American Crime Story: Evaluating the Human Resources Impact of the Yates Memo and Its Impact on Employment-Related White Collar Prosecutions

by Brandon Davis

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There has been a significant change of tempo concerning corporate criminal prosecutions and their impact in the workplace. In short, the government will now almost always seek to prosecute an individual employee when it initiates white collar investigations and prosecutions. This policy shift will likely change workplace relations, especially for businesses that are subject to serious federal regulatory oversight. Managers, executives, and small-business owners must closely examine this serious policy shift and modify business practices so their employees may avoid criminal liability.

On Sept. 9, 2015, Deputy Attorney General Sally Yates of the Department of Justice (DOJ) issued the so-called Yates Memorandum, which announced the government's decision to focus on prosecuting employees in their individual capacity in each instance where the DOJ initiates white collar investigations and prosecutions. Shortly after the Yates Memo was published, the DOJ announced that Hui Chen would head the government's new compliance initiatives. Chen previously led global compliance for companies like Pfizer and Standard Chartered Bank. In the first six months after the memo was issued, Chen, Yates and DOJ Fraud Unit Chief Andrew Weissmann all seriously stressed that the new "norm" will place individual employee liability at the forefront of all future white collar investigations and prosecutions. While six months is a relatively short period to measure the impact of the Yates Memo, corporate compliance plans and practices have already changed (or should have by now), and the Yates Memo will continue to have a far-reaching impact in the human resources context regardless of the size of the business that is subject to a white collar enforcement action. This is because the DOJ has definitively stated that it will likely always attempt to hold an individual employee liable in each white collar investigation or prosecution that is initiated.

Background and Key Policy Changes

The Yates Memo is the latest in a series of memoranda outlining DOJ policy that governs investigations and prosecutions of corporate crimes and is a result of the government's efforts to develop uniform prosecution standards in the white collar context. The Holder Memo was issued in 1999 after defense attorneys complained that federal prosecutors were indicting corporations in a nonuniform manner. The Thompson Memo modified the Holder Memo in 2003, the McNulty Memo followed in 2006, and the Filip Memo further refined the DOJ's position on white collar prosecutions of this type in 2008. These evolving policy statements reflect the difficulty that the DOJ has encountered in drafting a practical prosecutorial guide that yields desirable outcomes in government white collar investigations and prosecutions. After the media heavily criticized the DOJ for failing to focus on individual accountability in the wake of the housing crisis, the DOJ published the Yates Memo and used the opportunity to outline six "key steps" that DOJ prosecutors and civil litigators must now follow to "fully leverage its resources to identify culpable individuals at all levels in corporate cases."[1] The steps are as follows:

1. In order to qualify for any cooperation credit, corporations must provide to the DOJ all relevant facts about the individuals involved in the corporate misconduct;
2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
3. Criminal and civil attorneys handling corpo-

rate investigations should be in routine communication with one another;

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals;
5. Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized; and
6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

Yates, who authored the Yates Memo, expounded on each of these steps in a speech made at New York University shortly after the memo was issued.[2] Her comments provide key guidance that employers should consider when implementing policies to comply with this new policy shift and are explored below:

1. **You [don't] have the right to remain silent.** Yates noted that the first step (which requires full disclosure) was designed to create an all-or-nothing scenario that eliminates the piecemeal disclosure responses that prosecutors regularly encounter when prosecuting corporate crimes. When prosecuting corporate wrongdoing, the duty of full disclosure applies to both civil and criminal investigations—any potentially culpable employee must be disclosed to the DOJ, along with non-privileged evidence and all material facts about that employee's involvement. Yates pointed out that this disclosure requirement places companies on notice that they must conduct their own internal investigation to evaluate their own employees, and that they cannot simply step back and let the DOJ take the investigatory lead when corporate investigations and enforcement actions are initiated. "If the [companies under investigation] don't know who is responsible, they will need to find out," she said. "If they want any cooperation credit, they will need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals." Yates also explained that all settlement agreements going forward will include a "continued cooperation" provision, requiring the corporate entity to continue to provide relevant information about potentially culpable employees to the government even after the investigation is closed and a settlement agreement is signed. In essence, the Yates Memo will likely create an environment where employers act as a *de facto* police agency for the federal government.
2. **There is no get-out-of-jail-free card.** As to the second through fourth key steps, Yates explained that civil and criminal investigations will be conducted side by side; the government will no longer delay criminal investigations until a civil investigation is resolved. More importantly, the focus on establishing individual employee criminal intent will begin immediately with a civil investigation so that evidence does not become stale or obsolete by virtue of applicable statutes of limitations. To achieve these goals, the DOJ will now require the approval of the U.S. attorney or assistant U.S. attorney *before* a prosecutor releases any individual employee from liability for corporate crime. But a release from liability simply will not be a given under the new policy. Rather, prosecutors must fully justify their decision not to prosecute to the satisfaction of the approving authority with considerations given to these new policy objectives. Hence, any release of an individual employee as part of a corporate settlement under the Yates Memo will be the rare exception to the rule.
3. **If it doesn't make dollars, it still makes sense.** Critically, even in circumstances where individual employees are judgment-proof, the DOJ may still pursue civil enforcement actions in tandem with criminal prosecutions. The government's aim in this regard is to establish a deterrent to employee criminal and/or fraudulent conduct, even when a civil case will not yield actual dollar damages paid to the government. Again, the point is that the government will use every combination of enforcement authority to prosecute employees who act as decision-makers in criminal wrongdoing.

Properly managed internal communications will be key to ensure that whistle-blowers are protected from even the appearance of retaliation. Human resource managers must therefore understand how to handle full investigations that yield results that meet the DOJ's standards for "full cooperation."

Practical Workplace Implications

The policy statements outlined in the Yates Memo generate numerous questions that employers and human resource managers must resolve. Step one requires employers to disclose all non-privileged information about all culpable employees or risk total loss of cooperation credit. Several questions flow from this mandate, namely: How should employers determine when an employee is sufficiently culpable to warrant disclosing to the DOJ that the individual is reasonably suspected of criminal wrongdoing? Should employers simply accept the DOJ's position on culpability, and is there any ability to defend and protect employees that a company reasonably believes are not culpable, even when the DOJ suspects they are liable for criminal wrongdoing? If a company does identify employees that it reasonably and legitimately believes are not culpable for criminal wrongdoing, will that company risk losing the benefits of cooperation credit? Lastly, what happens after a criminal investigation is complete? Will the employer risk liability if it discloses information about an employee but the DOJ declines to initiate an investigation and/or charge that individual with a crime?

These substantive questions run parallel to the wide-reaching scope of the government's new policy initiatives. Simply stated, size does not matter. Rather, the new initiatives in the Yates Memo expose smaller companies and less wealthy individuals to DOJ pros-

ecution. The DOJ's decision to press charges and bring civil claims regardless of the size of the business brings greater risk to small companies and low-level employees. An individual employee's inability to pay fines and penalties will not preclude DOJ attention; smaller players simply will not escape scrutiny based on size.

As stated above, the DOJ recently enlisted Hui Chen, a compliance expert, to assist its prosecutors in determining whether a corporate compliance plan is simply a "paper program" or a "real program." Chen promised in a recent interview to use her practical experience in compliance to assist prosecutors in determining whether a corporation's compliance plan is thoughtful and committed. "My experiences in both roles help me in translating the challenges, in helping the prosecutors contextualize the compliance piece more concretely so that it not only more fully informs how they evaluate resolutions, but also how they approach investigations," she said. "Many times, that can lead to a more exacting probe into what companies are telling the Justice Department about compliance. But it can also lead to concurrence with the approach a thoughtful and committed company has taken to compliance." Critically, Chen indicated that "a focus on individual accountability is a positive development for those who want to prevent and detect misconduct in corporations."[3]

Chen's perspective reasonably suggests that human resources should anticipate that the DOJ will soon begin reviewing corporate compliance plans with scrutiny. There will likely be a longer and more in-depth investigation of various corporate compliance plans, involving more DOJ analysis at every level of a company. Heightened compliance is a must, as corporations can and should presume that any future DOJ investigation will focus on poking holes in a company's plan, both as-written and as-applied.

However, a well-crafted and executed compliance plan is not enough. The written documents will simply serve as a roadmap for further DOJ investigation and will likely be used as a checklist of interviewees and document requests when the DOJ inquires as to the compliance plan's effectiveness at all levels of the corporate hierarchy. Thus, corporations must now require greater engagement and knowledge about the attitudes and feelings held by employees at nonmanagement levels. Human resource managers should pay close attention to disgruntled employees. Because the DOJ is actively seeking individual employees to hold liable, any unhappy employee can conceivably direct the DOJ's attention to a manager with whom he or she is aggrieved. This is why human resources functions concerning this particular aspect of employee relations have never been so important as in this post-Yates Memo climate.

For example, the DOJ will likely focus on whistle-blower activity and any corporate activity that may arguably chill employees' active participation in DOJ (and internal) investigations to root out fraud. Companies' whistle-blower protections and policies will be particularly under the microscope. Corporations should ensure that their employees understand how to report fraud and should handle fraud investigations with great care to avoid any appearance of retaliation. In so doing, they should consider engaging their compliance and human resources departments to ensure a consistent approach. Meanwhile, because companies are now required to perform a full investigation and turn over information to the DOJ on any potentially culpable individual employees, such employees are probably going to be less likely to want to cooperate in these investigations, fearing DOJ attention on themselves. This change places the company in a precarious position. Although businesses will be required to fully investigate corporate wrongdoing, they may be unable to provide employees with an incentive to cooperate in such investigations.

The Final Frontier: Developing an Internal Investigation

The Yates Memo will almost certainly increase the number of civil and criminal cases brought against individual employees. These types of cases will likely be initiated more rapidly to avoid statute of limitations issues. DOJ investigations will likely be longer and more in-depth, and civil investigations will almost certainly be used to gather information for later criminal inquiries. Accordingly, internal investigations of misconduct must be conducted with an eye toward potential future DOJ involvement and discovery. The depth and scope of these internal investigations will likely impact attorney-client privilege and attorney-work-product immunity even though the exact impact of the Yates Memo on these privilege doctrines is unclear. Properly managed internal communications will be key to ensure that whistle-blowers are protected from even the appearance of retaliation. Human resource managers must therefore understand how to handle full investigations that yield results that meet the DOJ's standards for "full cooperation." However, information about internal investigations also needs to be limited in its dissemination, both to carefully preserve any discovery privileges that may apply and because the DOJ is essentially making an employer adverse to its own employees. The more employees know, the more they can use against the company if they are later the subject of an individual inquiry and want to shift the blame.

A November 2015 speech by Assistant Attorney General Leslie Caldwell gives additional clues to the future of investigations of corporate misconduct. Caldwell, head of the DOJ's Criminal Division, described a bank that recently proffered a guilty plea and "many millions of dollars in fines" when the DOJ discovered collusion to manipulate foreign exchange markets. Caldwell noted that the bank's compliance plan failed to "consider obvious risks" because the market at issue "was largely unregulated by the [U.S. Securities and Exchange Commission] or [U.S. Commodity Futures Trading Commission]."[4] Hence, the DOJ's new focus will continue to be broad in scope, and companies must address compliance issues with the understanding that old risk assessments based on prior regulatory attention may no longer apply.

As to which industries will be targeted—it seems that prosecutorial attention will be spread widest across all sectors of industry. Chen indicated that she has already worked on cases involving health care, oil and gas, retail, manufacturing, beverages, banking, telecom, and airlines.[5] Hence, although the Yates Memo was perhaps precipitated by bankers' behavior, it is not only banks that will feel the heat of the DOJ's attention.

Striking the Balance

The DOJ has taken on the goal of eliminating corporate crime and fraud by creating an environment where such conduct leads to an extremely undesirable outcome, both for employers and individual employees alike. Corporations that operate ethically would agree that fraud prevention is a primary goal. But an equally important goal is establishing that the company has developed a corporate culture of fraud prevention, with as little expense and DOJ intervention as possible. Businesses must have policies, procedures, insurance coverage, audits, and compliance initiatives in place and running

smoothly to ensure that employees can report deviations from these protective measures without fear of reprisal. At the same time, a corporation must recall that policies that incentivize "witch-hunting" and lengthy investigations of petty misdeeds will likely detract from the company's ultimate goals and ruin morale, thereby leading to employee disloyalty, turnover costs, unwanted paper trails, data storage issues, and wasted resources. So the issue is how business can cultivate employee loyalty and trust, while eliminating fraud and the temptation to commit fraud in this new climate. A few practical steps are outlined below:

1. **Institute broader compliance measures.** Compliance is key in creating a corporate environment that eliminates fraud and also reduces the scope and length of any potential future DOJ investigation. The DOJ's addition of a compliance expert whose role is to "reality check" compliance plans is instructive. Companies should assume that their compliance plans will be subject to Chen's protocol and draft them accordingly. When determining what the plan should cover, a company should consider the laundry list of federal regulations that may be implicated in their particular business, including the Foreign Corrupt Practices Act,[6] the False Claims Act, and the Affordable Care Act (and its myriad reporting requirements), as well as regulations issued by other administrative agencies such as the Environmental Protection Agency, the Occupational Safety and Health Administration, the Food and Drug Administration, the Federal Housing Authority, the Securities and Exchange Commission, the Department of Labor, and others. Remember also, however, that compliance must go beyond regulated conduct. Companies must not presume that there are safe harbors for areas of corporate conduct that are beyond agency regulations. Finally, because of Chen's experience in corporate compliance programs, she will likely focus on pinpointing potential areas of deviation in practice from the written plan. Employers should make sure that the written plan reflects reality and will stand up to thorough auditing.
2. **Check insurance coverage and whistle-blower reporting.** Companies should look into their employment practices liability insurance to make sure that proper coverage is in place. Businesses should understand coverages and exclusions and should anticipate how the Yates Memo and any investigation could impact premiums, claims, and payments. Further, companies should understand the interplay between the Yates Memo's emphasis on individual disclosure, as well as any local or federal whistle-blower protection laws. If a whistle-blower becomes subject to criminal or civil investigation, that change in status may impact the coverage available for defense costs and/or liability.
3. **Think about conflicts of interest between the company and employees.** The Yates Memo instructs government lawyers to focus, from the beginning of the investigation, on civil and criminal liability for individual employees. This focus sets the employee and business at odds with one another because each party will likely have antagonistic defenses. Corporate counsel's provision of conflict waivers and Upjohn warnings remain important tools in protecting attorney-client privilege and also cooperation credit. However, given the earlier focus on individual culpability, the point at which an employee should have his or her own counsel should be clearly defined.
4. **Make sure stakeholders are informed and engaged.** Finally, corporate managers must protect stakeholders by ensuring that they have the tools they need to comply. Businesses should conduct training, communicate regularly, and make sure that employees, officers, directors, and any other stakeholders have a full understanding of their personal stake in instances of misconduct. Finally, managers should ensure that evidence of their full cooperation and engagement with stakeholders is readily available—doing so will protect both individuals and the company.

Final Note

News headlines concerning corporate prosecutors will likely be forthcoming in light of the new Yates Memo policy changes. Still, corporate compliance can be achieved, fraud prevention can be successful, and companies and employees can survive this shift in DOJ policy. Planning, engagement, and commitment are the essential factors that must be embraced to succeed in the post-Yates Memo era. ⊙

Endnotes

[1]Sally Quillan Yates, Memorandum Re: Individual Accountability for Corporate Wrongdoing, (Sept. 9, 2015), *available at* www.justice.gov/dag/file/769036/download.

[2]Deputy Attorney General Sally Quillian Yates, Speech at New York University School of Law (Sept. 10, 2015), *available at* www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

[3]Laura Jacobus, *DOJ's Andrew Weissmann and Hui Chen Talk Corporate Compliance in Exclusive Interview, Ethics & Compliance Initiative* (Feb. 1, 2016), *available at* www.ethics.org/blogs/laura-jacobus/2016/02/01/doj-interview.

[4]Assistant Attorney General Leslie R. Caldwell, Speech at SIFMA Compliance and Legal Society New York Regional Seminar (Nov. 2, 2015), *available at* www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-sifma-compliance-and-legal/society

[5]*See supra* note 3.

[6]During her interview, Chen announced that she would not focus solely on Foreign Corrupt Practices Act claims, but also look at all programs designed to detect and prevent misconduct, "whether that misconduct is corruption or something else." *See supra* note 3.