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Corporate Employees at Risk: Strategic and Practical Implications of the Yates Memo

by Mary Beth Buchanan and Jovana Crncevic

On September 9, 2015, Deputy Attorney General Sally Quillian Yates issued guidelines for the civil and criminal accountability of officers and managers for corporate wrongdoing, known eponymously as the Yates Memo.[1] It should come as no surprise that the Department of Justice (DOJ), under the new leadership of Attorney General Loretta Lynch, issued this pronouncement redoubling efforts to hold culpable corporate officers accountable both criminally and civilly. Former Attorney General Eric Holder faced harsh criticism over DOJ's failure to prosecute any corporate executives or officers for their role in the financial fraud that precipitated the mortgage crisis of 2008-2009 despite levying billions of dollars in fines against their respective financial institutions. The Yates Memo seeks to remedy this inaction with the goal of sending a message to corporate wrongdoers and, in the words of Deputy Attorney General Yates, "chang[ing] corporate culture to appropriately recognize the full costs of wrongdoing, rather than treating liability as a cost of doing business[.]"[2]

Although the buzz surrounding the Yates Memo has garnered much attention in the legal community, the Memo itself does not introduce a radical change in the existing civil or criminal legal structures holding individual corporate officers responsible. Rather, the Yates Memo indicates that DOJ is resurrecting a policy and tradition of prosecuting individuals responsible for corporate fraud, as evidenced in the junk-bond crisis of the 1970s; the savings-and-loan crisis of the 1980s; and the accounting-fraud crisis of the 1990s.[3] In effectuating this policy goal, the Yates Memo sharpens the expectations of corporations to reveal individual misconduct and sends a clear message to corporate officers and managers that DOJ will be looking more closely at their personal culpability. The Memo also reassures the public that "there is one system of justice and it applies equally regardless of whether that crime occurs on a street corner or in a boardroom."[4]

Outlining the Significance of the Yates Memo

The Memo outlines six points of guidance in facilitating accountability for individual corporate wrongdoing:

1. Corporations must provide all relevant facts about individuals involved in misconduct to receive any corporate credit for cooperation.
2. Individual conduct should be the focus at the outset of all civil or criminal investigations.

[1] Sally Quillian Yates, *Memorandum Regarding Individual Accountability for Corporate Wrongdoing*, Dep't of Justice, Sept. 9, 2015, available at http://www.justice.gov/dag/file/769036/download.
[2] Sally Quillian Yates, Remarks at the New York University School of Law (Sept. 10, 2015), available at http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.
[3] Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted*, The N.Y. Rev. of Books, Jan. 9, 2014, available at http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/.
[4] Matt Apuzzo and Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. Times, Sept. 9, 2015, available at http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html?_r=0.

Mary Beth Buchanan is a Partner and **Jovana Crncevic** is an Associate with Bryan Cave LLP in its New York, NY office. Ms. Buchanan previously served as U.S. Attorney for the Western District of Pennsylvania.

3. "Routine communication" should take place among civil and criminal attorneys investigating corporate wrongdoing.
4. Corporate resolutions will not protect individuals from civil or criminal liability.
5. Corporate cases should not be closed before there is a plan for addressing individual liability.
6. Civil attorneys should consider pursuing litigation against individual wrongdoers despite their inability to pay.

As mentioned above, none of these points presents a radical change from DOJ's *The Principles of Federal Prosecution of Business Organizations*.[5] However, by shifting the focus of investigations of corporate wrongdoing onto the entire corporate form, including its internal actors—individual executives, officers, and managers—the Yates Memo raises some interesting strategic and practical implications for practitioners defending corporate and individual clients in these actions.

1. The "All-or-Nothing" Approach to Corporate Credit. In perhaps its most significant change, the Yates Memo has altered the cooperation model from "some cooperation, some credit" to an "all-or-nothing" system. In no uncertain terms, the Memo states that "to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct." From DOJ's perspective, this requirement will be rigorous, emphasizing that "[c]ompanies cannot pick and choose what facts to disclose." As Deputy Attorney General Yates stated, "We're not going to be accepting a company's cooperation when they just offer up the vice president in charge of going to jail."[6]

In essence, the Memo recognizes what many civil litigators have experienced both in representing and suing large corporations—that corporations are vast repositories of information and documents that are difficult to access (and digest) from the outside. As a result of this embedded institutional knowledge, corporations themselves are best placed to identify individual misconduct and to provide evidence—and, unfortunately, to bury it as well. One need only look at the prosecution of BNP Paribas for corporate fraud, which DOJ settled in June 2014 for $8.9 billion. Former Deputy Attorney General James Cole acknowledged that BNP Paribas's "failure to cooperate had a real effect" since "it significantly impacted the government's ability to bring charges against responsible individuals[.]"[7] By shielding its individual officers and not providing DOJ with facts or evidence of their involvement, BNP Paribas's corporate officers escaped prosecution when the statute of limitations expired.

What effect this revamped system of corporate credit will have on corporations in the long term is difficult to assess. To be sure, corporations have a more burdensome course to traverse if they wish to reap the benefits of corporate credit. More risk-averse corporations (and their legal representatives) may see an increased need for transparency and consistent cooperation throughout civil and criminal investigations. The theory behind this is that corporations with less to hide will be more cooperative and transparent, while those involved in serious wrongdoing will eschew cooperation.

On the other hand, corporations might be too guarded to reveal the full extent of their evidentiary information, particularly where the conduct of an individual officer or employee is not severable from the corporation's own liability. Thus, a corporation may be quite reluctant to sign on to this stringent "all-or-nothing" proposition for fear of revealing too much about its own defense strategy.[8] Moreover, as some commentators have noted, "[c]orporations' activities and investigations regarding potential misconduct are usually done under

[5] http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.
[6] Apuzzo and Protess, *supra* note 4.
[7] *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*, Dep't of Justice, June 30, 2014, available at http://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial.
[8] In fact, former Deputy Attorney General James Cole espoused this view and stated that "over time, the government's going to realize this and they're going to start to retreat from this all-or-nothing approach." Chris Bruce, *U.S. Will Retreat on Yates Memo, Former DOJ Official Predicts*, Bloomberg, Nov. 23, 2015, available at http://www.bna.com/us-retreat-yates-n57982063844/.

the confidential cloak of the attorney-client privilege and the attorney work product doctrine."[9] Divulging all facts relating to individual corporate misconduct may have the precarious effect of waiving the valuable work-product and attorney-client privileges. Consequently, a general trend may develop of corporations becoming more protective of their information, privileges, and individual officers.

This stricter cooperation requirement will undoubtedly challenge corporate general counsel in undertaking preliminary internal investigations. Particularly at the outset of an investigation into potential corporate wrongdoing, the corporation itself may have a limited understanding of the wrongdoing involved. Nonetheless, the new corporate-credit guidelines require that the general counsel consider whether the corporation will cooperate, how counsel will protect the corporation's privileges if it does so, and what kind of communication the general counsel will have with individual officers who may become implicated in the wrongdoing.

This new challenge has the potential of more acutely bifurcating the general counsel's duties to represent the corporation and the extent to which the general counsel communicates the results of the internal investigation to other executives. As commentators have noted, a general counsel inevitably "must balance his or her obligation to communicate with leadership against the obligation, as the company lawyer, to gather evidence of individual misconduct for disclosure to the government. This raises questions of whether and what the organization's lawyer tells the CEO, other officers, the company's risk manager, and others during those critical first moments."[10]

2. Placing Individuals at the Forefront of Investigations Along with—and in Conflict with—Corporations. The Yates Memo lists three goals it hopes to achieve by placing individual officers at the forefront of corporate wrongdoing investigations: (1) DOJ can "ferret out the full extent of corporate misconduct" since individuals are the "most efficient and effective" source of facts of corporate misconduct (and since corporations can only act though individuals); (2) early focus on individuals will result in greater cooperation from people who have valuable information regarding misconduct; and (3) early focus will maximize the chances of obtaining civil and criminal charges against individuals.

However, DOJ's notice to corporate executives and officers seems to have a more frank goal—to increase the government's ability to hold as many individuals liable as it can within the prescribed criminal and civil statute of limitations. This guideline, in turn, also facilitates the accomplishment of the fifth point of guidance that seeks to keep up the procedural—and substantive—pace of corporate and individual accountability.

Given DOJ's commitment to focus on individual wrongdoing at "inception," the likelihood is that a greater number of officers will seek independent counsel in order to fully protect their legal rights and interests. This reaction is a natural consequence of the fact that the stricter standard of expected corporate cooperation for credit essentially pits a corporation against its employees and makes the individual employee vulnerable to criminal, civil, and corporate investigation. Thus, an individual's and a corporation's interests could starkly diverge at the very outset of the investigation. Even if the effect of an individual's hiring counsel may seem a mere formality, it could become a significant impediment since an individual is, after all, indispensable to the corporate form.

Take for example a scenario of a civil litigation against a corporation for negligently failing to properly train and supervise an employee. The litigation moves through the discovery phase and the corporate officer responsible for training and supervising the employee is noticed for a deposition based on being the corporate representative in the best position to testify for the corporation. The officer fears that his testimony will result in self-incrimination stemming from his own criminally negligent actions and wants to invoke his Fifth Amendment

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[9] Frank Sheeder, *DOJ's Pursuit of Individual Liability for Corporate Misconduct: The Yates Memo*, COMPLIANCE & ETHICS PROFESSIONAL, Nov. 2015, at 75, available at https://www.dlapiper.com/~/media/Files/Insights/Publications/2015/10/Sheeder%20SCCE%20Article%20on%20Yates%20Memo.pdf.

[10] *The Yates Memo and Prosecution of Corporate Individuals: Whose Team Does your General Counsel Play for Now?*, DENTONS, available at http://www.dentons.com/en/insights/alerts/2015/september/25/the-yates-memo-and-prosecution-of-corporate-individuals.

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privilege.[11] To the extent this individual corporate officer encounters the dilemma of waiving his Fifth Amendment privilege or exposing himself to criminal liability, the officer cannot be compelled to provide testimony and is free to invoke the Fifth Amendment privilege.

However, in some jurisdictions, the failure of an officer to provide information based upon personal assertion of the Fifth Amendment privilege may result in an adverse inference and even the imposition of sanctions against the corporation since corporations do not possess a Fifth Amendment privilege and cannot enjoy its residual benefits.[12] And thus, the Catch-22 conundrum would entangle the individual and the corporation.

3. Consequences of Dual-Track Criminal and Civil Proceedings. Another DOJ strategy highlighted in the Yates Memo is the tandem pursuit of civil and criminal investigations of individuals. This is evidenced, for example, by DOJ's expectations that civil and criminal attorneys investigating corporate wrongdoing engage in "routine communication" in order to "permit[] consideration of the full range of the government's potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment)[.]"

Nonetheless, parallel criminal and civil prosecutions raise other concerning challenges. One of the most strategically pressing challenges involves the ability to obtain a stay of the civil litigation pending the conclusion of the parallel criminal proceedings. However, courts generally disfavor civil stays and only grant them where the individual can show (1) that the criminal and civil proceedings significantly overlap, (2) that the burden on the individual defendant in litigating both proceedings is greater than the civil plaintiff's interest in proceeding expeditiously, and (3) that the interest of the public and the courts is to stay the civil litigation.

A stay matters for more than the sheer costliness and inconvenience of an individual's having to defend himself on both fronts. A parallel civil litigation also gives the government the benefit of access to broader civil discovery, particularly deposition testimony. And although the government has a duty to conduct civil discovery in good faith, information gleaned through civil discovery can be very influential in bolstering the parallel criminal proceedings.[13] Further, as discussed above, an individual wrongdoer defending a civil litigation must be mindful of asserting his Fifth Amendment privilege or bear the risk of waiving it and having incriminating information used in parallel criminal proceedings.

Conclusion

At its core, the Yates Memo does not usher in a new legal infrastructure changing the liability of corporate officers. Whether the Yates Memo has a real and lasting practical impact remains to be seen. It is still early and interested parties must await the trickle of the first few individual prosecutions. One thing is certain: corporate executives, officers, and managers must pay attention to their roles and actions when faced with assertions of corporate liability and be cognizant of their own potential legal exposure. This awareness will undoubtedly have a counterproductive impact on a corporation's ability to ferret out what happened, determine how extensive the wrongdoing was, and make prompt disclosures to the Department of Justice.

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[11] Where a corporate officer provides discovery responses on behalf of a corporation that are testimonial in nature (such as depositions or interrogatories), he or she risks forfeiting the Fifth Amendment privilege with respect to that subject matter. *See e.g., United States v. Kordel*, 397 U.S. 1 (1970); *State, ex rel. Montgomery v. United Cancer Found.*, 118 Ohio App. 3d 683, 686, 693 N.E.2d 1149, 1151 (1997); *In re Plastics Additives Antitrust Litig.*, No. CIV.A. 03-2038, 2004 WL 2743591, at *8 (E.D. Pa. Nov. 29, 2004).

[12] *See e.g., Cont'l Assurance Co. v. Lombardo*, No. CIV A 85-4867, 1988 WL 38377, at *4, n. 9 (E.D. Pa. Apr. 11, 1988); *In re Anthracite Coal Antitrust Litig.*, 82 F.R.D. 364, 368-69 (M.D. Pa. 1979).

[13] *Kordel*, *supra* note 11; *see also* Georgia A. Staton and Renee J. Scatena, *Parallel Proceedings—A Discovery Minefield,* State Bar of Ariz., July 1998, available at http://www.myazbar.org/azattorney/archives/july98/7-98a3.htm.

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