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Companies must weigh impact of Yates Memo when responding to alleged misconduct

One of the most difficult decisions that a company must make when it discovers misconduct is whether to disclose it to the government in the hopes of receiving credit for cooperation. The decision just got a little more complicated by virtue of a recent announcement by the U.S. Department of Justice (DOJ). Now, to receive credit for cooperation, a company must not only disclose the misconduct, but it must also name the specific employees who were responsible. If the company fails to do so, it will receive *zero* credit for the cooperation.

Deputy Attorney General Sally Quillian Yates outlined the new policy in a memorandum addressed to high-level DOJ officials and U.S. Attorneys across the country. The document—now known as the “Yates Memo”—certainly got the attention of in-house lawyers and corporate executives, as newspapers across the country featured stories about it.

On the surface, the Yates Memo is not a radical departure from previous DOJ policy. DOJ has long stressed the importance of companies supplying as much information as they can about individual wrongdoing when cooperating with a government investigation. The “all or nothing” approach, however, is new. Under the Yates Memo, if a company “declines to learn” facts about culpable individuals, or learns that information and does not provide it to the government, the company will not receive *any* credit for cooperating.

Stung from criticism that it did not do enough to prosecute individuals who contributed to the financial crisis, DOJ attempts to correct that perceived imbalance in the Yates Memo. DOJ sets forth six guiding principles in the memo for its investigation and prosecution of individuals responsible for corporate misconduct:

1. Companies must provide “all relevant facts” about specific individuals involved in corporate misconduct to receive *any* credit for cooperation.
2. Government investigations should focus on individuals from the outset.
3. Criminal and civil prosecutors should be “in routine communication with one another” about the liability of individual wrongdoers.
4. An agreed resolution with the government will not protect individuals from liability “absent extraordinary circumstances.”
5. Prosecutors cannot resolve cases against companies without a “clear plan” also to resolve cases against culpable individuals, or a written explanation to their superiors for why individual charges will not be pursued.
6. Civil attorneys for DOJ also should focus on cases against individuals and make decisions regarding which cases to bring based on factors beyond an individual’s ability to pay.

The Yates Memo raises a host of thorny questions for companies when responding to alleged wrongdoing, such as:

- If companies have discovered wrongdoing, but are concerned that they may not have sufficiently identified the culpable actors, will they balk at disclosing the wrongdoing to the government for fear that they will not receive any credit for doing so?
- Will companies find it more difficult to secure cooperation from their own employees during internal investigations?
- How should in-house counsel effectively serve the best interests of the company while maintaining working relationships with senior executives whose conduct may be under scrutiny?
- How will DOJ balance this new pronouncement with its previously expressed policy not to force companies to disclose privileged information as a condition of cooperation?
- How does the new policy apply to individuals who had no knowledge of the wrongdoing but may be culpable under the responsible corporate officer doctrine? (i.e., so called “Park liability” under *United States v. Park*, 421 U.S. 658 (1975), and its progeny).
- How do the criminal grand jury secrecy rules affect the directive that criminal and civil prosecutors should “routinely” communicate with each other?
- Will companies find it more difficult and time-consuming to reach a global resolution with DOJ?

Whatever the long-term repercussions of the Yates Memo for DOJ enforcement, there are immediate consequences for companies responding to alleged misconduct. If companies want to get any credit for disclosing wrongdoing to the government, it is not enough simply to determine what happened and to make sure it does not happen again. Companies also must focus on who was responsible. While this has always been an important aspect of any thorough internal investigation, the Yates Memo certainly gives the determination of individual culpability renewed emphasis.

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