Yet another Revision of the Justice Department's Requirements for Corporations to Obtain Cooperation Credit in Criminal Investigations

On September 9, 2015, Justice Department Deputy Attorney General Sally Q. Yates issued a memorandum titled "Individual Accountability for Corporate Wrongdoing." The "Yates Memo," as it has become known, outlined six specific measures for Department attorneys to follow while conducting ongoing and future investigations. DOJ believes these measures will better identify, target, and punish culpable individuals in cases of corporate malfeasance.

The Yates Memo reflects DOJ's belief that this new focus on individual culpability will, in the long-term, decrease corporate fraud by deterring the individuals who may actually commit it. This is a pivot from DOJ's serial pursuit of high-profile, high-figure resolutions with corporate defendants in recent years. It also attempts to respond to public criticism that the DOJ's policies has left shareholders and lower-level employees bearing the brunt of punitive settlements, while high-level executives escape unscathed.

"All-or-nothing" cooperation credit. To obtain leniency in exchange for cooperation, a company must now "completely disclose to the Department all relevant facts about individual misconduct." According to DOJ, this means that companies can no longer "pick and choose what facts to disclose" if they wish to get the benefit of cooperation as a mitigating factor. When introducing this new policy, Deputy Attorney General Yates explained:

> The rules have just changed. Effective today, if a company wants any consideration for its cooperation, it must give up the individuals, no matter where they sit within the company. And we're not going to let corporations plead ignorance. If they don't know who is responsible, they will need to find out. If they want any cooperation credit, they will need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals.

This past week, Deputy Attorney General Yates further elaborated on the meaning of DOJ's revised policy for corporations: "Companies seeking cooperation credit are expected to do investigations that are timely, appropriately thorough and independent and report to the government all relevant facts about individuals involved, no matter where they fall in the corporate hierarchy." The Yates Memo, as well as the Department's subsequent remarks, make clear that the government expects companies to immediately conduct robust internal investigations in response to all allegations of possible wrongdoing.

This change represents a departure from the DOJ's Principles of Federal Prosecution of Business Organizations (known as the "Filip Factors," named for former Deputy Attorney General Mark Filip), which acknowledged the availability of cooperation credit for dimensions of cooperation *other* than disclosure of

facts concerning misconduct. Footnote 2 in Section 9-28.720 of the U.S. Attorney's Manual specifically noted that cooperation could include providing documents and evidence, making witnesses available for interviews, and assisting in interpreting complex business records. If the Yates Memo is strictly followed, cooperation in these forms no longer will carry weight if they are not accompanied by disclosure of *all* individuals involved, including the "who" and the "how."

No shelter for individuals. Criminal and civil government attorneys will now work in tandem at the outset of corporate investigations to focus on individual liability. This policy shift reflects the DOJ's acknowledgment that it is relatively difficult to build a criminal or civil case against a particular individual after the conclusion of a broader corporate investigation, given the passage of time and the higher level of proof required.

Under this new level of scrutiny, individuals should no longer expect to escape liability as a matter of course. DOJ attorneys are now instructed not to release individuals from civil and criminal liability when resolving a matter with the company except under the rarest of circumstances. Prosecutors are expected to memorialize their justification for *not* bringing charges and obtain sign-off from their supervisors, and any rare release of an individual will require written approval from the relevant U.S. Attorney or Assistant Attorney General. These formalized policies discourage DOJ attorneys from settling into a default policy of non-enforcement against individuals.

Emphasis on civil enforcement against individuals. Dovetailing with the measures discouraging non-prosecution is the Yates Memo's new emphasis on pursuing civil enforcement against individuals, regardless of ability to pay. Instead of considering whether a defendant has sufficient resources to satisfy a judgment, factors such as the severity of the misconduct and whether pursuing the action "reflects an important federal interest" will drive the decision whether to bring suit. This represents an additional lever that the government will now use to deter individual misconduct.

Increased uncertainty regarding resolution. The DOJ's new internal policies of (1) discouraging immunization of individuals and (2) disregarding ability to pay civil judgments will likely lead to more civil enforcement proceedings against individuals. This, in turn, means that it will typically take longer for a company to fully resolve a matter, because a company's cooperation credit will hinge on post-plea and post-settlement cooperation. In-house counsel should thus expect delays and extended uncertainty for complete resolution of a corporate criminal matter.

Companies now must navigate new challenges when faced with allegations of corporate wrongdoing. DOJ's focus on individual culpability—and its expectation that companies will look deeply into the role of their individual employees in the alleged wrongdoing—inevitably will result in an adversarial relationship between the organization and its employees. In addition, the Yates Memo reveals an innate skepticism by DOJ about the degree of disclosure that companies will provide in exchange for

credit. Shortly after the issuance of the memorandum, Deputy Attorney General Yates stated that DOJ attorneys "will be vigorously testing information provided by companies" to ensure that "it is indeed complete." Moreover, this week Deputy Attorney General Yates warned that companies seeking cooperation credit should not seek to shield non-privileged information from investigators, emphasizing that while legal advice is privileged, facts are not.

While it is premature to discuss the Yates Memo's impact, it is likely to have some predictable results. Companies may feel pressure to conduct investigations that are broader and more intense than necessary, at great cost. And even though the DOJ has carved out voluntary disclosure as a separate credit from cooperation, the new demands from the DOJ's revised policy and its heavy focus on individuals may make voluntary disclosure seem even less palatable than before. Internally, the tension between companies and their employees likely will escalate during internal investigations, as it did during the era in which the Department's "Thompson Memo" was in effect. This is because more employees may refuse to cooperate in company investigations, justifiably believing that company will not necessarily have their best interests in mind. The Yates Memo is viewed by many in corporate America and the defense bar as a setback to relations with the federal government. Whether it will engender a harsh backlash by corporations, bar associations and defense counsel—similar to the fallout caused by the Thompson Memo—only time will tell.