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What Lies Ahead for the Yates Memo?

By Patrick F. Linehan, Galen Kast, and Elizabeth Pericak Ginsburg*

This article explores the future of Yates Memorandum policies, which increased emphasis on the need to pursue individual prosecutions for those involved in corporate wrongdoing, while also instituting a rigid cooperation credit policy that required corporations to provide all relevant facts about individuals involved in corporate misconduct to the Department of Justice to be eligible for any cooperation credit, in both criminal and civil cases.

The status of the Yates Memorandum, issued late in the Obama administration, has remained unclear since President Trump took office. However, the beginning of 2019 brought with it greater clarity on the U.S. Department of Justice's ("DOJ") position on the Yates Memo, thanks to comments made by Deputy Attorney General Rod J. Rosenstein late last year. On November 29, Rosenstein clarified that the Yates Memo's aggressive targeting of individuals remained a "top priority," despite relaxing some requirements for cooperation agreements.

BACKGROUND

The Yates Memo was enacted in September 2015 by former Deputy Attorney General Sally Yates. The memo brought increased emphasis on the need to pursue individual prosecutions for those involved in corporate wrongdoing, while also instituting a rigid cooperation credit policy that required corporations to "provide to the [DOJ] *all* relevant facts about the individuals involved in corporate misconduct,"[1] to be eligible for *any* cooperation credit, in both criminal and civil cases.

As we entered 2019, with the Trump Administration's DOJ now having two years under its belt, we have not seen any significant changes in the DOJ's approach toward the principles embodied in the Yates Memo. Federal prosecu-

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[1] Memorandum from Sally Quillian Yates, Deputy Att'y Gen., US Dep't of Justice to All US Att'ys et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download (emphasis added).

tors have continued to expect full cooperation from our corporate clients as a condition of any leniency, and continue to focus heavily on holding culpable individuals criminally responsible. Although the Yates Memo contemplates an increased emphasis on bringing more civil enforcement actions against individuals, we have not seen a significant spike in the filing of civil enforcement actions against individuals. However, that approach may change.

CHANGES AHEAD?

In a speech during the Annual International Conference on the Foreign Corrupt Practices Act in late November 2018, after over a year of uncertainty as to the post-Obama import of the Yates Memo, Rosenstein announced the Trump DOJ's long-awaited position on the memo. In that speech, although Rosenstein reaffirmed the Yates Memo's central thrust—the prosecution of individual wrongdoers in corporate investigations—he also announced a revised policy that provides federal prosecutors greater discretion around whether to pursue individuals unlikely to be prosecuted, based on new standards that differ for civil and criminal investigations.[2]

In criminal cases, companies seeking cooperation credit under the revised policy must identify all individuals who "are substantially involved in or responsible for the criminal conduct." There will be particular focus on those who "play significant roles in setting a company on a course of criminal conduct," including those "who authorized the misconduct, and what they knew about it." Companies do not, however, need to include all employees whose "routine activities" are alleged to be part of an illegal scheme. This revision makes clear that criminal investigations should not be delayed to collect information "about individuals whose involvement was not substantial, and who are not likely to be prosecuted."

In civil cases, the DOJ will no longer employ an "all or nothing" approach that requires companies to provide the DOJ with evidence of the civil liability of any individual employees in order for it to receive full cooperation credit. Instead, the DOJ will apply a "sliding scale"-type approach, varying the credit awarded based on the extent of the company's cooperation. In order to receive "any credit," "a company must identify all wrongdoing by senior officials, including members of senior management or the board of directors." In order to receive "maximum credit," a company "must identify every individual person

[2] Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act, Office of Public Affairs, US Dep't of Justice (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

who was substantially involved in or responsible for the misconduct." The speech provides the following example:

> In a civil False Claims Act case, for example, a company might make a voluntary disclosure and provide valuable assistance that justifies some credit even if the company is either unwilling to stipulate about which non-managerial employees are culpable, or eager to resolve the case without conducting a costly investigation to identify every individual who might face civil liability in theory, but in reality would not be sued personally.

In the months following Rosenstein's announcement, there has not been a sudden shift in DOJ's approach to corporate cooperation or individual prosecutions. However, in the longer term, we could see changes that may offer some cost and time savings to corporations under investigation, particularly those with substantial headcounts. Among the key takeaways:

- For criminal cases, to receive cooperation credit, companies under investigation must continue to identify individuals who "authorized the misconduct" or played "significant roles in setting a company on a course of criminal conduct."
- For civil cases, the end of DOJ's "all or nothing" policy is likely to provide greater discretion to DOJ attorneys, and in turn, permit corporations to reach settlements faster, and at lower cost. That said, corporations must still identify all wrongdoing by senior-level officials to receive *any* cooperation credit. Additional disclosures may result in additional cooperation credit.
- Across both civil and criminal cases, the relaxed information-gathering and sharing obligations for individuals with insubstantial involvement are likely to reduce the cost burden on companies under investigation and permit accelerated resolution. These gains will be most prominent for large corporations whose improper conduct touched, but did not substantially involve, numerous low and mid-level employees.
- A reduced focus on employees insubstantially involved in the conduct alleged may also indirectly moderate investigation costs and reduce delays by shrinking the number of employees who require individual counsel, and by expanding the scope of joint defense agreements and resulting cooperation for those who require individual counsel.
- Despite these cost and time benefits, caution is still warranted. The revised policy requires corporations to identify employees for information-gathering and sharing obligations in good faith. This directive should be viewed from an investigative standpoint that does not limit the

disclosure of information already in the company's possession, because "[c]ompanies caught hiding misconduct by senior leaders or failing to act in good faith will not be eligible for any credit."

- Finally, the speech left undefined the meaning of "substantial involvement." It is unclear to what extent information gathering and sharing is required for senior-level executives who are nonetheless only minimally involved in the alleged misconduct and are thus unlikely to face individual prosecution or liability.

CONCLUSION

These revisions strike a familiar tone for enforcement under the Trump Administration, following prior business-friendly changes such as credit for voluntary disclosures to the government, and a more moderate use of monitorships. Considered in concert with the administration's prior policy changes, Rosenstein's speech marks one more data point in DOJ's trend towards business-friendly(er) enforcement, a trend likely to continue in 2019 under a Trump DOJ led by Attorney General William Barr, particularly in light of his public disavowal during his confirmation hearing of a memo he wrote regarding the unconstitutionality of the False Claims Act while a lawyer in the Office of Legal Counsel in 1989.[3] Based on this memo, many questioned whether Barr would choose to dismiss cases that did not serve the government's interest, pursuant to the Granston Memo.[4] When asked about his position on the Granston Memo by Senator Chuck Grassley (R-Iowa), Barr committed to ensuring the department does not "unnecessarily" dismiss False Claims Act cases.[5]

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[3] William Barr, Common Legislative Encroachments On Executive Branch Authority, Office of Legal Counsel (July 27, 1989), https://www.justice.gov/file/24286/download.

[4] Memorandum from Michael Granston, Director US Department of Justice, Commercial Litigation, Civil Fraud Section, to Commercial Litigation Branch, Fraud Section (Jan. 10, 2018), https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.

[5] William Barr's Hearing On Capitol Hill. Aired 10:30-11a ET, CNN Transcripts (Jan. 15, 2019), http://transcripts.cnn.com/TRANSCRIPTS/1901/15/cnr.04.html.