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JUSTICE DEPARTMENT

Three partners at DLA Piper discuss the new procedural requirements on federal prosecutors imposed by the Yates memorandum. The authors explain how these new requirements will have profound collateral consequences on counsel for business organizations that are the subject of a federal investigation. They further note that the new requirements could be the component of the memo that causes the greatest change to the way prosecutors investigate business organizations and their agents.

Incentivizing Prosecutors to Pursue Individuals



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Much has been made of the Sept. 9, 2015, memorandum from former Deputy Attorney General Sally Quillian Yates addressing individual accountability for corporate wrongdoing (Yates Memo). A substantial portion of the commentary addresses the tension between a corporation's need, under the Yates Memo, to disclose all "relevant facts" to federal prosecutors regarding the conduct of employees and agents if it wishes to receive any credit for cooperating with the government and a corporation's desire to protect the attorney-client privilege and work-product protections that cover the investigations that developed the relevant facts. See e.g. Stephen Dockery, *U.S. Justice Dept. Memo Complicates Talks with Companies*, WALL STREET JOURNAL (Oct. 21, 2015, 6:12 AM), <http://blogs.wsj.com/riskandcompliance/2015/10/21/u-s-justice-dept-memo-complicates-talks-with-companies/>.

Two lesser addressed aspects of the Yates Memo, however, deserve additional focus. *First*, the Yates Memo imposes new procedural requirements on federal prosecutors. These new requirements will have profound collateral consequences on counsel for business organizations that are the subject of a federal investigation. *Second*, as a result of the Yates Memo, the Department of Justice modified the "cooperation" factor in its Principles of Federal Prosecution of Business Organizations (the Principles)—the guidelines that govern the conduct of federal prosecutors—splitting the factor into two parts. One factor focuses solely on the question of whether there has been a timely and voluntary disclosure of wrongdoing, and a second factor focuses on the corporation's willingness to cooperate in the investigation of its agents (this is the factor to which most refer when speaking of "cooperation"). Despite the focus the Yates Memo has caused on business organizations' cooperation, cooperation is not dispositive of the outcome of the DOJ investigation for business organizations.

The Principles explicitly say as much. Instead, cooperation, while an important factor, is one of 10 factors. Several of these other factors provide substantial room for advocacy—particularly while the DOJ works through the issue of what constitutes sufficient disclosure of “relevant facts” for a business organization to receive cooperation credit.

The Yates Memo Should Have A Substantial Impact on How Corporations And Their Counsel Approach Investigations Of Potential Misconduct

At its core, the Yates Memo provides a standard framework for how prosecutors should approach investigations involving allegations of misconduct at business organizations, encouraging a sequencing of prosecutorial decisions not previously required. The framework was incorporated into a new section of the Principles: 9-28.210—Focus on Individual Wrongdoers.

The Yates Memo directs that “criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct.” [p.4] The new section on the Focus on Individual Wrongdoers provides: “It is important early in the corporate investigation to identify responsible individuals and determine the nature and extent of their misconduct.” Accordingly, it is no longer an option for a prosecutor or civil attorney to focus first on resolving the investigation with respect to the business organization and then turning to individuals; the focus must be on both the business organization and the potentially culpable individuals from the outset. Moreover, the Yates Memo not only directs that investigations of business organizations and individuals commence at the same time, but it also incentivizes prosecutors and civil attorneys to conclude the investigations at the same time.

If a prosecutor or civil attorney wishes to seek authorization for a resolution with a business organization, but work remains with respect to potentially culpable

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individuals, the attorney proposing the resolution must provide a detailed plan addressing how the investigation will be completed: “If an investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and, when warranted, an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period.”

Show Your Work. Finally, the Yates Memo imposes an entirely new requirement that prosecutors show their work if they conclude that criminal or civil charges should not be brought against individuals. Prosecutors must justify, in writing, why charges are not being brought and that decision must be approved by the U.S. Attorney or assistant attorney general responsible for the investigation: “If a decision is made at the conclusion of the investigation to pursue charges or some other resolution with the corporation but not to bring criminal or civil charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or the Assistant Attorney General whose office handled the investigation, or their designees.”

It is hard to overstate the influence this requirement could have on line attorneys. Prior to the Yates Memo, a line attorney conducting an investigation might be asked, “who do you want to charge?” And if the answer were, “just the business organization,” there very well could have been little follow-up or pushback. After the Yates Memo, the question has become, “which individuals are you proposing the United States charge?” If the answer is, “just the business organization,” the line attorney will have to explain to his or her immediate supervisor, the relevant U.S. Attorney or the assistant attorney general, and every supervisor between, why the answer is, “just the business organization.” And the attorney must justify the decision in a written memorandum that will be memorialized in the case file. A recommendation to prosecute only a business organization will obviously not be made lightly.

Trickle Down Prosecution. The requirements imposed on prosecutors invariably must trickle down to business organizations and the counsel representing them. Prosecutors cannot commence their investigation of potentially culpable individuals without knowing who the individuals are. As such, one should expect to see a greater emphasis in early meetings with prosecutors not just on “what happened?” questions, but also on “who did it?” questions. The prosecutors’ interest under the Yates Memo must guide how defense counsel approach a representation of a business organization that may have engaged in criminal misconduct. Prior to the Yates Memo, it may very well have been standard to focus initial efforts on figuring out what occurred. Now, if the business organization wishes to maximize the chances that it earns cooperation credit, counsel must also focus on the actors who made decisions and which individuals might potentially be culpable for the conduct.

As the investigation progresses towards the finish line, it also will be important to remember that the business organization must either cross the line with the potentially culpable individuals or the prosecutor must be in a position to articulate a clear plan for what will be done with individuals after the business organization resolves its investigation. Accordingly, it is now in the interest of the business organization, in any advocacy presentation or submission discussing how the investigation should be resolved with respect to the business organization, to also address the culpable individuals—specifically addressing the relevant facts the business organization has disclosed with respect to the culpable individuals, and whether there is any additional investigation that the business organization has identified that could be done with respect to the culpable individuals to potentially develop additional relevant facts.

This now-mandated emphasis on individuals raises an additional question that counsel for business organizations should consider—under what circumstances should a recommendation be made that an employee obtain his or her own counsel. Even before the Yates Memo, defense counsel for an organization obtained relevant facts from employees/agents, knowing that they would almost assuredly turn over these facts if their client wanted cooperation credit. The only change in this analysis after the Yates Memo is that the chance of turning over the relevant facts if the business organization wanted cooperation credit went from “likely” to “definitely.” This change probably has little impact on the question of individual representation.

Being Charged Just Got More Likely. What has significantly changed, though, is that the prosecutor must now analyze the relevant facts and—where the prosecutor has concluded that criminal misconduct occurred at a business organization—either decide to charge culpable individuals or be able to persuade a U.S. Attorney or an assistant attorney general that there are no culpable individuals who should be charged. While there is no way to quantify it, one would be hard pressed to argue that these new review and memorialization requirements would not materially increase the likelihood that an individual or individuals will be charged at a business organization where the prosecutor believes criminal wrongdoing occurred. Does the greater likelihood of individual prosecution impact when an employee or agent should get his or her own counsel? One could certainly imagine that in many circumstances, the answer might be, “yes,” and this issue will be something that counsel for the business organizations will have to monitor on a case-by-case basis.

Moreover, from a purely practical perspective, there is more of an incentive for counsel to the business organization to advise employees and agents to get individual counsel sooner than they would have prior to the Yates Memo. If culpable individuals are not represented, it will be very difficult for prosecutors to have the type of pre-indictment conversations that typically occur prior to the indictment of employees or agents of business organizations. Under the new Yates Memo requirements, delays in investigating individuals will likely result in delays in resolving the investigation for the business organization.

A Corporation’s Willingness to Cooperate In the Investigation of Its Agents Is One Of 10 Factors Federal Prosecutors Are Required to Consider, Not the Only Factor

While much of the recent commentary regarding the Principles has understandably focused on cooperation, it is important to remember that cooperation—though incredibly important—is still only one of 10 factors. As the Principles note, “[c]ooperation is a potential mitigating factor, but it alone is not dispositive.” There are a number of other factors that should not be forgotten by counsel and some of these factors have been indirectly impacted by the Yates Memo:

- *The existence and the effectiveness of the corporations pre-existing compliance program:* While not directly impacted by the Yates Memo, this factor is the factor on which business organizations should always be focused. An ounce of prevention is worth a pound of cure. The ever-growing scope of laws governing business organizations coupled with the trend of the DOJ aggressively prosecuting conduct that has any potential U.S. nexus presents a substantial amount of risk for a multi-national business organization. An employee, or employees, not understanding U.S. law—or worse yet, understanding U.S. law and attempting to circumvent it—can cause needless headaches and expenses for a corporation. Compliance training and compliance procedures work and may help the organization avoid ever having to undertake the Principles analysis by avoiding potential violations in the first instance. Business organizations should routinely invest in compliance reviews. If violations occur, it is best to argue that they occurred in spite of a robust program. When violations do occur in spite of a robust program, it is likely that these robust compliance procedures will limit the number of individuals involved in the conduct and/or the duration of the conduct. With fewer culpable individuals, there will be fewer moving parts as the business organization is trying to resolve the investigation in a post-Yates Memo world.

- *The corporation’s timely and voluntary disclosure of wrongdoing:* This is a new factor in the Yates Memo that is the product of splitting the prior cooperation principle into two separate factors. This new factor regarding the voluntariness of the disclosure is an objective factor that the business organization controls (assuming it discovers the conduct before the government does). A business organization can move one factor onto its side of the scale if the organization decides it is appropriate to disclose.

- *Remedial actions:* The Post-Yates emphasis on the conduct of the individuals should afford more of an opportunity to understand not only who was responsible for the conduct, but also how the conduct occurred despite a robust compliance program. Business organizations should take advantage of this information by both correcting deficiencies in the compliance program and taking proper remedial employment actions *before* attempting to resolve the investigation with the government. It is one thing for a business organization to say that it takes violations seriously, it is another thing altogether, though, for a business organization to show it

takes the violations seriously by voluntarily remediating. This factor is another factor over which a business organization, during the course of an investigation, has substantial control.

Conclusion

It is likely that the procedural changes for prosecutors will have as much impact as any other component

of the Yates Memo. In a post-Yates Memo world, business organizations, individuals, and counsel will have to carefully consider how their fortunes have been tied together.