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## The U.S. Department of Justice's New Policy Emphasizing Individual Civil and Criminal Accountability for Corporate Wrongdoing

By Jodi L. Avergun, Anne M. Tompkins and J. Robert Duncan, of Cadwalader, Wickersham & Taft LLP, Washington.

In the past five years, the U.S. Department of Justice (DOJ) has negotiated ever more eye-popping settlements with companies in cases involving violations of the U.S. Foreign Corrupt Practices Act, health-care fraud and financial fraud. With each new corporate resolution, the DOJ announces larger and larger penalties.

Despite the influx of billions of dollars in fines and penalties into the government's coffers, the DOJ's prosecutions of flesh and blood individuals has lagged.

Critics of these cash-based settlements, including judges, politicians and the media, abound.

In response, the DOJ recently made significant changes to its internal policies surrounding corporate investigations and charging decisions, mandating that prosecutors focus on individual civil and criminal accountability, and warning companies that, if a company wants any credit for cooperating with the government,

that company must assist the government in its quest to focus on individual accountability.

This new policy was announced in a memorandum entitled "Individual Accountability for Corporate Wrongdoing" on Sept. 9, 2015, authored by Deputy Attorney General Sally Yates (*see WSLR, October 2015, page 20*).

### The Yates Memo

The title says it all. The "Yates Memo" posits that "one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing." Individual accountability, the memo continues, is important in that it "deter[s] future illegal activity, it incentivize[s] changes in corporate behavior, . . . ensure[s] that the proper parties are held responsible for their actions, and . . . promote[s] the public's confidence in our justice system."

The Yates Memo is the first formal announcement of a policy shift that DOJ officials have hinted at during the past year. It represents a refocus from the DOJ's post-Enron tendency to structure corporate settlements in a

way that would influence company culture and behavior, and directs prosecutors to focus on individuals from the outset of their investigations.

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**The new policy is likely to have a significant impact on corporate employees at all levels, companies themselves and those who advise them, because it represents more than just an incremental shift in prosecutorial priorities. It will necessitate a reassessment of how a company under investigation deals with the government, and has the potential to change the dynamic between employees, officers and directors and their employers in internal investigations and perhaps in day-to-day business dealings.**

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### Policy Changes

In truth, the Yates Memo’s “new” policies exhorting prosecutors to focus their inquiries on individual wrongdoers and requiring civil and criminal prosecutors to work together to achieve both civil and criminal charges and resolutions are not, in fact, new. And, for U.S. Attorney’s Offices experienced in prosecuting large-scale corporate investigations, the memo does not represent a big shift in how business gets done.

But the DOJ’s requirement that companies actively investigate and disclose individual wrongdoing at all levels before a company will be eligible to receive any credit for cooperation is entirely new and potentially transformative.

Cooperation is now all or nothing—partial credit, where it existed before, is a thing of the past.

In a Sept. 10, 2015, speech at New York University School of Law, at which she publicly announced the policy, Yates stated that, “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.”

Moreover, the new policy requires that, once a company begins to cooperate against individuals, it is obligated to

assist the government in its investigation and prosecution of those individuals, even after any resolution of corporate charges.

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Moreover, the requirement of identifying and providing evidence against individual corporate wrongdoers will not be limited to cases in which a company is seeking “full” cooperation credit sufficient to result in a non-prosecution agreement or a deferred prosecution agreement, but in all cases in which a company seeks any cooperation credit at all, whether that credit be in the form of a reduced financial penalty, waivers of debarment, or settlement agreements with subsidiaries rather than parent companies.

The new policy also requires that, before a prosecutor can release individuals from liability in connection with a corporate settlement, the prosecutor must show “extraordinary circumstances.” If a prosecutor decides not to charge an individual in connection with an investigation, he or she must obtain approval from the relevant U.S. attorney or assistant attorney general supervising the case. The DOJ has said that these approvals will ensure consistent prosecution of individuals and will also be tracked and used to compile data that identifies areas where individual prosecution proves difficult.

The policy also makes clear that civil and criminal division prosecutors are required to consult about investigations from the outset. While the announcement requiring consultation between civil and criminal assistant U.S. attorneys may not be groundbreaking, this heightened cooperation suggests a broadened focus on civil enforcement. In the past, a defendant’s ability to pay was a key consideration in bringing individual civil actions.

In her speech explaining the policy shift, Yates emphasized the deterrent value in bringing civil cases against individuals that goes beyond the recovery of money. “These individual civil judgments will also become part of the corporate wrongdoers’ resumes that will follow them throughout their careers.”

Additionally, she noted a goal of changing corporate culture such that accountability for wrongdoing has to be more than the cost of doing business.

### Criminal Investigation Strategies Come to the Boardroom

In her speech, Yates further alluded to similarities in the DOJ’s pursuit of individuals involved in corporate wrongdoing and investigations with more traditional criminal enterprises. Evoking images of the characters Bud Fox and Gordon Gekko meeting in Central Park in

the 1987 movie “Wall Street,” Yates noted the desirability of finding a “cooperating witness, preferably one identified early enough to wear a wire.” The use of corporate informants shifts the DOJ away from more refined corporate investigation practices of the past; perhaps relying on the historical record and reconstructing “what happened based on a painstaking review of corporate documents, looking for a smoking gun that most financial criminals are far too savvy to leave behind.”

DOJ lawyers will require that companies that want cooperation credit not only identify, but also essentially become witnesses against, the individual wrongdoer, regardless of the level of that individual actor. The tactic of flipping witnesses up the chain of command will be more frequently applied in corporate investigations, working up from floor trader to managing director.

Underscoring her seriousness, Yates analogized the DOJ’s approach to pursuing individuals involved in corporate crimes to a cooperating drug trafficker: “A drug trafficker . . . can take the stand for the government and testify against a dozen street-level dealers. But if he has information about the cartel boss and declines to share it, we rip up his cooperation agreement and he serves his full sentence.” Emphasizing an equally demanding playing field for all criminals, she disclaimed that corporations should get “special treatment as a cooperator simply because the crimes took place behind a desk.”

### **Collateral Consequences/Widespread Impact**

The DOJ might not view the Yates Memo as groundbreaking or having significant impact, because it has always emphasized the goal of prosecuting culpable individuals. However, to the impacted companies and their employees, the requirement that corporations take a more active role in helping the DOJ achieve that goal makes corporate internal investigations more complicated.

Companies and their counsel will have to carefully consider what cooperation looks like and when it occurs under the new policy. While most companies that cooperate with the government understand that the DOJ expects a full and thorough internal investigation and complete cooperation, in the past it may have been able to get cooperation credit and remediate corporate misconduct by instituting new policies and firing culpable wrongdoers. Providing actual evidence against individuals and requiring employees to testify demands a different level of commitment.

Companies will also have to carefully consider the timing of initiating cooperation. Whereas, prior to the Yates Memo, companies might have responded to a subpoena

with a swift and sure statement indicating cooperation with the government, a company might need to take some time to conduct more thorough investigations before making that commitment, so that it can assess the impact on its business of a likely demand to cooperate against all those the government identifies as or believes to be individual corporate wrongdoers. The scope of internal investigations may have to be broadened in the search for individual accountability for corporate wrongdoing. If employees feel vulnerable to the threat of prosecution, they may be less inclined to cooperate, making it more difficult for companies to conduct a complete and thorough investigation.

Corporate culture will be tested during an internal investigation. With its “all or nothing” standard, the Yates Memo arguably pits the company against its employees, especially mid- and lower-level employees. Potentially culpable high-level employees have always understood that they could be charged, and, most times, they have gotten separate counsel. All employees now know that corporate cooperation credit is conditioned on identifying and turning over names and information on individuals, no matter where they sit in the organization. As such, there may be a chilling effect on open and honest communications between company leadership and employees when the investigation is being conducted.

Only time will tell the extent of the DOJ’s willingness to reach deep into an organization for civil or criminal responsibility, and how jarring the new changes will be in reality.

As noted above, Yates has underscored that the DOJ will now mandate that a cooperating company continue cooperating with prosecutors against culpable individuals, even after the terms of the cooperation agreement have been satisfied. Since most recent deferred prosecution agreements and non-prosecution agreements last for only three years, a corporation must consider its willingness to continue cooperating for the duration of the government’s investigation of its employees in both civil and criminal cases. In some cases, it may be preferable to enter into a plea agreement and move forward from the issue.

Finally, given the focus on corporate employees of all levels, corporations will have to double down on their training and enforcement of corporate policies to prevent misconduct. It will be in a company’s best interest to ensure that its training programs and processes for monitoring compliance are best designed to prevent misconduct from occurring.

The DOJ’s focus on individuals invites speculation into a host of other issues.

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**It is unclear whether the Securities and Exchange Commission, which has also had its share of high-dollar civil settlements with corporations, will follow the DOJ's lead in defining adequate cooperation. If the SEC does not do so, then the discrepancy in requirements could lead to "forum shopping" by corporations under investigation by civil authorities that are considering self-reporting.**

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Another unclear area is the impact of the Yates Memo on ongoing cases. Yates stated that the policy changes are "effective immediately." She also noted that the new policies will affect cases just getting underway, the impact of which may not be felt for years.

Internal investigations that are not close to resolution may need to be re-examined to determine compliance with the stricter scrutiny required for cooperation credit. Yates stated in an interview that the changes would impact ongoing cases only to the extent that it was "practicable." However, the \$900 million General Motors criminal settlement announced just after the Yates Memo was published includes no individual criminal charges.

Yates said that the DOJ would not "renege on verbal agreements," indicating that individual charging decisions were determined prior to the policy change. Counsel involved in current investigations should get clarity on where their case falls on the continuum of practicality.

## Conclusion

Yates's memo and speech formally announced a policy shift towards individual accountability. Even though the new focus is on individuals, corporations will be affected by the policy shift as much as, if not more so than, their employees, officers and directors.

Corporate officers should discuss the ramifications of the policy with counsel and take steps to ensure that their companies are positioned to prevent misconduct from occurring, to receive full cooperation credit and to intelligently assess whether the DOJ's all-or-nothing requirement for cooperation might be a less desirable path to follow than a straight plea and fine.

*The full text of Yates's memorandum is available at <http://www.justice.gov/dag/file/769036/download>.*

*The full text of Yates's speech as prepared for delivery is available at <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.*

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