YATES MEMO INSIGHTS FOR CORPORATIONS:

WHAT THE YATES MEMO *REALLY* MEANS FOR YOUR COMPANY AND INDIVIDUAL EMPLOYEES

PUGH, JONES & JOHNSON, P.C. NEWSLETTER JUNE 2016

On Tuesday, May 10, 2016, Deputy Attorney General Sally Yates delivered remarks at the New York City Bar Association White Collar Crime Conference regarding DOJ's Individual Accountability Policy, otherwise known as the "Yates Memo." During her remarks, Yates sought to provide further insight into DOJ's reasoning behind the policy and feedback regarding implementation of the Yates Memo's directives thus far. Some of the highlights of Yates's remarks include the following:

1. INDIVIDUAL ACCOUNTABILITY

Yates emphasized that the concept of individual accountability for corporate wrongdoing has always been an essential and effective deterrence mechanism for DOJ. She observed that in most corporate structures, however, it is difficult to disentangle who did what, and to discern whether anyone had the requisite knowledge and intent to prove liability. She said it was because of these two competing concepts (that, on the one hand, it is critical for DOJ to hold individuals accountable, and on the other hand, doing so poses real world challenges) that DOJ convened a working group to examine how DOJ approaches corporate culpability. The Yates Memo is the end product of those discussions.

2. CHANGING DOJ PRACTICES

While certain concepts underlying the Yates Memo have long been part of DOJ's approach to corporate prosecutions, Yates noted that the new policy was designed to usher in some changes. To start, DOJ now requires a company to provide all of the facts about individual conduct in order to qualify for cooperation credit. No longer will passive proffers like "mistakes were made" be sufficient. Moreover, DOJ has sought to increase cooperation between civil and criminal DOJ, and requires all DOJ attorneys to focus on individual liability from the very beginning of an investigation. In fact, DOJ attorneys must get approval if they decide not to bring charges against individuals, and may not release individuals from civil or criminal liability except "under the rarest of circumstances."

3. COOPERATION CREDIT MUST BE EARNED

Therefore, Yates said, if companies want cooperation credit they must "advanc[e] the ball…in determining who did what." Yates made clear that this directive does not mean every time a company learns of misconduct, they must conduct an overly broad, years-long multimillion dollar investigation. Instead they must carry out a thorough investigation tailored to the scope of the wrongdoing. Less clear, however, is what type of investigation is needed because as Yates puts it, "the determination of the appropriate scope and how to proceed is always case specific—it's not possible to lay out hard and fast rules." Rather, Yates suggested, investigation scope is something that should be discussed with the DOJ lawyer handling the matter. How effective that will be as a practical matter is unclear.

4. NO "FALL GUY" NECESSARY

Yates also stated that companies are not required to find a fall guy (*i.e.*, "the vice president in charge of going to jail"), if in fact an appropriately tailored investigation was conducted in an effort to determine who did what, but the company simply could not conclusively assign blame. In these circumstances, a company could still receive cooperation credit. Yates cautioned, however, that this will not be the exception that "swallows the rule" and that DOJ is going to "pressure test" the investigation to ensure that this purported obstacle is not being used as an excuse.

5. KEEP PRIVILEGES, BUT GIVE FACTS

As an extension of that concept, Yates stated that DOJ does not expect a company to provide legal conclusions about civil or criminal culpability. DOJ wants facts. To that end, Yates emphasized that there is nothing in the policy that requires companies to waive attorney-client privilege; nor does the Yates Memo roll back attorney-client protections that are already in place. However, companies cannot—in the name of privilege or otherwise—pick and choose which facts to provide if they want cooperation credit. She noted that no companies to date had reported that the new policy required them to waive the privilege.

6. REACTIONS AND WRAP UP

Finally, Yates observed the polar opposite reactions to the policy—some that said the policy changed nothing, and some that it changed everything—and she clarified that the reality is somewhere in between. "Just as the policy does not seem to have brought about the end of western civilization from the companies' perspective, it's not business as usual at DOJ either." The Criminal Division at DOJ is now thinking about individuals from the very start of the investigation, and is watching companies to see if they are meeting their obligations to provide all facts about individual conduct. There is now a more "uniform, systematic and sustained focus on individuals," such that if there are culpable individuals, "we are holding them accountable." The changes in the Civil Division are "even more pronounced." The Civil Division now accepts that its "obligation is about more than recovering the most money from the greatest number of companies"; it also includes deterrence, "[…] stopping fraud in the first place and […] redressing misconduct of those responsible." Practically, this means that the Civil Division is willing to name individuals in a lawsuit regardless of their ability to satisfy a judgment. Yates concluded by explaining further changes caused by the new policy, including changes in the Antitrust Division (which is also focusing on individuals) and in the FCPA Unit (which recently announced a ground breaking 12-month pilot program).

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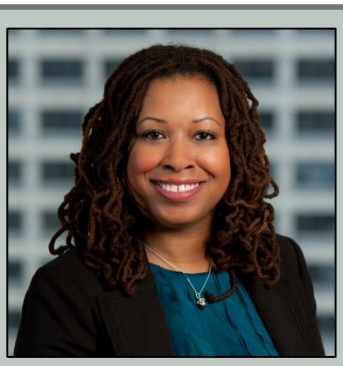

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At your request, we would be happy to provide further insight regarding the Yates Memo, and what it means for corporations.

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