

## White-Collar Crime

## Expert Analysis

# Latest Approach on Prosecuting Individuals for Corporate Misconduct

Move over Holder, Thompson, McNulty, and Filip and make room for Yates. Taking its place in the parade of guidelines issued by top Department of Justice leadership on the topic of prosecuting business organizations comes a new entry from Deputy Attorney General Sally Quillian Yates. On Sept. 9, 2015, Yates issued a memorandum titled “Individual Accountability for Corporate Wrongdoing” (the Yates Memorandum), setting forth six steps to be taken in the investigation of corporate misconduct in order to “fully leverage [the department’s] resources to identify culpable individuals...in corporate cases.”<sup>1</sup> With a degree of fanfare, the new regime at the Justice Department has announced that it intends to target individual employees for corporate wrongdoing rather than simply the companies that employ them.

To those who practice in this area, that goal is nothing new. Indeed, experience has shown that the guidance memoranda issued by Justice Department leaders have varying import—some contain specific policy directives that mark a shift in the way the department does business, while others serve more as a public relations tool to inform observers about the department’s attitudes and priorities.

The Yates Memorandum appears to fall more into the latter category, as an effort by new Justice Department top leadership to respond to public criticism regarding the lack of prosecutions against individuals in the aftermath of the 2008 financial crisis and in some notable later scandals. Nevertheless, in an organization as large as the Justice Department, the message and attitude from the top do matter, and can be expected to influence line prosecutors and their supervisors. Further, though time will tell, by at least one of the guidelines in her memorandum, Yates appears to have taken another step down the path in deputizing corporate employers to help the Justice Department police their own personnel.

The government has had great success in obtaining large monetary settlements and, in some instances, guilty pleas from corporate entities in the past few years by relying heavily on a combination of high-pressure tactics, including the threat of ruinous fines under the Alternative



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Fine Act,<sup>2</sup> and the ability to rely on controversial theories such as “collective knowledge” to prove corporate culpability. In many cases, corporations have proven they are willing to settle despite the somewhat dubious nature of the government’s claims. A corporation simply may want to put the matter behind it to avoid angering shareholders

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and minimize the business consequences and expense of a continuing government investigation.

The willingness of corporations to settle without testing the merits of the government’s case makes them a more attractive defendant than individual employees who may be more likely to fight the government’s questionable claims. Despite the government’s success in cases against companies, critics have cried foul at the dearth of individual prosecutions.<sup>3</sup> Clearly promulgated in response to such criticism, the Yates Memorandum joins a line of Justice Department policies issued in recent years that reflect the ebb and flow of demands for vigorous prosecution of corporate wrongdoing and concerns about government overreach.

### Evolution of Policies

In 1999, Eric Holder, then-deputy attorney general, issued a memorandum on the federal prosecution of business organizations in response to complaints that no uniform rules existed for deciding whether to bring charges in corporate

cases.<sup>4</sup> The Holder Memorandum was revised in 2003 by the Thompson Memorandum, written by Larry Thompson, deputy attorney general from May 2001 through August 2003, when public anger at corporate malfeasance was at its height as a result of scandals at Enron and WorldCom.

The Thompson Memorandum expanded the Justice Department’s privilege waiver policy by instructing prosecutors to take into account the extent to which a corporation cooperated with the government when deciding whether or not to charge the corporate entity, including considering whether the corporation was willing to waive attorney-client privilege and work product protection in disclosing the results of internal investigations. In addition, prosecutors were told to consider whether a corporation had advanced attorney fees to its employees in measuring a company’s cooperation.

By 2004, the collapse of Arthur Andersen following its conviction at trial (which ultimately was overturned) made clear to many business leaders that cooperating with government investigations was a matter of survival, and not really a choice. Critics, however, believed that the Thompson Memorandum policies on how corporations gained cooperation credit dangerously eroded the attorney-client privilege and work product protection and individual employee’s rights.<sup>5</sup>

Under pressure from Congress, the Justice Department’s policy was subsequently pulled back and revised by the McNulty and Filip Memoranda issued, respectively, by Paul McNulty, deputy attorney general from March 2006 through July 2007, and Mark Filip, deputy attorney general after McNulty until January 2009. The Filip Memorandum specifically dictates that corporations cannot be punished for choosing not to waive the attorney-client privilege or disclose attorney work-product. Following the Justice Department’s well-publicized setback on this issue in the KPMG tax shelter prosecution, the Filip Memorandum also expressly disavowed the department’s ability, which had been reserved in the McNulty Memorandum, to consider advancement payments negatively in awarding cooperation credit to a company.

### The Yates Memorandum

The Yates Memorandum “is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the

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individuals responsible for illegal corporate conduct.”<sup>6</sup> It offers six-step guidance to strengthen the department’s pursuit of individual wrongdoing.

• **Point One: Giving Up the Employees.** Potentially the most significant specific change in the new Justice Department guidance is the requirement that corporations provide all relevant facts regarding individuals responsible for misconduct in order “to be eligible for any cooperation credit.” In the past, no such express requirement was present, and corporations typically would receive some credit for cooperating with the government merely by turning over the results of their internal investigations, even if in some cases such investigations were not as thorough or far-reaching as the government would have preferred. In a speech delivered one day after her memorandum was released, Yates referred to the new requirement as a “substantial shift” from prior practice, stating that the “rules have just changed.”<sup>7</sup>

The government may have been motivated to institute this new policy in part by its experience in the investigation of the French bank BNP Paribas. In June 2014, BNP agreed to pay \$8.9 billion to settle federal and state criminal charges related to the bank’s movement of money through American financial systems on behalf of sanctioned countries including Iran, Sudan and Cuba. Despite the significant settlement, the Justice Department was frustrated by the bank’s failure to fully cooperate in its investigation, noting in its press release that BNP’s lack of cooperation “significantly impacted the government’s ability to bring charges against responsible individuals.” The Yates Memorandum seeks to avoid this result in future investigations.

Likening the expectation in corporate cooperation cases to other criminal cases involving cooperating witnesses, Yates stated that “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.” The Yates Memorandum refers to a “threshold requirement” that a company must meet in order to be eligible for cooperation credit. At a minimum, a company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide all facts relating to that misconduct to the government. If the government believes a company declined to learn such facts or kept relevant information from the government, it will not receive cooperation credit.<sup>8</sup>

As noted by one commentator,<sup>9</sup> this requirement essentially makes the corporation a member of the government team, although the Yates Memorandum makes clear that government attorneys should not wait for the company to deliver on its obligation but proactively should investigate individuals on its own. The government’s expectation that corporations produce evidence against individual employees may be unreasonable in some cases given that companies do not have access to the same tools relied upon by the government to collect such evidence, such as grand jury subpoenas to compel testimony and the production of documents or grants of immunity to lure an individual to cooperate, not to mention law enforcement techniques like wiretaps and search warrants.<sup>10</sup>

• **Points Two and Three: Improved Coordination of Criminal and Civil Cases.** Point two of the Yates Memorandum states that both criminal and civil corporate investigations should focus on individuals from the inception of the investigation. Step three counsels criminal and civil attorneys handling corporate investigations to be in routine communication with one another.

• **Points Four and Five: No Corporate Resolution Without a Plan for Individual Cases.** Point four states that absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals. This formalizes what has been generally understood to be Department of Justice policy for quite some time. Point five further makes clear that government attorneys are not permitted to resolve civil or criminal corporate cases without 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.”<sup>11</sup> The plan must address how individual cases will be resolved prior to the expiration of any applicable statute of limitations and notes that declinations to prosecute

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individuals must be memorialized.

In recent years, the government increasingly has relied on civil lawsuits to resolve corporate wrongdoing, reaping billions of dollars for the government’s coffers in the process.<sup>12</sup> Typically, companies are willing to pay over tremendous sums to resolve civil suits, in part as a way to avoid criminal prosecution. The availability of such alternative resolutions may be impacted by the Yates Memorandum, given the high bar placed on corporations getting credit for cooperation and the increased Justice Department focus on requiring individual liability in both civil and criminal enforcement cases.

• **Point Six: An Individual’s Inability to Pay Should Not Prevent a Lawsuit.** The final step of the guidance provides that civil attorneys consistently should focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond the individual’s ability to pay. The Yates Memorandum acknowledges that this policy will not yield economic benefits, stating that “[a]lthough in the short term certain cases against individuals may not provide as robust a monetary return on the Department’s investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence.”<sup>13</sup>

## What the Future Holds

Many questions arise in the wake of the issuance of the Yates Memorandum. How corporations will respond in the face of the government’s heightened expectations is difficult to predict. For instance, corporations may more strongly consider waiving attorney-client privilege or disclose attorney work-product to secure leniency under the new standards. Or, on the other end of the spectrum, corporations may choose to more vigorously fight charges of misconduct rather than cooperate, given the increased pressure to provide information on key individual employees and uncertainty about how that information will be received.

A situation where a company provides all of the information in its possession, yet the evidence does not support a case against any individual employee is not difficult to conceive. Indeed, under the doctrine of “collective knowledge,” a company can be found guilty of wrongdoing even if no individual can be held criminally responsible. Under these circumstances, it is hard to believe that a company will be denied cooperation credit. Yet the Yates Memorandum tends to suggest the contrary. What seems likely, however, is that prosecutors will be skeptical of corporations’ claims that, despite appropriate efforts, they lack the ability to determine whether or not an individual is criminally culpable.

## Conclusion

Concluding her speech at NYU, Yates said that government prosecutors and civil attorneys have embraced the opportunity to “earn and be vigilant in maintaining over time” the public’s confidence. “We do that by relentlessly pursuing wrongdoing, no matter who those wrongdoers may be.” That is hardly a news flash, and to some, the Yates Memorandum may appear to be largely an exercise in public relations. Nevertheless, some of its policy changes could have significant consequences on corporate America and white-collar practice.

1. Memorandum from Sally Quillian Yates to Assistant Attorneys General (Sept. 9, 2015) (available at: <http://www.justice.gov/dag/file/769036/download>).

2. 18 U.S.C. §3571.

3. See Elkan Abramowitz and Jonathan Sack, “Why So Few Individuals? Government’s Prosecution of Corporate Misconduct,” NYLJ (March 5, 2013).

4. Peter Lattman, “The Holder Memo and Its Progeny,” The Wall Street Journal Law Blog (Dec. 13, 2006).

5. Crystal Joy Carpenter, “Federal Prosecution of Business Organizations: The Thompson Memorandum and Its Aftermath,” 59 Alabama L. Rev. 207 (2007).

6. Yates Memorandum at p. 2.

7. Press Release, “BNP Paribas Agrees to Plead Guilty and to Pay \$8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions,” Department of Justice (June 30, 2014).

8. Yates Memorandum at p. 3.

9. Ellen Podgor, “It’s Official—Throw the Employees Under the Bus,” White Collar Crime Prof Blog (Sept. 9, 2015).

10. See Robert J. Anello and Richard F. Albert, “Rajaratnam, ‘Necessity’ and the Path for Future Wiretaps,” NYLJ (Dec. 4, 2012).

11. Yates Memorandum at p. 6.

12. See, e.g., Robert Anello, “The Year in White-Collar Crime: A Look Back Helps Us See Ahead,” The Insider Blog, Forbes.com (Jan. 7, 2015).

13. Yates Memorandum at p. 7.