



## The Yates Memo – A Warning to Execs and Employees: Effects of Expanding the DOJ’s Efforts to Combat Corporate Wrongdoing and Hold Individuals Accountable

Jason E. Bring, Sara M. Lord and Sean T. Sullivan

“The buck needs to stop somewhere where corporate misconduct is concerned,” said Attorney General Eric Holder in a September 17, 2014 speech to NYU School of Law.<sup>1</sup> He went on to say that “corporations are structured to blur lines of authority and prevent responsibility for individual business decisions from residing with a single person.”<sup>2</sup> The same day, Principal Deputy Assistant Attorney General for the Criminal Division Marshall Miller told the Global Investigation Review Program that “corporations do not act criminally, but for the actions of individuals. The Criminal Division intends to prosecute those individuals, whether they’re sitting on a sales desk or in a corporate suite.”<sup>3</sup>

Last month, these warnings were solidified as Department of Justice policy with the publication of Deputy Attorney General Sally Yates’ Memorandum, “Individual Accountability for Corporate Wrongdoing.” The Yates Memo, which is addressed to DOJ attorneys and the FBI, requires the Department to “*fully leverage its resources to identify culpable individuals at all levels in corporate cases,*” (emphasis added), and outlines “six key steps to strengthen our pursuit of individual corporate wrongdoing,” including:

1. To be eligible for *any* cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.
2. Both criminal and civil investigators should focus on individuals from the inception of the investigation.
3. Criminal and civil attorneys handling corporate 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.
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.<sup>4</sup>

Yates followed the announcement of the memo with a speech the next day, in which she commented that “corporate misconduct isn’t all that different from everything else DOJ investigates and prosecutes. Crime is crime. And it is our obligation at the Justice Department to ensure that we are holding lawbreakers accountable regardless of whether they commit their crimes on the street corner or in the boardroom.”<sup>5</sup>

Inevitably, the Yates Memo has been widely publicized and discussed since it was promulgated on

1 <http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>.

2 *Id.*

3 <http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller>.

4 <http://www.justice.gov/dag/file/769036/download>.

5 <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.

September 9, 2015. It is becoming increasingly clear, however, that the memo raises more questions than it answers – and that answering these questions will pose difficult choices, not only for companies and their employees, but also for the government.

In fact, the Yates Memo constitutes a further development in the DOJ's longstanding efforts to apply principles of federal prosecution in cases involving corporate wrongdoing. While the Yates Memo focuses on *individual accountability* for corporate wrongdoing, it follows a series of memos by previous Deputy Attorneys General (DAG) clarifying when and whether to require *corporate accountability* based on individual wrongdoing. The Holder Memo (1999); the Thompson Memo (2003); the McNulty Memo (2006) and the Filip Memo (2008), all, have outlined the various factors to be considered in deciding whether to charge a corporation based on the acts of its agents, or individual employees. These factors have always included the nature and extent of the corporation's cooperation in the investigation, *including its willingness to cooperate in the investigation of its agents and individual employees*.

Of the various evolving factors to be considered in deciding whether to charge a corporation, the requirement of cooperation, *specifically with respect to cooperating in the investigation of individual employees*, has proved the most challenging to apply. The 2008 Filip Memorandum, which for the first time required the Principles of Federal Prosecution of Business Organizations to be included in the U.S. Attorneys Manual, contains six sections outlining the requirements for corporate cooperation, including with respect to individual employees.

Within this history, the Yates Memo both shifts and expands upon the cooperation a company must now provide to qualify for DOJ consideration in several respects, all of which should concern companies/employers.

First, and perhaps most importantly, while the previous DAGs' memos focused on the role of cooperation in deciding whether to bring criminal charges, *the Yates Memo extends and applies the requirement to civil cases* as well. The effects of this shift on civil damages and individual liability in corporate cases under the False Claims Act (FCA) are likely to be significant.

Second, the memo highlights the emphasis on individual accountability in corporate civil cases with specific instructions that DOJ attorneys focus on individuals from inception of the investigation – and the requirement that the corporate investigation may not be resolved without a plan to resolve the related individual cases.

Third, no credit will be given unless the company provides *all* relevant facts about the individuals' misconduct. Since the DOJ determines what constitutes "all" the facts, what is "relevant" to the investigation, who the individuals are who committed the misconduct, and what the "misconduct" entails, companies will be forced, more than previously, to navigate between their corporate interests and their responsibilities toward their employees.

Fourth, while cooperation in criminal cases means reduced sentences under the Sentencing Guidelines, cooperation in civil cases means reduced damages, typically in the form of a lower multiplier. Companies that do not (or cannot) satisfy the DOJ's demands for all relevant information about their individual employees will not receive any credit (*i.e.*, a reduced multiplier) against their FCA damages. The specter of treble damages, where the company would otherwise settle the case, is likely, however, to affect and impede settlements in the long-term.

Fifth, since the Federal Principles of Prosecution also apply to individuals, the same incentives to cooperate are present for companies and individual employees both. This not only affects the company's ability to operate during an investigation, it also affects the company's ability to cooperate with the investigation. In particular, it heightens the difficulty and increases the risks of communications between corporate employees and legal counsel. Among the issues companies (and their counsel) will have to consider are whether *Upjohn* warnings must be given even where the employee is merely collecting information or turning over records; whether counsel should be made available to all employees once the company learns of the investigation; the extent to which the company should disclose the investigation to its employees, etc.

The above list is not exhaustive and the full range of the memo's consequences cannot be predicted. Whether the

Yates Memo is a game changer or the concrete expression of practices evolving over the last several years, the DOJ's intended message is loud and clear: where there is a basis for doing so, individuals will be held liable for the bad acts of the company, regardless and independent of any disposition reached with the company.

The difficulties in holding individuals responsible for the company's conduct, where, as former AG Eric Holder remarked a year ago, "responsibility remains so diffuse, and top executives so insulated, that any misconduct could again be considered more a symptom of the institution's culture than a result of the willful actions of any single individual," remain.<sup>6</sup> Even in the DOJ's \$900 million settlement with GM, announced the same week as the release of the Yates Memo, the US Attorney acknowledged the difficulty of finding evidence of individual criminal intent, saying that "a particular person may have had only partial knowledge, and contributed in a chain of actions."

However, the Yates Memo makes it clear that the DOJ has made surmounting these difficulties a priority.

---

<sup>6</sup> <http://www.nytimes.com/2015/09/22/business/dealbook/many-messages-in-the-gm-settlement.html>.

## Authors and Contributors

---

**Jason E. Bring**

Partner, Atlanta Office  
404.873.8162  
jason.bring@agg.com

**Sara M. Lord**

Partner, DC Office  
202.677.4054  
sara.lord@agg.com

**Sean T. Sullivan**

Associate, Atlanta Office  
404.873.8510  
sean.sullivan@agg.com

not *if*, but *how*.<sup>®</sup>

## About Arnall Golden Gregory LLP

---

Arnall Golden Gregory, a law firm with more than 150 attorneys in Atlanta and Washington, DC, employs a “business sensibility” approach, developing a deep understanding of each client’s industry and situation in order to find a customized, cost-sensitive solution, and then continuing to help them stay one step ahead. Selected for The National Law Journal’s prestigious 2013 Midsize Hot List, the firm offers corporate, litigation and regulatory services for numerous industries, including healthcare, life sciences, global logistics and transportation, real estate, food distribution, financial services, franchising, consumer products and services, information services, energy and manufacturing. AGG subscribes to the belief “not if, but how.” Visit [www.agg.com](http://www.agg.com).

**Atlanta Office**

171 17th Street, NW  
Suite 2100  
Atlanta, GA 30363

**Washington, DC Office**

1775 Pennsylvania Avenue, NW  
Suite 1000  
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: <http://www.agg.com/subscribe/>

©2015. Arnall Golden Gregory LLP. This legal insight provides a general summary of recent legal developments. It is not intended to be, and should not be relied upon as, legal advice. Under professional rules, this communication may be considered advertising material.