconduct should not be permitted to walk away while the company and its employees and shareholders pay the price. However, it is unlikely that in seeking to increase individual prosecutions, the Department intended to reduce corporate ones. Therefore, and notwithstanding the acknowledged difficulties in bringing individual prosecutions in the corporate context, we do not expect the Department to bring fewer cases against corporations in the wake of the Yates Memorandum.

Third, the Yates Memorandum signals what may be a major shift in favor of the use of the Department's civil enforcement powers against individuals. The Yates Memorandum pushes its civil arm

⁸ *Id.*

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to the forefront in several places, and Ms. Yates stressed in her speech last week that there is real value in bringing civil cases against individuals who engage in corporate misconduct, and that value cannot always be measured “in dollars and cents.” To the contrary, Ms. Yates noted that civil enforcement actions hold wrongdoers accountable and even deter future wrongdoing, a purpose traditionally associated with criminal prosecutions.

In the past, the Department’s civil attorneys rarely addressed the civil culpability of employees when considering, or seeking approval for, a corporate settlement — for example, very few individuals have ever been sued under FIRREA (The Financial Institutions Reform, Recovery and Enforcement Act) or the False Claims Act (beyond the occasional founder or principal

shareholder of a closely held corporation). But the Yates Memorandum directs civil attorneys to focus on individuals and to evaluate whether to bring suit against individuals based on considerations beyond the individuals’ ability to pay. The Yates Memorandum also directs coordination between criminal and civil attorneys, groups that tended to operate in silos in the past.

As a result, we may see increasing numbers of civil lawsuits against individuals in cases where the Department lacks sufficient evidence for a criminal prosecution. And a corporation that provides evidence leading to such a civil lawsuit presumably could thereby satisfy the Department’s new threshold requirement for cooperation.

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