

The Impact of the Yates Memo: Government Investigations are Getting Personal

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A recent memorandum authored by Deputy Attorney General of the United States, Sally Quillian Yates, marks a significant change in the government's attitude toward corporate fraud.

Now known as the Yates Memo, the document entitled "Individual Accountability for Corporate Wrongdoing" was addressed to all law enforcement functions within the Department of Justice (DOJ) including the FBI and attorneys across the United States.

Memos to **all** federal prosecutors, issued from the Attorney General or Deputy Attorney General, signal significant policy changes. As federal law enforcement personnel across the country discuss the implementation of the Yates Memo, private counsel and their clients are advised to take stock of its impact and prepare accordingly for major shifts in prosecutorial strategy and priorities.

In effect, corporate fraud investigations are about to get personal. The prosecution of **individuals** within the corporations will be a priority.

Historically, corporations involved in governmental investigations attempted to mitigate exposure and avoid criminal prosecution by cooperating with investigators. However, those "cooperative" efforts were typically murky and ambiguous, as related to the roles of the individuals whose decisions and actions led to the investigation.

Fraud investigations of large corporations were most frequently resolved by large monetary settlements. Few prosecutions against individual corporate officers or employees were ever initiated.

Under the Yates Memo, eligibility for **any** cooperation credit requires that the corporation provide the DOJ with **all** relevant facts about individuals involved in the corporate misconduct.

Prosecutors may no longer permit corporations to determine what information about which employees will be shared. The Yates Memo requires that corporations identify all individuals and relevant facts relating to the alleged misconduct under investigation, regardless of the individual's position, status or seniority.

Cooperation credit is now tied to a robust initiative to provide thorough and complete information to federal prosecutors concerning any alleged misconduct — in effect, a blueprint for prosecution of the individuals identified.

Of course, it is possible that even a diligent internal investigation may fail to produce all relevant information, and may, thus, adversely impact a corporation's ability to receive cooperation credit. This concern, however, can be addressed as follows:

1. Engage independent counsel with experience in conducting internal investigations into allegations of corporate fraud;
2. Open and maintain the lines of communication between counsel for the corporation and the investigating entity, because prosecutors are less likely to penalize a corporation for missed information if they believe its efforts are in good faith;
3. Work with prosecutors to identify the parameters of the alleged misconduct and the investigation so that the corporation's internal efforts are efficient, targeted and responsive.

Even if the matter against the corporation is resolved through a non-prosecutorial agreement and corporate-level fine, the corporation should still expect provisions mandating continued cooperation, including cooperation relating to the prosecution of individuals who are allegedly responsible.

The Yates Memo instructs prosecutors to take a bottom-up approach to corporate fraud cases. This represents a paradigm shift in the way these cases are investigated, drawing on a model more frequently used against organized crime.

This shift in strategy by the DOJ is designed to “maximize its ability to ferret out the full extent of corporate misconduct” and “increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation” to maximize the DOJ's ability to bring civil and criminal charges.

Thus, corporations may now find that federal investigations require more effort from their employees and corporate counsel. Corporations may also find themselves in the position of hiring separate, independent counsel for individual employees — most likely at corporate expense.

The Yates Memo suggests that corporations and counsel should expect that charges will be brought or threatened against lower-level employees in an effort to obtain testimony in exchange for leniency, allowing the prosecutions to eventually reach top decision-makers in the executive suites.

The DOJ must preserve its ability to pursue individuals when closing a corporate investigation. It will no longer permit a corporation to shield its employees from prosecution by entering into a global settlement:

Absent extraordinary circumstances, no corporate resolution will provide protection from criminal and civil liability for any individuals.

— Sally Quillian Yates, “Individual Accountability for Corporate Wrongdoing” (Section 4)

The days of corporate fraud cases being resolved through large monetary settlements using corporate funds are over. In the absence of extraordinary circumstances, future corporate fraud investigations will be accompanied by a string of criminal charges against employees, officers and directors, and those charges will not be dismissed as part of any corporate resolution with the government.

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