

Coming to Terms with the Yates Memo: Implications for Government Contractors

December 2015

Government Contracts Issue Update

On September 9, 2015, Deputy Attorney General Sally Yates issued a new policy memorandum designed to give teeth to the Department of Justice's (DOJ) oft repeated promise to hold individuals criminally and/or civilly liable for corporate misconduct. Largely motivated by a belief that adequate deterrence of corporate crime is best achieved through prosecution of individuals, the DOJ policy is also likely a response to criticism leveled against it that large corporate resolutions fail to hold those individuals responsible for the misconduct accountable for their conduct.

In determining whether to charge a corporation, it has long been the DOJ's policy, as most recently articulated in the DOJ's 2008 Filip Memo, to evaluate whether a corporation has "cooperated" with the government's investigation. That evaluation has traditionally included an assessment of whether the corporation has identified the wrongdoers, taken remedial action and cooperated with the DOJ in its investigation and prosecution. The Yates Memo clearly amps up the volume with regard to cooperation.

Without question, an understanding of the Yates Memo and how it will operate in practice is of immediate concern to corporate America and its counsel. It is of particular moment to government contractors who are obligated to investigate, and where appropriate, disclose fraud, conflict of interest, bribery, or gratuity violations of Title 18 as well as violations of the civil False Claims Act.

The Yates Memo

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The Yates Memo is addressed to DOJ attorneys, and it outlines six “key steps” in any investigation of corporate misconduct. These six steps are:

1. To qualify for cooperation credit, corporations must provide the DOJ with all relevant facts relating to the individuals responsible for the misconduct;
2. Criminal and civil corporate investigations conducted by the DOJ should focus on those individuals responsible for the misconduct;
3. DOJ civil and criminal attorneys handling corporate investigations should be in routine communication with one another;
4. Absent extraordinary circumstances, the DOJ will not release culpable individuals from civil or criminal liability when settling a matter with a corporation;
5. DOJ attorneys should not settle matters with a corporation without a clear plan to resolve related individual cases; and
6. DOJ civil attorneys should focus on individuals as well as corporations and evaluate whether to bring suit against an individual based on considerations beyond an individual’s ability to pay.

In November 2015, the policies articulated in the Yates Memo were incorporated into the United States’ Attorneys’ Manual (USAM) and resulted in substantial revisions to the DOJ’s Principles of Federal Prosecution of Business Organizations. Notably, the Principles were revised to include a new section describing the foundational principles of corporate prosecution. This new section emphasizes that one of the most effective ways to combat corporate misconduct “is by holding accountable all individuals who engage in wrongdoing” and that prosecutors “should focus on wrongdoing by individuals from the very beginning of any investigation of corporate misconduct.” USAM § 9-28.010. The revised Principles also make clear that high-level corporate officers should be a primary target of prosecutors, even if the corporation intends to plead guilty or otherwise settle the charges. *Id.*

Implications for All Companies

The Yates Memo raises a number of practical issues for any company that is faced with allegations of wrongdoing. The manner in which an investigation is conducted, the nature of a disclosure and the timing of a resolution are all directly impacted by the change in policy.

Identifying Responsible Individuals. The Yates Memo makes clear that for a corporation to receive credit for cooperation, the company must provide the DOJ “all relevant facts” relating to the individuals responsible for the misconduct. In articulating this policy, the DOJ clearly has sought to end the discussion as to what constitutes “cooperation.” No longer can a company simply assert that it deserves cooperation credit by sharing the facts developed in an internal investigation, providing documents and making witnesses available while leaving it to the government to determine whether there was sufficient evidence to hold individuals culpable under the law.

In a continued and uncomfortable trend to deputize every corporate counsel, the DOJ now makes clear that a company must make determinations as to who is responsible for any misconduct and provide the government with all relevant facts relating to that misconduct. This presumably includes facts, documents or witnesses that might lie outside the subpoena power of the DOJ. Indeed, the revised Principles state that a company seeking cooperation credit bears the burden of explaining why evidence cannot be accessed by the company or disclosed to the government. USAM § 9-28.700. Certainly, it would seem incumbent on company counsel in these circumstances to also provide evidence that may support an alleged wrongdoer's claims of innocence.

Complicating a company's ability to provide all relevant facts relating to responsible individuals is the lack of a clear standard to be used when determining whether one is "responsible" for alleged misconduct. Is the standard the same as what the government must prove in court? Or does some lower standard apply? Deputy Attorney General Yates recently attempted to assuage these concerns by clarifying that "cooperation does not require a company to characterize anyone as 'culpable'" but instead requires a company to simply provide "all facts about all individuals involved." Despite such assurances, it is apparent that there will be tremendous pressure on a company and its counsel to deliver responsible actors.

There will also likely be a tendency for a company to paint with a very broad disclosure brush to avoid a downstream suggestion by the government that the company failed to make an adequate and complete disclosure. As a result, the Yates Memo will unquestionably complicate internal investigations because there can be little doubt that it sharpens the divergent interests of a company and its employees, officers, and directors. While it is clear that in most circumstances an employee has a duty to cooperate as a condition of employment, it is nonetheless now more likely that an individual will request counsel early in this process. An employee may also only agree to be interviewed with his counsel present or only agree to cooperate if he is first provided documents and information bearing on his conduct.

Earlier Representation Decisions. As a matter of course, corporate counsel often seeks to delay a decision on whether an individual requires separate counsel until a determination is made that the interests of the company and the individual diverge. Often that decision is precipitated by a communication from the government that it wishes to interview an individual. In the post-Yates world, however, companies can expect individuals to demand counsel far earlier in the investigatory process. In the context of an ongoing DOJ investigation, this means that a company will now have to make decisions about potential individual culpability far earlier in the investigative process.

Relatedly, companies should reexamine their by-laws, articles of incorporation and relevant D&O policies relating to the advancement and indemnification of legal costs for officers, directors, or employees. The Yates Memo makes it far more likely that a greater number of individuals will need counsel and that such a need will arise earlier in an investigation than in the past. At the very least, this will lead to increased defense costs, but it could also impact a company's ability to defend against allegations of wrongdoing. A company, its board and its executives need to make important policy determinations regarding payment of legal fees for individual counsel in the event of an investigation.

Revised Defense Strategies. Once it is determined that an individual needs separate representation, a company will have to carefully determine how to involve that individual in the company's defense strategy. Companies and individuals regularly "circle the wagons" and jointly defend against allegations of wrongdoing. Often, such a united front results in favorable resolutions for both companies and individuals. The Yates Memo makes such joint defense arrangements a less attractive option for both parties. Companies will now have to evaluate more closely the level of cooperation they can expect from any implicated individuals and whether a joint defense arrangement is still even possible. One is hard pressed to imagine a situation where counsel for an individual will provide any relevant factual information in the context of a joint defense beyond that which clearly exculpates the client. In addition, the company will need to assess whether it is in its best interests to share arguably exculpatory information with an implicated individual when the company believes that individual has engaged in misconduct.

Investigations of Sufficient Scope. A company will be required to conduct internal investigations of sufficient scope as to identify **all** potentially culpable individuals. Deputy Attorney General Yates said shortly after the release of the Yates Memo that the government is "not going to be accepting a company's cooperation when they just offer up the vice president in charge of going to jail." Whereas a company could previously have chosen to identify only individuals who were clearly at fault, a company does not have that luxury in light of the Yates Memo—especially where responsibility for a particular issue is diffuse. The revised Principles of Federal Prosecution of Business Organizations now say that a company can earn cooperation credit only if it identifies "**all individuals** involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority." USAM § 9-28.700 (emphasis added).

The initial scoping of an internal investigation also becomes important as individuals may become uncooperative during the course of the investigation. For instance, an individual who understands that the information he provides will be turned over to the government may refuse to cooperate with internal investigations lest he implicate himself. He may also determine that he stands to benefit more from talking exclusively with prosecutors rather than cooperating with his current or former employer. Accordingly, though always important, it is now critical for a company to speak with all relevant individuals as early in the process as possible.

Specific Considerations for Government Contractors

In addition to the above, government contractors will face some additional issues specific to the government contracting realm.

Mandatory Disclosure Rule. The Yates Memo will impact how a contractor complies with the Mandatory Disclosure Rule. In general, the Mandatory Disclosure Rule, included in FAR 52.203-13, requires government contractors to disclose, among other things, whenever there is "credible evidence" of a fraud, conflict of interest, bribery, or gratuity violation of Title 18 or when there is a violation of the civil False Claims Act (FCA). Although contractors do not typically make such mandatory disclosures to the DOJ, Inspectors Generals (IGs) and Suspension and Debarment Officials (SDOs) routinely forward such disclosures to the DOJ. Thus, it has long been a best practice to draft such mandatory disclosures with the assumption that a DOJ attorney will be

reviewing the disclosure. With the advent of the Yates Memo, government contractors should consider including all information about all responsible individuals so they can position themselves to secure cooperation credit from the DOJ. Although prior mandatory disclosures may have provided some information about individuals, the Yates Memo will require contractors to reevaluate how they draft disclosures so as to ensure the DOJ's stated interest in individual misconduct is addressed.

The failure to draft mandatory disclosures to address the DOJ's interest in individual accountability may complicate any later efforts to achieve cooperation credit from the DOJ. If this information is not collected initially, a contractor simply may not be able to obtain such information at a later date, as individuals may refuse to cooperate—a scenario that becomes more likely as time passes and the government starts conducting its own investigation. The failure to collect such information may also cause the DOJ to question the adequacy of a contractor's internal investigation and the contractor's commitment to discovering culpable individuals. Even if the information is collected, the DOJ may view with disfavor a contractor's decision to withhold this information from an initial disclosure. In short, a contractor should not view a mandatory disclosure as akin to a preliminary disclosure that can be supplemented only if and when the DOJ comes knocking. Rather, contractors should endeavor to provide comprehensive disclosures sufficient to satisfy the DOJ's desire for information on individuals involved in any alleged wrongdoing.

When making disclosures that include information about a number of individuals with varying levels of culpability, contractors should assess the suspension and debarment impact on those individuals. Contractors should be prepared to engage with SDOs to address and explain the culpability of individuals identified in the disclosure as necessary.

FCA Liability for Executives and Employees. The Yates Memo specifically directs government attorneys to focus on criminal **and civil** proceedings against culpable individuals, and the FCA is likely to feature prominently in the government's attempts to hold individuals accountable—especially as to individuals associated with government contractors. Traditionally, the government has not pursued FCA actions against individuals opting instead to focus its efforts on prosecuting the company. This made practical sense from the government's perspective as pursuing individuals requires the government to meet additional burdens of proof, and few individuals are likely to be able to pay a significant amount in damages. The Yates Memo could significantly change this approach. Not only are civil attorneys being instructed to focus on individuals, but civil attorneys are also being directed not to base enforcement decisions solely on an individual's ability to pay a judgment. See USAM § 4-3.100. Thus, executives and employees of government contractors face the very real possibility that they could be liable for treble damages and penalties for violations of the FCA, even if they did not personally benefit from any wrongdoing.

Takeaways

Counsel for government contractors should familiarize themselves with the Yates Memo and its implications and should ensure that their directors, executives and employees are also educated on the Yates Memo. It provides government contractors an opportunity to reevaluate and strengthen compliance programs and to convey to individuals that they truly have "skin in the game" and could be held criminally and civilly

accountable by the government for any misconduct. Effectively communicating the implications of the Yates Memo can serve to strengthen a company's culture of compliance.

Government contractors should analyze their current procedures regarding internal investigations. Internal investigation teams should work under the direction of counsel to properly scope such investigations with an eye towards obtaining cooperation credit from the DOJ. Contractors should also review and revise company indemnification policies and other practices regarding the provision of legal services so these issues can be promptly addressed when they arise during internal investigations.

Finally, contractors should review their practices when making disclosures pursuant to the Mandatory Disclosure Rule. Such disclosures should be made with the understanding that the DOJ will review the disclosure and will be interested in all individuals involved in the misconduct. Contractors should also assess the potential impact on suspension and debarment arising from the identification of individuals in their disclosures.