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# INSIGHTS

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## The Yates Memo: What Is It and What You Need to Know

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*“One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.”*

This was among the opening lines in a memo that is now being referred to as the “Yates Memo.” From the desk of Deputy Attorney General Sally Yates of the Department of Justice, the memo went out in September 2015 to all Assistant Attorneys General and all US attorneys.

The goal? To prioritize the prosecution of individuals in corporate misconduct investigations.

The Yates Memo offers guidance, not policy, on the steps that should be taken in any investigation of corporate misconduct:

1. In order to be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.
2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.
3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.
4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.
5. 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.

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.

Several commentators have reacted to the first item above with both concern and criticism. The concept is that corporations will receive zero cooperation credit unless able to identify facts that would lead to the conviction of individual wrongdoers.

Notwithstanding the wording found in the Yates Memo, Assistant Attorney General Leslie Caldwell commented on this at the Global Investigations Review conference in September:

*“When a company is truly unable to identify culpable individuals, even after an appropriately tailored, careful, thorough investigation, but [it] still provides the government with all the relevant facts, and otherwise assists us in obtaining the relevant evidence, the company will still be eligible for cooperation credit.”*

It is generally believed that the guidelines were created as a response to the financial crisis of 2007-2008 in which only one executive went to jail after the collapse.

The charge is that despite the hefty settlements the DOJ receives from corporations year after year, there hasn’t been much individual accountability. With the Yates Memo, the DOJ wants to change that.

Be that as it may, more criticism for the Yates memo lies in the fact that the guidelines leave much to the interpretation of prosecutors. It must be said, however, that prosecutorial over-reaction is not a given.

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The article at [JDSupra.com](#) points out that the Yates Memo is not new news, nor is it particularly startling for the DOJ, and that it simply reinforces the agency's "longstanding standard operating procedures and expectations in white collar cases"; the article references several points in time where DOJ officials have expressed their stance on targeting individuals.

I'll also note that the Securities and Exchange Commission has also been fairly vocal about its desire to [obtain guilty pleas from individuals](#) rather than merely settle with the companies. It has also been clear about the [benefits of "self-reporting"](#)— which is to say proactively cooperating with the SEC by bringing entire matters to its attention.

Will we, in fact, see more white-collar criminals in jail as a result of the Yates Memo? Maybe ... but I don't expect to see an immediate change. A more likely scenario is simply that the DOJ will collect less in fines over time compared to now when corporations in misconduct cases are typically quick to settle.

Individuals – especially high-profile individuals – are likely to fight longer and harder. It may also be harder in some instances for corporations to gain the cooperation of individuals during the course of an internal investigation.

In my next post, I'll discuss what the Yates Memo means when it comes to D&O insurance.

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