



# THE "YATES ERA" IN FULL FORCE

*The DOJ Fully Implements  
Yates Memo*

BY SCOTT R. GRUBMAN AND SAMUEL M. SHAPIRO

**b**y now, most attorneys in the white collar and government investigations legal communities are intimately familiar with the "Yates Memo"—a memorandum issued by Deputy Attorney General Sally Yates in September 2015, outlining a new policy initiative to increasingly target individuals involved in corporate crimes and civil frauds. Since Yates issued her memo, the Department of Justice (DOJ) has taken several steps to make clear that the principles outlined in the Yates Memo have been fully incorporated into the DOJ's policies and practices, including in the *U.S. Attorneys' Manual*—the main policy manual for DOJ attorneys. It is crucial for white collar

attorneys—whether representing large institutional clients or individuals—to understand how these principles have been implemented into DOJ policy and what the government now expects in resolving fraud investigations, both criminal and civil.

#### YATES MEMO: BRIEF RECAP

The Yates Memo sets forth six principles to be followed by all DOJ attorneys (both criminal and civil) in investigating corporations for wrongdoing. Those principles are stated as follows:

1. To be eligible for any cooperation credit, corporations

must provide to the DOJ all relevant facts about the individuals involved in corporate misconduct and cannot pick and choose which facts to disclose;

2. Both criminal and civil corporate investigations 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.

(Memorandum from Sally Quillian Yates, Deputy Attorney Gen., DOJ, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter Yates Memo], available at <http://tinyurl.com/znawfcv>.)

#### IMPLEMENTATION OF NEW POLICY INITIATIVES POST-YATES MEMO

In November 2015, the *U.S. Attorneys' Manual* (USAM)—the main point of reference for U.S. attorneys, assistant U.S. attorneys, and DOJ attorneys containing general DOJ policies and procedures—was amended to implement the principles contained in the Yates Memo (*see* <http://tinyurl.com/hhrvne2>). Specifically, section 4-3.100 (“Pursuit of Claims against Individuals”) was added to title 4 of the USAM (“Civil”), and substantial changes were made to section 9-28.000 (“Principles of Federal Prosecution of Business Organizations”) in title 9 of the USAM (“Criminal”). In addition, revisions were made to section 1-12.000 (“Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings”) in title 1 of the USAM to require even more coordination between DOJ criminal and civil attorneys.

Laced between the substantive revisions to the new USAM are statements of policy that emanate directly from the Yates Memo. For example, section 9-28.010 now contains the following provision:

**SCOTT R. GRUBMAN** is a partner at Chilivis Cochran Larkins & Bever LLP (CCLB) in Atlanta, Georgia, where he represents individuals and businesses—particularly in the healthcare industry—in connection with government and internal investigations, False Claims Act and complex civil litigation, and white collar criminal defense. He is a former assistant U.S. attorney and DOJ trial attorney. **SAMUEL M. SHAPIRO** is an associate at CCLB.

One of the most effective ways to combat corporate misconduct is by holding accountable all individuals who engage in wrongdoing. Such accountability deters future illegal activity, incentivizes changes in corporate behavior, ensures that the proper parties are held responsible for their actions, and promotes the public's confidence in our justice system.

Likewise, the next paragraph (also added subsequent to the Yates Memo's publication) explains that the new focus on building cases against individual wrongdoers accomplishes three goals: (1) it increases the DOJ's ability to understand the full extent of the corporate misconduct; (2) it increases the likelihood of identifying individuals with knowledge of the misconduct, as well as the likelihood that such individuals will come forward with information; and (3) it “maximize[s] the likelihood that the final resolution will include charges against culpable individuals and not just the corporation.”

In a November 2015 speech at the American Bankers Association and American Bar Association Money Laundering Enforcement Conference, Yates made remarks on the changes to the USAM. In her speech, Yates alluded to the importance of codifying policy statements such as those in section 9-28.010:

We don't revise the USAM all that often and, when we do, it's for something important. We change the USAM when we want to make clear that a particular policy is at the heart of what all Department of Justice attorneys do and when we want to make sure that certain principles are embedded in the culture of our institution.

(Sally Quillian Yates, Remarks at American Bankers Association and American Bar Association Money Laundering Enforcement Conference (Nov. 16, 2015), <http://tinyurl.com/z9vmewn> [hereinafter Yates Conference Remarks] (emphasis added).)

Thus, Yates made clear that the revisions to the USAM do more than simply enact new directives to be followed by civil and criminal DOJ attorneys; they enact a set of core values and a shift in the way the DOJ will think about individual accountability in all future investigations of corporations. Indeed, as Yates went on to note, the USAM revisions were further meant to “tell[] the world about our priorities and our values, so that others know what to expect when the Justice Department comes knocking.” (*Id.*)

#### CORPORATE COOPERATION POLICY POST-YATES MEMO

Underlying the Yates Memo's policy objectives is the pronouncement that in order to receive credit for cooperation in a DOJ investigation, a company must “completely disclose” all relevant facts relating to the misconduct at issue and must identify all individuals involved or responsible “regardless of their position, status or seniority.” To that end, the Yates Memo notes that “[i]f a company seeking cooperation credit declines to learn of such facts or to provide the [DOJ] with complete

factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.*”

Section 9-28.700(A) of the USAM now expressly implements this policy shift regarding the “value of cooperation.” As such, it is now DOJ policy that for a company to meet the threshold requirement for cooperation credit, it must provide all relevant facts with respect to each individual wrongdoer. However, in her November speech, Yates made clear that the DOJ does not intend to require that companies “embark on a years-long, multimillion dollar investigation every time a company learns of misconduct.” Instead, investigations should be “tailored to the scope of the wrongdoing.” (Yates Conference Remarks, *supra.*)

### CHANGES TO THE “FILIP FACTORS”

The DOJ last revised the “Principles for Federal Prosecution of Business Organizations” in an August 2008 memorandum issued by then deputy attorney general Mark R. Filip. (Memorandum from Mark Filip, Deputy Attorney Gen., DOJ, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008) [hereinafter Filip Memo], available at <http://tinyurl.com/z5fs6xr>.) (The Filip Memo supplanted the McNulty Memo, issued in December 2006 by then deputy attorney general Paul McNulty, which itself modified the earlier Thompson Memo, issued in January 2003 by then deputy attorney general Larry Thompson.) Principally, the Filip Memo served to clarify and institute those factors that would (and would not) be considered in determining whether to charge a corporation or individual, and whether or not a corporation would get credit for cooperating with the DOJ’s investigation (the Filip factors). Among the Filip factors was “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.”

The Yates Memo builds off of and further clarifies the Filip factors, going so far as to separate one such factor into two individual and distinct considerations. In order to bring the USAM in line with its policy goals, the Yates Memo revises the Filip factors outlined in the USAM to isolate and distinguish the concepts of cooperation and prompt disclosure. Indeed, whereas cooperation and prompt disclosure were previously considered together, the USAM now expressly states that “the corporation’s willingness to cooperate in the investigation of its agents” and “the corporation’s timely and voluntary disclosure of wrongdoing” will be weighed separately as part of the DOJ’s decision-making process. (USAM § 9-28.300(A).)

Importantly, the Yates Memo and the subsequent USAM revisions do not change the DOJ’s policy that, in providing all relevant facts, companies are *not* required to waive attorney-client privilege or the work product doctrine protections. This is a continuation of the policy first articulated in the Filip Memo that DOJ attorneys should not ask for waivers of privilege or work product. (This policy was a repudiation of the Thompson Memo’s statements that corporations should waive attorney-client privileges and work product protections in order to establish their cooperation with a government investigation.) As such, the USAM reminds companies that subject to limited exceptions, “the key measure of cooperation is the disclosure of factual information known to the corporation, not the

disclosure of legal advice or theories rendered in connection with the conduct at issue.” (*Id.* § 9-28.720 n.3.) However, in her November speech, Yates made sure to emphasize that “legal advice is privileged . . . [f]acts are not.” (Yates Conference Remarks, *supra.*) As a practical matter, though, the Yates Memo and USAM revisions will likely induce many companies to waive attorney-client privilege in the course of conducting an internal investigation. This could cause employees a great deal of angst at the thought of cooperating with corporate counsel’s internal inquiries. These employees are now more likely to see their interests as not aligned with the interests of the corporation, and are therefore also more likely to demand their own attorneys.

### REQUIREMENTS FOR PROSECUTORS

Additionally, the revised USAM imposes new requirements on federal prosecutors. Notably, section 9-28.210(B) of the USAM now mandates:

If a decision is made at the conclusion of the investigation to pursue charges or some other resolution with the corporation but not to bring criminal or civil charges against the individuals who committed the misconduct, the reasons for that determination must be *memorialized* and *approved* by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Furthermore, citing directly to the Yates Memo, a new paragraph in section 1-12.000 (“Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings”) highlights the importance of civil and criminal parallel proceedings in ensuring that individuals are held accountable for corporate misconduct. The new provision warns that such parallel proceedings must be handled with care “in order to avoid allegations of improper release of grand jury material or abuse of civil process,” but that when properly coordinated, such proceedings are highly beneficial to law enforcement and the public. Like the Yates Memo, the new parallel proceedings provision urges “early and regular communication” between the DOJ’s civil and criminal attorneys.

The revisions also note that DOJ criminal attorneys should keep their civil counterparts apprised of any decision as to whether the criminal team will be pursuing criminal action in a particular case. Conversely, the new provision states that civil attorneys should be in constant contact with their criminal counterparts during the civil investigation and inform the criminal team of anyone who should be subject to criminal inquiry.

### APPLICATION TO CIVIL MATTERS

The Yates Memo expressly stated that the conditions for cooperation credit apply with equal force in both the criminal and civil contexts and that “a company under civil investigation must provide to the [DOJ] all relevant facts about individual misconduct in order to receive any consideration in the negotiation.” Pursuant to this mandate, a new section entitled

“Pursuit of Claims against Individuals” has been added to title 4 of the USAM to implement the six standards set forth in the Yates Memo as applied to civil matters. (USAM § 4-3.100.) Thus, the USAM now provides that like criminal matters, civil corporate investigations should focus on individuals from the inception and that determinations as to whether to bring suit against an individual should not be based solely on an individual’s ability to pay a judgment. As Yates explained in her November 2015 remarks, this revision “acknowledges that our mission in civil corporate cases is not just to recover money. It is also to redress and deter misconduct.” (Yates Conference Remarks, *supra*.)

Further, the USAM makes clear that individuals will not be released from civil liability based on corporate settlement releases absent “extraordinary circumstances,” which “must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.” Similarly, if a decision is made at the conclusion of a civil investigation not to bring civil claims against involved individuals, “the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.” (USAM § 4-3.100(5), (6).)

In the context of the False Claims Act (FCA), the principles articulated in the Yates Memo are potentially game-changing. In an October 2015 speech to a pharmaceutical group, DOJ Principal Deputy Assistant Attorney General Benjamin Mizer, who oversees the DOJ’s Civil Division, added some specifics to how the Yates Memo would apply to civil actions, and in particular to FCA actions. (Benjamin C. Mizer, Principal Deputy Assistant Attorney Gen., DOJ, Remarks at 16th Pharmaceutical Compliance Congress and Best Practices Forum (Oct. 22, 2015), <http://tinyurl.com/nmnyz5d>.) Mizer stated that, under the principles enumerated in the Yates Memo, “in order to qualify for the reduced multiples provision under the [FCA], the organization must voluntarily identify any culpable individuals and provide all material facts about those individuals.” (*Id.*)

Additionally, the Yates Memo principles and corresponding USAM revisions pertaining to parallel proceedings between civil and criminal DOJ attorneys also have implications in the FCA arena. In September 2014, a year before the Yates Memo was issued, Assistant Attorney General Leslie R. Caldwell announced the establishment of a new Criminal Division procedure in which “all new qui tam complaints” would be “shared by the Civil Division with the Criminal Division as soon as the cases are filed.” (Leslie R. Caldwell, Assistant Attorney Gen., DOJ, Remarks at the Taxpayers against Fraud Education Fund Conference (Sept. 17, 2014), <https://tinyurl.com/h5jkam6>.) The parallel proceeding principles articulated in the Yates Memo (and now codified in the USAM) build off earlier DOJ qui tam policies by enumerating the ways in which the Criminal and Civil Divisions should collaborate in order to hone in on culpable individuals. As the USAM now states, “Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued.” (USAM § 1-12.000.)

## CONCLUSION

The official implementation of the principles set forth in the Yates Memo into the USAM makes clear that the DOJ’s newly revamped initiatives in prosecuting both corporations and individuals for wrongdoing is now the official policy of the DOJ and that the DOJ will follow those principles in both criminal and civil matters for a long time to come. This new era in individual responsibility has a real potential to complicate corporate internal investigations and the achievement of meaningful corporate settlements, and must be taken into account by corporate counsel from the beginning of an investigation, as well as by counsel representing potentially culpable individuals. ■

