



DOJ Eases Requirement for Obtaining Cooperation Credit in False Claims Act Cases

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In September 2015, then-Deputy Attorney General (DAG) Sally Q. Yates announced, in a memorandum (the “Yates Memo”), that the Department of Justice (DOJ) would place greater emphasis on pursuing individuals for corporate misdeeds.¹ The Yates Memo set forth six principles aimed at strengthening DOJ’s pursuit of individual corporate wrongdoing in both criminal and civil enforcement actions.

Of these six principles, the most consequential was the requirement that “in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct.”² The Yates Memo specified that, in order to receive *any* credit or leniency for cooperating with DOJ, “the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct.”³ The Yates Memo further provided that these requirements would apply equally in both criminal and civil matters, such as False Claims Act (FCA) investigations.⁴

On November 29, 2018, in remarks delivered at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act in Oxen Hill, Maryland, the current DAG, Rod J. Rosenstein, announced a revision to the Yates Memo’s “all or nothing” requirement for obtaining cooperation credit in civil enforcement matters, including FCA cases⁵. While noting that DOJ still “want[s] to focus on the individuals who play significant roles in setting a company on a course of criminal conduct”—including the names of individuals who authorized the alleged misconduct, and the extent of their knowledge—Mr. Rosenstein acknowledged that “[c]ivil cases are different.”⁶ Citing to the experiences of civil DOJ attorneys operating under the Yates Memo’s “all or nothing” approach to cooperation credit, the DAG further stated that in civil enforcement actions—where the “primary goal” is to recover money and criminal liability is not at stake—“our attorneys need flexibility to accept settlements that remedy the harm and deter future violations, so they can move on to other important cases.”⁷

For these reasons, per Mr. Rosenstein, DOJ has now revised its cooperation credit policy to allow for some discretion by civil attorneys conducting enforcement actions. The following are the key takeaways:

- In order to earn *any* cooperation credit, the company must still identify all wrongdoing by any member of the company’s senior management or board of directors;
- “Maximum” or “full” credit—such as that available under the Yates Memo—is still available to those companies that identify *every* individual person who was substantially involved in

1 Memorandum from Sally Quillian Yates, Deputy Attorney General, DOJ, “Individual Accountability for Corporate Wrongdoing” (Sept. 9, 2015), available at <https://www.justice.gov/archives/dag/file/769036/download>.

2 *Id.* (emphasis added).

3 *Id.*

4 *Id.* (stating that “the Department’s position on ‘full cooperation’ under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided”).

5 DOJ Press Release, “Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act” (Nov. 29, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.

6 *Id.*

7 *Id.*

or responsible for the alleged misconduct;

- When a company “meaningfully assists” in the government’s investigation, DOJ civil attorneys now have discretion to offer some credit, even if the company does not qualify for “maximum” credit;
 - Using FCA cases as an example, Mr. Rosenstein noted that in such cases, a company could receive *some credit*—as opposed to full credit—for making a voluntary disclosure and providing meaningful assistance, even if the company is unwilling or unable to conduct a full investigation into every individual who, in theory, may face civil liability;
- With supervisory approval, DOJ civil attorneys are permitted to negotiate civil releases for individuals who do not warrant additional investigation in corporate civil settlement agreements;
- Civil attorneys may (still) take into account an individual’s ability to pay in determining whether to pursue a civil judgment, and the Department “generally do[es] not want attorneys to spend time pursuing civil litigation that is unlikely to yield any benefit; not while other worthy cases are competing for our attention.”⁸

Mr. Rosenstein’s revisions to the Yates Memo follow a long line of directives from prior Deputy Attorneys General seeking a fair balance between corporate and individual liability, as well as the requirements for those companies seeking cooperation credit. For more information about the Yates Memo and its predecessors, please review our [2015 article](#) on the subject.

⁸ *Id.*

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