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# WHITE COLLAR REFORM

## The U.S. Department of Justice's All-or-Nothing Proposition for Corporations Under Fire

by Patrick J. Preston

### **A NEW BOUNTY HAS BEEN PLACED on the heads of wayward executives and corporate professionals.**

The bounty consists of the U.S. Department of Justice's (DOJ) offer of "cooperation credit" to a company under investigation, but strictly conditioned on the company's willingness to give up its own, regardless of their position, for their misconduct. Compliance officers, in-house counsel, and outside counsel conducting internal investigations now may be asked to play the role of bounty hunter, effectively functioning as DOJ's deputies to ferret out white-collar fraudsters. The stakes for companies under federal investigation could not be higher. Cooperation credit may mean the difference between a company avoiding prosecution in favor of civil fines or penalties, having the opportunity to settle a federal investigation quickly and with less reputational fallout, or staying in business under a deferred prosecution or non-prosecution agreement rather than facing debarment or a statutory corporate death penalty through conviction.

But will DOJ's new bounty on individuals bring white-collar reform and restore public and shareholder faith in financial markets and corporate America in the wake of the aging 2008 Wall Street crisis?

### **INDIVIDUAL ACCOUNTABILITY AND WHITE-COLLAR REFORM**

In September 2015, DOJ circulated to all federal prosecutors a memorandum by Deputy Attorney General Sally Quillian Yates entitled "Individual Accountability for Corporate Wrongdoing."<sup>1</sup> The premise of the "Yates Memo" is that "[o]ne of the most effective ways to combat corporate misconduct is by

seeking accountability from the individuals who perpetrated the wrongdoing." DOJ issued the guidelines below for prosecutors to apply when considering whether to grant cooperation credit to a company under investigation. These guidelines will amend the Principles of Federal Prosecution of Business Organizations in the U.S. Attorney's Manual.<sup>2</sup>

While prosecutors traditionally have rewarded companies with mitigation points for identifying culpable individuals in white-collar investigations, the Yates Memo may signal a shift in end-game priorities from isolated corporate deferred prosecution agreements and large monetary settlements to increased individual criminal and civil enforcement actions directly addressing the malfeasance of executives, officers, or employees. If so, DOJ seeks to upend the age-old witticism that a corporation exists as an "ingenious device for obtaining profit without individual responsibility."<sup>3</sup> A company under a federal probe will be expected to satisfy the "threshold requirement of providing all relevant facts" about individual wrongdoers to be "eligible for consideration for cooperation credit."<sup>4</sup> This, in turn, is intended to restore public confidence in our justice system.

The Yates Memo breaks new policy ground through its absolute terms: eligibility for "any" cooperation credit requires a company to disclose "all relevant facts about the individuals involved in corporate misconduct."<sup>5</sup> Yates likewise did not mince words in announcing the new policy: "It's all or nothing" for cooperation credit eligibility; "[n]o more picking and choosing what gets disclosed. No more partial credit for cooperation that doesn't include information about individuals."<sup>6</sup> DOJ

will seek to target “individuals higher up the corporate hierarchy” early in an investigation, including civil enforcement actions against wrongdoers “who may not have the necessary financial resources to pay a significant judgment.”<sup>7</sup> The Yates Memo applies broadly to all white collar civil and criminal misconduct, including antitrust, false claims, foreign corrupt practices, environmental, healthcare, securities and exchange, and tax matters.

But why the hard-nosed focus on individual accountability now? The answer may lie in DOJ’s desire to return to its roots through individual white-collar prosecutions after broad public criticism, ranging from commentary in mainstream media to political pundits to Occupy Wall Street protestors, that corporate criminals were evading justice.<sup>8</sup> Such criticism appears statistically supported: a report analyzing DOJ data by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University showed a decrease to less than 6,900 white-collar prosecutions in fiscal year 2015 from nearly 11,000 in 1995.<sup>9</sup> According to the Federal Bureau of Prisons, the federal inmate population reached a high of 219,298 in 2013. After a modest decrease to 214,149 in 2014, followed by the current population of approximately 196,000, the Yates Memo appears ready to reverse the downward trend, at least regarding white-collar criminals.<sup>10</sup>

During the recent tenure of Attorney General Eric Holder, a common public perception was that “DOJ was collecting huge settlement payments from large institutions, but no one actually did any time.”<sup>11</sup> This spawned fears that companies viewed DOJ settlements as a mere cost of doing business, and one that often could be funded by shareholder dollars. *Forbes* magazine reported that DOJ’s “white-collar agenda in 2014 was marked by skyrocketing corporate settlements and continued reliance on deferred and non-prosecution agreements, coupled with compliance monitors.”<sup>12</sup> Compared to the aftermath of the savings-and-loan scandals of the 1980s during which “1,100 people were prosecuted, including top executives at many of the largest banks,” the financial collapse of 2008 reportedly yielded only one banker who received a prison sentence.<sup>13</sup> DOJ’s new guide-

lines refocus its priorities.

## **COOPERATION CREDIT UNDER THE NEW GUIDELINES**

The Yates Memo presents six guidelines for prosecutors overseeing white-collar investigations to determine whether a company deserves cooperation credit. The guidelines reflect new policy shifts to existing practices of many federal prosecutors. All guidelines are geared toward individual accountability for misconduct. While written in plain terms, some guidelines encompass significant qualifiers in the Memo’s accompanying commentary.

### **“1. To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.”<sup>14</sup>**

The first guideline presents DOJ’s ultimatum: a company under investigation must self-disclose the bad facts from its internal investigation or DOJ won’t negotiate cooperation credit for a criminal or civil matter. A company must proactively investigate individuals “at every step of the process — before, during, and after any corporate cooperation.” The refusal to do so, e.g., through willful blindness or a failure to investigate, will result in the loss of cooperation credit. As a check against selective disclosure of bad facts, a prosecutor will “vigorously” compare information provided by a company to the independent findings of the federal investigation to guard against minimization or obfuscation. DOJ will view a company’s lack of continuing cooperation as a “material breach” of a settlement agreement.

### **“2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.”<sup>15</sup>**

With its unwavering focus on individual accountability, the Yates Memo seeks to cut through the diffuse allocation of responsibility and decision-making that forms the architecture of a corporation. Targeting individuals whose positions may shield them from accountability for the wrongdoing of subordinates, the second guideline makes clear that DOJ will seek information from a company about culpable “individuals higher up

in the corporate hierarchy.” Predictably, a moral hazard exists in the identification of scapegoats to protect the company or C-suite executives. As Dwight D. Eisenhower quipped, “The search for a scapegoat is the easiest of all hunting expeditions.” Yet the Yates Memo seeks to implement a strategy rooted in deterrence and reform that goes beyond the monetary justice that marked the glut of deferred prosecution agreements after collapse of the financial markets. The focus on individuals from the beginning of an investigation is designed to yield individual accountability through indictments and civil enforcement proceedings, even if there might be less recovery for the public purse.

### **“3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.”**

DOJ’s arsenal of civil and criminal remedies for corporate fraud includes “incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment.”<sup>16</sup> A prosecutor’s nuanced selection of the remedy or remedies that best fit the misconduct will have the greatest impact and potential for justice and reform. DOJ also wields the threat, or pursuit, of parallel civil and criminal proceedings against a company to leverage cooperation and the identification of culpable individuals. Criminal prosecutors must promptly alert civil prosecutors of potential individual civil liability and vice versa regarding criminal acts. No longer will the pursuit of a criminal prosecution against a company end DOJ’s inquiry. If civil or criminal enforcements also may be pursued against individuals, the general policy requires a federal prosecutor to do so.

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

While the fourth guideline sends a clear message that cooperation credit depends on a company’s disclosure of information about individual wrongdoers, the commentary adds a further layer of quality control within DOJ. Federal prosecutors will be evaluated on wheth-

er they pursue enforcement actions against such individual wrongdoers. Only in “extraordinary circumstances,” which must be “personally approved in writing by the relevant Assistant Attorney General or United States Attorney” will individuals be released from personal liability, provided immunity, or have charges dismissed against them.<sup>17</sup>

**“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.”**

Corporate fraud investigations often are complex and may last months or years while a statute of limitations is running. The Yates Memo prioritizes enforcement decisions on targeted individuals within a company under investigation before the statute expires. For most federal offenses, the statute of limitations is five years,<sup>18</sup> although the charging period may be suspended or extended depending on the offense conduct. Civil proceedings may have similar periods. When the length of a corporate investigation poses a risk for expiration of an applicable statute of limitations regarding an individual enforcement action, the Yates Memo authorizes a prosecutor to seek a tolling agreement. A prosecutor must obtain high-level written approval of a decision to decline criminal charges or a civil claim against an individual.

**“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.”**

In litigation between private parties, a plaintiff often may choose not to name a potential defendant lacking assets sufficient to satisfy a judgment. The Yates Memo, however, eliminates that sole consideration for a federal prosecutor to decline to pursue a civil enforcement proceeding against a targeted white-collar wrongdoer. While DOJ may not frequently dedicate its scarce resources to litigate proceedings against judgment-proof defendants, the new policy appears to place a premium on individual accountability and deterrence

beyond robust monetary returns in the interests of reform.

**IMPLEMENTATION CONCERNS AND COMPLIANCE**

In the aftermath of the Yates Memo, corporate counsel must apply a new risk calculus to federal probes and weigh complex strategic considerations. Given the high stakes of DOJ’s “all or nothing” approach to cooperation credit, companies should expect longer and

more expensive internal investigations, despite DOJ’s stated focus on individual accountability to promote reform.<sup>19</sup> Likewise, federal investigations may expand and require greater resources to identify culpable individuals and secure evidence sufficient to prove criminal charges and for civil enforcement, especially in the absence of company cooperation. Corporate counsel should vigilantly exclude potentially culpable individuals from conducting internal in-

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vestigations to maintain credibility with DOJ at the negotiating table. The safest mechanism to maintain investigational integrity and preserve privilege often will be for companies to arrange for outside counsel to take the lead.

DOJ's policy shift may yield far-reaching consequences and additional concerns. Does the "all or nothing" approach of Yates Memo effectively mark a return to the tactics of the 2003 "Thompson Memorandum," which con-

ditioned charging decisions on corporate waiver of attorney-client privilege and work product protections and demonized advancement of attorney fees to employees, prompting a Congressional and judicial backlash over erosion of Sixth Amendment rights?<sup>20</sup> Will internal investigations suffer if commonly used joint defense agreements (JDAs) between a company and personnel who find themselves in the "hot seat" become disfavored? At least one commentator

has observed that if a company decides from the onset to seek cooperation credit by making the broad disclosures to the government required by the Yates Memo, the company "cannot, in good faith, enter into a JDA with anyone who did something wrong."<sup>21</sup> Will internal investigations run into roadblocks if corporate counsel's *Upjohn*<sup>22</sup> warnings to employees before interviews include the advisement that the company alone holds privilege over the interview, and that the company's cooperation credit will require waiver and full disclosure of any admitted misconduct? And will there be an increase in break-away employees and executives refusing to talk in favor of exercising trial rights to defend their reputations and livelihoods?

DOJ concedes that the sweep of the Yates Memo "may take years to become public" as career prosecutors receive training and begin to implement its guidelines.<sup>23</sup> Early enforcement yielded mixed results on individual accountability. Within a week of the Yates Memo's issuance, DOJ announced a deferred prosecution agreement with General Motors, conditioned on a \$900 million forfeiture for the company's cover-up for more than a decade of vehicle ignition switch defects that admittedly caused "15 deaths, as well as a number of serious injuries."<sup>24</sup> No culpable personnel were identified for criminal charges or other individual punitive consequences. By late October, however, DOJ trumpeted the indictment of a former president and three district managers of pharmaceutical manufacturer Warner Chilcott for illegal marketing of prescription drugs as exemplifying the Yates Memo's new policies at work to "identify and charge corporate officials responsible for the fraud."<sup>25</sup> Rounding out the settlement, a Warner Chilcott subsidiary also pled guilty to healthcare fraud and DOJ netted a civil recovery of \$91.5 million as part of a \$125 million settlement.

As 2016 unfolds, the challenge for DOJ will be to consistently and fairly implement the Yates Memo's guidelines when interacting with companies under investigation. Although the Memo anticipates scenarios in which inculpatory evidence exists and is simply waiting to be discovered or disclosed, many investigations — whether internal or by the government — may yield no clear



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evidence of wrongdoing, in which case the determination of cooperation credit should be moot. On the other side of the coin, it will be prudent for companies to fortify compliance and ethics programs and be prepared to initiate vigorous internal investigations if investigators come knocking. Although Wall Street watchdogs already are questioning the efficacy of the Yates Memo,<sup>26</sup> with the new bounty on the heads of wayward executives and corporate professionals, deterrence and reform may be on the horizon. **NWL**



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*The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or the WSBA. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

#### NOTES

1. See Memorandum from Sally Quillian Yates, Deputy Attorney Gen., U.S. Department of Justice to the Assistant Attorney Gen., Antitrust Div., et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) (Yates Memo) ([www.justice.gov/dag/file/769036/download](http://www.justice.gov/dag/file/769036/download)).
2. USAM 9-28.000 *et seq.*
3. Ambrose Bierce, *The Devil's Dictionary* (New York: Neale, 1911).
4. *Supra* n. 1 at 3.
5. *Id.*

6. "U.S. Dep't of Justice, Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing" (Sept. 10, 2015) (Yates NYU remarks) ([www.justice.gov/opa/speech/deputy-attorneygeneral-sally-quillian-yates-delivers-remarks-new-york-university-school](http://www.justice.gov/opa/speech/deputy-attorneygeneral-sally-quillian-yates-delivers-remarks-new-york-university-school)).
7. *Supra* n. 1 at 6.
8. See *Huffington Post*, "Occupy Arrests Near 8,000 As Wall Street Eludes Prosecu-

tion" (May 23, 2013) ([www.huffingtonpost.com/2013/05/23/occupy-wall-street-arrests\\_n\\_3326640.html](http://www.huffingtonpost.com/2013/05/23/occupy-wall-street-arrests_n_3326640.html)).

9. TRAC Reports, "Federal White Collar Crime Prosecutions At 20-Year Low" (July 29, 2015) (<http://trac.syr.edu/tracreports/crim/398>).
10. See Federal Bureau of Prisons website ([www.bop.gov/about/statistics/population\\_statistics.jsp#old\\_pops](http://www.bop.gov/about/statistics/population_statistics.jsp#old_pops)).
11. The Takeaway, "Feds Pledge to Get Tougher On White-Collar Crime," WNYC Radio/PRI

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***Segura v. Cabrera,***

\_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2015 WL 6549175 (2015)  
(T/F/T was retained by Rental Housing Association  
to submit successful amicus brief on damages)

***State v. Sykes,***

182 Wn.2d 168, 339 P.3d 972 (2014)  
(Drug Court therapeutic proceedings not subject to  
open courts requirement of Washington Constitution)

***Moore v. Health Care Authority,***

181 Wn.2d 299, 332 P.3d 461 (2014) (addressing  
methodology for assessing damages in class action)

***In re the Marriage of Larson and Calhoun,***

178 Wn. App. 133, 313 P.3d 1228 (2013), review denied, 325 P.3d 913 (2014) (successfully addressing  
property division issues in one of the largest dissolution cases in Washington State history)

***Woods v. HO Sports Co., Inc.,***

183 Wn. App. 145, 333 P.3d 455 (2014)  
(defeating application of parental immunity doctrine  
in negligent operation of speed boat)

***Eubanks and Gray v. Brown,***

180 Wn.2d 590, 327 P.3d 635 (2014)  
(addressing venue issues in gender discrimination  
action against deputy prosecutor)

***Washburn v. City of Federal Way,***

178 Wn.2d 732, 310 P.3d 1275 (2013) (city liability in  
service of anti-harassment order)

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(Sept. 11, 2015) ([www.thetakeaway.org/story/feds-pledge-get-tougher-white-collar-crime](http://www.thetakeaway.org/story/feds-pledge-get-tougher-white-collar-crime)).

12. See Forbes, "The Year in White-Collar Crime: A Look Back Helps Us See Ahead," Robert Anello (Jan. 7, 2015) ([www.forbes.com/sites/insider/2015/01/07/the-year-in-white-collar-crime-a-look-back-helps-us-see-ahead/#6696a1e753a2](http://www.forbes.com/sites/insider/2015/01/07/the-year-in-white-collar-crime-a-look-back-helps-us-see-ahead/#6696a1e753a2)).
13. The Takeaway, "Feds Pledge to Get Tougher On White-Collar Crime," WNYC Radio/PRI (Sept. 11, 2015) ([www.thetakeaway.org/story/feds-pledge-get-tougher-white-collar-crime](http://www.thetakeaway.org/story/feds-pledge-get-tougher-white-collar-crime)).
14. *Supra* n. 1 at 3 (emphasis in original).
15. *Id.* at 4.
16. *Supra* n. 1 at 5.
17. *Supra* n. 1 at 5.
18. 18 U.S.C. 3282.
19. See generally, Yates Memo.
20. See The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 110 (2006); *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008) (affirming dismissal of fraud indictment against employees of KPMG accounting firm due to deprivation of Sixth Amendment right to counsel related to Thompson Memorandum policies).
21. See "Will the New DOJ Policy End Joint Defense Agreements?," Grand Jury Target Blog," Sara Kropf (Sept. 27, 2015) (<http://grandjurytarget.com/2015/09/27/will-the-new-doj-policy-end-joint-defense-agreements>).
22. *Upjohn Co. v. United States*, 499 U.S. 383 (1981).
23. *Supra* n. 6.
24. "U.S. Dep't of Justice, U.S. Attorney of the Southern District of New York Announces Criminal Charges Against General Motors and Deferred Prosecution Agreement with \$900 Million Forfeiture," press release (Sept. 17, 2015) ([www.justice.gov/opa/pr/us-attorney-southern-district-new-york-announces-criminal-charges-against-general-motors-and](http://www.justice.gov/opa/pr/us-attorney-southern-district-new-york-announces-criminal-charges-against-general-motors-and)).
25. "U.S. Dep't of Justice, Warner Chilcott Agrees to Plead Guilty to Felony Health Care Fraud Scheme and Pay \$125 Million to Resolve Criminal Liability and False Claims Act Allegations," press release (Oct. 29, 2015) ([www.justice.gov/opa/pr/warner-chilcott-agrees-plead-guilty-felony-health-care-fraud-scheme-and-pay-125-million](http://www.justice.gov/opa/pr/warner-chilcott-agrees-plead-guilty-felony-health-care-fraud-scheme-and-pay-125-million)).
26. See "Rigged Justice: How Weak Enforcement Lets Corporate Offenders Off Easy," Sen. Elizabeth Warren (Jan. 29, 2016), available at <https://assets.documentcloud.org/documents/2699930/rigged-justice-2016.pdf>.