

Consumer Financial Services Committee

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**The Yates Memo: How DOJ got
There and What it Means**

The Yates Memo

How DOJ got there and What it Means

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Principles of Federal Prosecution **of Business Organizations**

- **Chapter 9-28.000 *et seq.* of the United States Attorneys' Manual is entitled "Principles of Federal Prosecution of Business Organizations" and sets forth the policy of DOJ in prosecuting corporations and other artificial corporate entities**
- **The Problem – Corporations are artificial beings and can only act through their agents – employees, officers and directors.**
- **Corporations can be prosecuted under federal criminal law for the criminal wrongdoing of their agents**
- **USAM 9-28.000 *et seq.* establishes the principles that a federal prosecutor must consider in deciding whether to prosecute a business organization for the wrongdoing of its agents**

Principles of Federal Prosecution of Business Organizations

- **9-28.000 *et seq.* stems from a memo issued by Deputy Attorney General Eric Holder in 1999 entitled “Bringing Criminal Charges Against Corporations.”**
- **All but one DAG since DAG Holder has issued his or her own memo revising or modifying 9-28.000 in some respects, including the Thompson memo in 2003, the McCallam memo in 2005, the McNulty memo in 2006, the Filip memo in 2008 and now the Yates memo issued this year.**
- **The basic principles have not changed and include the following:**
 - **Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment.**
 - **Generally, prosecutors should apply the same factors in deciding to prosecute a corporation as they would in deciding to charge an individual.**
 - **However, some additional factors must also be considered. The Holder memo listed 8 additional factors.**

Principles of Federal Prosecution **of Business Organizations**

- **The factor that garnered the most attention and that precipitated the subsequent memo's by later DAG's was factor 4 that read:**
 - **"The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges"**
- **The investigation of its agents included cooperating in the investigation of not only employees, but also officers and senior executives.**
- **The waiver of privileges was not a front burner issue in the immediate aftermath of the issuance of the Holder memo.**
- **And, for the most part, corporations often jointly defended criminal investigations with their officers and employees, even entering into joint defense agreements and refusing to waive attorney-client privilege.**

Principles of Federal Prosecution **of Business Organizations**

- **This perceived lack of authentic cooperation by many corporations led to the issuance of the Thompson memo in 2003 by DAG Larry Thompson. The memo stated that:**
 - **The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution. The revisions also address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.**
- **This focus on examining the authenticity of a corporation's cooperation, coupled with the existing directive that prosecutors were allowed to weigh the completeness of a corporation's cooperation, including**
 - **if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. ...Prosecutors may, therefore, request a waiver in appropriate circumstances.**
- **led to the perception that AUSAs were being directed to request privilege waivers routinely in corporate investigations.**

Principles of Federal Prosecution **of Business Organizations**

- **The Thompson memo also added a ninth factor, the adequacy of the prosecution of individuals responsible for the corporation's malfeasance.**
- **Public criticism of the perceived excessive use of attorney-client privilege waiver by DOJ prosecutors led to the issuance of the McCallam memo in 2005, requiring AUSAs to get approval from the U.S. Attorney before requesting a privilege waiver.**
- **The McCallam memo did little to quiet the criticism, so the McNulty memo was issued in 2006, which deleted from factor 4 the reference to waiver of attorney-client privilege as a factor in evaluating the willingness of a corporation to cooperate.**

Principles of Federal Prosecution of Business Organizations

- **However, the McNulty memo added a section on waiver of attorney-client privilege that stated that while waiver was not a prerequisite to finding adequate cooperation, waiver could assist in the investigation. The memo allowed prosecutors to continue to request waivers if there was a “legitimate need.”**
- **Significantly, it also retained the principle that a corporation’s response to a request for waiver could be considered in determining whether a corporation has cooperated in the investigation.**
- **It also retained the principle that joint defense agreements between a company and its employees, payment of attorneys’ fees for employees and the like could be taken into consideration in assessing whether a corporation was cooperating with the government.**

Principles of Federal Prosecution of Business Organizations

- In response to continued complaints from the criminal defense bar, the Filip memo was issued in 2008 and modified the way that payment of attorneys' fees and joint defense agreements should be taken into account by prosecutors.
- More significantly, it provided that while a corporation was not required to waive attorney-client privilege, it *was* required to disclose all relevant facts known to it. Basically, it reduced the importance of waiving the attorney-client privilege and replaced it with a requirement that corporations disclose all known relevant facts, regardless of how obtained, although waiver of the attorney client privilege would not be required.

Principles of Federal Prosecution **of Business Organizations**

- **The emphasis on cooperation by the corporation, waiver of attorney client privilege and disclosure of all relevant facts in the memos discussed above largely served two purposes.**
 - **First to allow DOJ to conduct a full and complete investigation of the wrongdoing**
 - **Second to allow DOJ to identify the individuals responsible for the wrongdoing**
- **A consistent principle since the issuance of the Holder memo, one that was retained in all subsequent memos, is that prosecution of the corporation should not be considered an adequate substitute for prosecution of the culpable individuals**
- **In other words, corporations should not be allowed to cooperate and enter guilty pleas in exchange for leniency for their employees, officers or executive management.**
- **In fact, disciplinary action, including termination of culpable individuals is a factor to be considered by the prosecutors in deciding whether to charge the corporation.**

The Yates Memo: Overview and Potential Impact on Corporations

- **On September 9, 2015, Deputy Attorney General Sally Yates of the U.S. Department of Justice (“DOJ”) issued a memo detailing new guidelines intended to strengthen the DOJ’s efforts to hold individual corporate employees accountable for corporate wrongdoing (the “Yates Memo”).**
- **The Yates Memo is the most recent in a series of guidelines issued by DOJ Deputy Attorney Generals since 1999, culminating in the DOJ’s current Principles of Federal Prosecution of Business Organizations, which details the framework federal prosecutors should use to make corporate charging decisions.**
- **While the Yates Memo is not binding legal authority, it conveys policy directives to DOJ attorneys conducting corporate fraud investigations and will involve changes to the Principles of Federal Prosecution of Business Organizations and other DOJ guidelines.**

The Yates Memo: Overview and Potential Impact on Corporations

- The Yates Memo directly acknowledges the “substantial challenges” unique to pursuing individuals for corporate misconduct, particularly in the context of criminal investigations because of the high burden of proof.
- DAG Yates has publicly recognized that the new guidelines may create additional impediments to the resolution of DOJ investigations, that corporations may decide the benefits of cooperation are “not worth the costs,” and that the result may be fewer settlements and potentially smaller overall recoveries by the DOJ.
- With regard to employees, DAG Yates further acknowledged that the prospect of individual civil and criminal liability could lead to an increase in the number of trials in corporate fraud matters.

The Yates Memo: Overview and Potential Impact on Corporations

- **The Yates Memo outlines six policies that the DOJ believes will maximize its ability to deter misconduct and to hold “the flesh-and-blood people responsible for misconduct” accountable.**
 - **In order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for misconduct.**
 - **Criminal and civil corporate investigations should focus on individuals from the inception of the investigation.**
 - **Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.**
 - **Absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation.**

The Yates Memo: Overview and Potential Impact on Corporations

- **Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases.**
- **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.**
- **Some of these guidelines are new and were not implemented until the Yates Memo was issued. However, others codify policies that are already in place.**
- **Under the new policies, in order to earn any credit for cooperation with the DOJ in civil or criminal investigations, companies must identify all individuals involved in the relevant wrongdoing, "regardless of their position, status or seniority in the company."**
 - **Such cooperation credit is typically instrumental for reducing fines, monetary penalties and other remedies.**

The Yates Memo: Overview and Potential Impact on Corporations

- **Companies must also provide all relevant non-privileged facts about these individuals' misconduct.**
- **DAG Yates claims that companies will not be required to “boil the ocean” by conducting longer and more expensive investigations every time they identify potential misconduct.**
- **However, the new policy notes that DOJ attorneys are required to “vigorously review any information provided by companies and compare it to the results of their own investigation.”**
- **In effect, these policies have the potential of creating a conflict of interest between the company and employees from the outset of both government and internal investigations.**

No Individual Liability Releases

- Under the policies, the process of settling claims against corporations now includes the formal consideration of potential charges against individuals.
- As part of any request for authorization to resolve a case against a corporation, DOJ attorneys are now required to detail in writing the status of their investigation of the relevant individuals and a plan for bringing such matters to conclusion prior to the end of any statutory limitations period.
- As a practical matter, these policies may have the effect of preventing settlement agreements until the DOJ is well along in its investigation of the relevant individuals.

No Individual Liability Releases

- **The policies further state that the DOJ will not release individuals from criminal or civil liability in corporate resolutions, such as settlement agreements, except in “extraordinary circumstances.”**
 - **Even if an “extraordinary circumstance” exists, all individual releases and decisions to forgo the prosecution of an individual must also be approved by the relevant United States Attorney or the Assistant Attorney General.**

Renewed Focus on Individuals in Civil Cases

- The policies place a renewed focus on individuals by DOJ's civil attorneys.
- The policies dictate that an individual's ability to pay a civil penalty should no longer be a material factor in deciding whether to bring a civil suit against that individual.
- The DOJ acknowledged that this policy change may result in less "monetary return on the Department's investment."
- However, even in cases where the likelihood of recovery is remote, the guidelines emphasize that civil claims should be considered "to hold the wrongdoers accountable and to deter future wrongdoing."
- The DOJ's new policy now establishes that the "twin aims" of "recovering as much money as possible, on the one hand, and of . . . deterrence of individuals, on the other . . . are equally important."

Renewed Focus on Individuals in Civil Cases

- **The potential effect of this policy is unclear considering the DOJ's resource limitations and the costs associated with pursuing each of these potential cases.**
- **However, it has the potential to significantly complicate the settlement process.**

Changes to the Investigation Process

- **The policies expressly require that all DOJ attorneys focus on individuals from the outset of corporate investigations in order to:**
 - **Create a better factual record against individuals;**
 - **Increase the likelihood that corporate employees will cooperate with the government; and**
 - **Maximize the chances of a resolution against individuals.**
- **The DOJ's criminal and civil attorneys must also be in early and routine communication with each other regarding individual misconduct.**
 - **As Deputy Attorney General Yates stated, "the best way to ensure that criminal prosecutors don't need to go back and build a new case after the civil attorneys finish their inquiry – or vice versa – is to make sure that everyone's talking to each other from the very beginning."**
- **This new civil and criminal coordination policy formalizes prior directives and practices already employed by the DOJ.**

Potential Implications

- **Although the Yates Memo incorporates principles and practices that have been part of the DOJ's approach for some time, there are potentially significant implications for companies with respect to DOJ criminal and civil investigations.**
- **As DAG Yates acknowledged, the new policies may create additional obstacles for companies attempting to resolve cases with the DOJ.**
- **The policies will place increased pressure on companies to develop and present evidence of wrongdoing by employees in order to get credit for cooperation.**
- **The policies will also put additional pressure on prosecutors to charge individuals and thereby increase the exposure of employees to government scrutiny.**

Potential Implications

- **The policies will precipitate a need, whenever a DOJ investigation is commenced or likely, to carefully consider potential conflicts of interest between a company and its employees.**
- **As a result, we expect to see an increase in the number of employees requesting individual counsel at the early stages of government and internal investigations.**

Proactive Measures

- **Ensure that the appropriate group directs all investigations from the outset to protect the company's attorney-client privilege.**
- **Establish procedures so that cases where individual employees face potential exposure are identified at the earliest possible stages.**
- **Consider establishing special committees to supervise these matters to ensure that anyone with exposure is not involved in the related investigation.**
- **Continue to implement and support robust compliance policies and procedures intended to identify and remediate any potential misconduct.**

Save the Date

Join us for our next program on
January 13, 2016, when we will
look at another current issue in
Consumer Financial Services.

Have a great month and a

Happy New Year!