

For the Real Impact of the Yates Memo, Look to the Heartland

By: Timothy Q. Purdon and Brendan V. Johnson, Corporate Counsel
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Internal and government investigations are about to get personal. The U.S. Department of Justice, through Deputy Attorney General Sally Yates, recently issued guidance to all federal prosecutors making it clear that prosecuting corporate fraud, and prosecuting responsible individuals, is a top priority for new Attorney General Loretta Lynch. Analysis of the Yates Memo to date has focused primarily on the impact it will have in U.S. attorney's offices that historically have handled the largest white collar cases, leading many to conclude that it is really much ado about nothing, and it is just business as usual. What has been missed, however, is the significant impact it will have on companies located outside New York and California. In this article by two former U.S. attorneys who served with Sally Yates and Loretta Lynch, we focus on the memo's disproportionate impact on prosecutions brought in midsize and small districts, and discuss what that means for companies and business executives located in America's heartland.

Why the Yates Memo Matters

Federal prosecutors pay close attention whenever a memo is issued from the attorney general or the deputy attorney general because it does not happen regularly and often signals a significant policy change. The memo's importance is underscored since it was sent to *all* federal prosecutors. U.S. attorneys from Minnesota to Maine will soon be sitting down with their offices and discussing its key points and how the priorities of DOJ leadership will be implemented.

The memo carries increased importance in federal districts that do not handle the same volume of white collar cases. This is because federal offices with less relevant experience often rely on expertise from attorneys at Main Justice in Washington, DC, and are often more inclined to accept guidance on the best way to handle their more limited caseload of white collar crimes. The following is our analysis of the memo's important principles and how we anticipate they will be interpreted by current U.S. attorneys and others, and particularly in federal districts outside New York and California.

1. Identify the individuals.

"To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals in corporate misconduct."

Corporations are encouraged to cooperate with government investigations because cooperation can be a mitigating factor when assessing penalties. The extent of that mitigation depends on many factors, including timeliness of cooperation, the manner of the internal investigation, the proactive nature of the cooperation, etc.

The message that federal prosecutors are likely to glean from this principle is that cooperation credit is all or nothing. Corporations cannot choose what information to reveal with the hope of sheltering key employees. Corporations must identify all individuals involved in the misconduct under investigation, regardless of position, status or seniority. Plus, corporations must also identify all facts relating to the misconduct. A corporation seeking credit must take initiative to learn such information and provide prosecutors complete facts.

One concern for corporations, however, is that they may undertake a painstaking internal investigation and inadvertently miss information that will adversely impact their ability to receive credit for conducting the internal investigation in the first place. This should be of particular concern for businesses located in federal districts with fewer white collar cases because less experienced prosecutors could rigidly interpret this provision. This concern can be addressed as follows: (1) engage an outside entity with experience in corporate fraud to conduct an independent investigation that can help ensure key evidence is located; (2) develop open lines of communication with the investigating entity, since in our experience, prosecutors are less likely to penalize a corporation for missing information if convinced that the corporation is acting in good faith; and (3) establish the parameters of both the internal and governmental investigation, since parameters will help ensure that relevant facts are provided.

Finally, even if the government resolves the matter with the corporation, prosecutors must ensure that any resolution explicitly provides for continued corporate cooperation regarding individuals, with consequences for a corporation's failure to do so.

2. Focus on individuals from the beginning.

“Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.”

Federal cases are often built from the bottom up, and the Yates Memo instructs prosecutors to take this approach with corporate fraud cases. This may be an important paradigm shift for some U.S. Attorney Offices with less experience handling these cases. In practice, corporations may now find that a federal investigation requires more of their employees, necessitates the hiring of counsel and leads to more charges being brought against lower-level employees in an effort to reach top decision-makers.

The Department believes that this initiative will “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,” all to maximize the potential for bringing civil and criminal charges.

3. The corporation cannot protect its people.

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

As discussed above, generally the Department builds its cases from the ground up. Companies cannot shield their employees from liability by negotiating a resolution for the company. In fact, the Department must specifically preserve its ability to pursue individuals when closing a corporate investigation, absent extraordinary circumstances. Many future fraud investigations may now be accompanied by a string of charges against employees, and those charges will not be dismissed as part of a global settlement with the company.

4. There will be no consideration of an individual’s ability to pay when DOJ considers charges.

“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.”

One reason that some prosecutors refrain from pursuing large fines against individuals is that they believe that it does not make sense to hold someone accountable for a fine they are unable to pay. The Yates Memo clarifies that large fines imposed against employees can be a significant deterrent and should be pursued, even if the chances of full collection are remote. This principle should raise red flags in C-Suites: the government is not just looking at the company for penalties, but also at employees.

The Yates Memo represents a meaningful step by the Department to address the criticism faced after the 2008 financial crisis that not enough individual wrongdoers faced prosecution. Its impact on corporations facing government investigations is likely to be significant. Corporations will be pressured to produce information early and consistently throughout the investigation to be eligible for credit. The risk for key corporate executives for liability is heightened now that consideration of an individual’s ability to pay is only one of many factors.