

A PRICE ON THEIR HEADS: THE DOJ'S "YATES MEMORANDUM" AND THE FUTURE OF CORPORATE INVESTIGATIONS

April 14, 2016

**ABA Section Annual Conference
Chicago, Illinois**

Moderator: **Lori Lightfoot**, Partner, Mayer Brown LLP

Panelists: **Ron Machen**, Partner, WilmerHale

Jason Knott, Partner, Zuckerman Spaeder LLP

Richard Bistrong, CEO, Front-Line Anti-Bribery LLC

Background

- Following the financial crisis, DOJ investigated major banks and recovered billions of dollars, but did not prosecute any senior Wall Street executives.
- DOJ was heavily criticized in press, by Congress, and by public for failure to “punish the elites.”
- Critics pointed to 1980s savings and loan prosecutions, which resulted in imprisonment of 1000+ bankers.
- Criticism intensified with time, as statutes of limitations began to run out.

The “Yates Memo”

“Individual Accountability for Corporate Wrongdoing,”
authored by Deputy U.S. Attorney General Sally Quillian
Yates

- Issued September 9, 2015, and announced in speech at NYU.
- Describes new DOJ policy for focusing on individual executives and employees, in addition to corporation.
- Applies to all corporate investigations, criminal and civil.
- Sets forth six key factors for DOJ attorneys to follow.

Yates Memo Factors

1. No credit for cooperating with the government unless company discloses “all relevant facts” concerning individuals involved in misconduct.
 - Partial credit no longer awarded.
 - Biggest change from previous DOJ policy.
2. In conducting both criminal and civil investigations, DOJ attorneys should focus on individuals from the inception of the investigation.
3. Criminal and civil DOJ attorneys should be in early and routine contact with one another.

Yates Memo Factors

4. Absent “extraordinary circumstances,” no protection for individuals as part of a corporate resolution.
5. Corporate resolutions must include clear plan for resolving cases against individuals within limitations period.
6. Civil attorneys should consider more than an individual’s ability to pay in deciding whether to bring a case – deterrent effect of bringing a claim is an equally important consideration.

Key Points: “To be eligible for any cooperation credit” . . .

- “the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position . . . and provide to the Department all facts relating to that misconduct.”
- “Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.”
- “Any such release of [individual] criminal or civil liability . . . must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.”

Implications for Corporate Cooperation

- Given the heightened standard for cooperation, the assessment of whether to voluntarily disclose potential wrongdoing becomes more difficult.
- Some practitioners have questioned the practicality of this approach, stating that it gives companies little reason to cooperate and will likely result in the government's "retreat from this all or nothing approach." (Former DAG Cole)
- Meanwhile, others such as DAG Yates are not convinced that it will impact corporate behavior, since cooperation still offers "substantial benefits." (DAG Yates)

Implications for Corporate Cooperation

- Careful cost-benefit analysis must be conducted early to assess value of self-disclosure and cooperation.
- Requirement of written certification of cooperation creates potential false statements liability for corporate executives.
- Necessity of disclosing “all relevant facts” may have implications for the attorney-client privilege and work product protection.

Implications for Internal Investigations

- Investigative focus on evidence of individual knowledge and intent to prepare for “Yates meetings.”
- Shorter investigative timeframes to respond to DOJ’s request for rolling, real-time disclosures and address statute-of-limitations concerns.
- Difficulties and delays caused by requests for individual representation and hesitation to enter into joint defense agreements.
- Necessity to challenge unreasonable prosecutorial information demands by appeal to senior Department of Justice decision makers.

Effect on Civil Enforcement

- Increased attention to individual targets and culpability at outset of civil investigation or complaint.
- Increased emphasis on deterrent value of civil claims brought against individuals irrespective of whether they can pay a large judgment.
- Complicated negotiation and execution of corporate resolutions given DOJ's unwillingness to release individual liability in the context of a corporate settlement.
- False Claims Act investigations and complaints likely to encompass corporate employees.

Considerations – Counsel for Individuals

- **Increased risks**
 - May be additional likelihood of individual criminal prosecutions.
 - Emphasis on civil proceedings and penalties even for those without resources to pay.
- **Whether to change defense strategy** because corporate resolutions will rarely protect individuals.
- **How to deal with statements** made to company counsel in investigation:
 - Prior to engagement of separate counsel – were Upjohn warnings made, and were they sufficient?
 - Under threat of termination – Constitutional implications?

Considerations – Counsel for Individuals

- Joint defense agreements with the company
 - Will company and individuals still share information?
 - Will company share information provided by your client with the government?
 - When is withdrawal appropriate or necessary?
- Indemnification/Advancement/D&O
 - Will company/insurers provide?
 - What are pitfalls?

Personal Accountability Isn't a New Concept



I've Got This to Prove It



So What Happens When You Get the Call?

Pre-Yates

- Cooperate internally to avoid the DOJ
- Retain counsel to manage the process
- Hope that it remains internal
- Cut losses with termination

Yates

- What do I know and what is the value?
- Management tone, knowledge and conduct
- What is the upside of internal cooperation
- **What is the downside of first-in to the DOJ**

Questions?



Lori Lightfoot
Partner, Mayer Brown LLP
312-701-8680
llightfoot@mayerbrown.com



Ron Machen
Partner, WilmerHale
202-663-6881
ronald.machen@wilmerhale.com



Jason Knott
Partner,
Zuckerman Spaeder LLP
202-778-1813
jknott@zuckerman.com



Richard Bistrong
CEO,
Front-Line Anti-Bribery LLC
203-446-3622
richardtbistrong@gmail.com