

What Will Really Change After the Yates Memo?

It's not uncommon for incoming deputy AGs to announce policy reforms out of the gate.

BY DAN WEBB AND ROBB ADKINS

Last month, the U.S. Department of Justice's deputy attorney general, Sally Yates, issued a memorandum announcing a shift in DOJ enforcement in corporate or financial fraud matters. The Yates Memorandum, entitled "Individual Accountability for Corporate Wrongdoing," sent shockwaves through the corporate and white-collar community. But it left some to wonder whether the announcement, standing alone, really signals a significant change in DOJ enforcement.

The Yates Memorandum begins by asserting that "one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing." Seeking this accountability is important, the Yates Memorandum continues, because "it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system." The Yates Memorandum contains six specific steps the DOJ will take in



its pursuit of prosecuting individual wrongdoing:

First, "to be eligible for any cooperation credit, corporations must provide to the department all relevant facts about the individuals involved in corporate misconduct." Accordingly, corporations "cannot pick and choose what facts to disclose." If a corporation wants to be eligible for any credit for cooperation, it must adequately investigate, uncover and disclose all information about individuals involved in the misconduct, regardless of position, status or seniority.

Second, "both criminal and civil corporate investigations should focus on individuals from the inception of the investigation." This new approach by the DOJ is aimed to "ferret out the full extent of corporate misconduct."

Third, "criminal and civil attorneys handling corporate investigations should be in routine communication with one another."

Fourth, "absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals."

Fifth, “corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires.” Moreover, if an individual will not be charged, “the reasons for that determination must be memorialized and approved.”

Finally, “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.”

NEW LEADERSHIP

Memoranda from deputy attorneys general are often issued at the beginning of their term in order to indicate an area of emphasis under new leadership, and to provide guidance to line prosecutors in the U.S. attorney’s offices around the country on current DOJ policy. Such memoranda do carry weight, especially in terms of the most powerful aspect of federal criminal enforcement: discretion. Prosecutors often face questions not about whether a case *can* be charged, but whether it *should* be charged.

The criteria that a prosecutor considers in making those discretionary decisions include the strength of the evidence, the nature and seriousness of the offense, the loss or harm resulting from the conduct, and the

federal interest involved. The Yates Memorandum does not disturb the factors that prosecutors must weigh in making decisions whether to charge an individual.

Indeed, much of what is recited in the Yates Memorandum is consistent with long-standing DOJ policy. For example, the DOJ has for some time directed prosecutors generally to charge the most readily provable offense in each case, including cases against individuals. Other aspects of the steps outlined in the Yates Memorandum—such as coordination between parallel investigations by the civil and criminal divisions of the DOJ and demands for full corporate cooperation—are not new DOJ concepts.

Although the Yates Memorandum does not alter the discretionary criteria that prosecutors bring to bear in fulfilling their mandate to seek justice, it may impact the approach and resolution in cases going forward. For example, expressly prohibiting (absent extraordinary circumstances) any protection for individuals as part of a corporate resolution will no doubt impact negotiations between DOJ and counsel representing the company.

Another impact of the policy shift may center on the requirement that corporations investigate and disclose

all information about individual conduct in order to obtain any cooperation credit. Individuals within a corporation will be aware that their employer now is heavily incentivized to focus specifically on any decisions, judgments or statements of the individual, and will likely disclose all such facts (regardless of context) to DOJ attorneys who are seeking to charge individuals. This could lead to more cumbersome and less efficient internal investigations, with more employees seeking their own outside counsel before answering any questions, even on routine matters. It could also trigger additional difficult attorney-client privilege issues.

The real question is whether this announcement will lead to increased enforcement or changed priorities in the actual investigations. In other words, in a time of limited budgets, will the DOJ direct additional resources and exercise its discretion to demonstrate that this newly announced policy is bearing fruit? Such questions are usually not answered in announcements and memoranda but with resources, tracking and prioritization at the local U.S. attorney’s offices. White-collar practitioners and corporate counsel should continue to monitor how this policy translates to actual enforcement in the near future.



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