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The DOJ's Renewed Emphasis on Individual Accountability

By Zachary H. Greene

According to its mission statement, the U.S. Department of Justice (DOJ) is obligated "to seek just punishment for those guilty of unlawful behavior." How the DOJ has gone about fulfilling that mission has varied over the last 15 years. As DOJ policies and practices have varied over that time, so, too, have the strategies—and corresponding headaches—of white-collar practitioners.

Between 2009 and 2014, in the wake of the 2008 financial crisis, the DOJ brought more than 60 fraud prosecutions against financial institutions and recovered tens of billions of dollars in settlements, restitution, and penalties. Yet, the DOJ faced pointed criticism of its perceived failure or, at least, reluctance to hold accountable the individuals—chief executive officers, chief financial officers, and other corporate executives—responsible for those frauds. On September 9, 2015, Deputy Attorney General Sally Quillian Yates issued a memorandum to prosecutors under the title of Individual Accountability for Corporate Wrongdoing, forever to be known as "the Yates Memo." In her eponymous memo, Yates acknowledged "substantial challenges unique to pursuing individuals for corporate misdeeds." However, she affirmed the DOJ's interest—expressed in its mission statement—in ensuring "that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct."

To promote enforcement consistency, the Yates Memo declared it DOJ policy that for a company under investigation "to receive any consideration" for cooperation credit, the company

> must completely disclose to the Department all relevant facts about individual misconduct. . . . That is, to be eligible for any credit for cooperation, 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.

To borrow an analogy from the financial markets, "cooperation credit" is a reserve currency for individuals and companies threatened with criminal prosecution or facing civil liability to the government, such as under the False Claims Act. It includes any form of mitigation supplied by the DOJ that can produce a better result for the recipient. Examples of such mitigation include entering into non-prosecution or deferred prosecution agreements and consenting to reduced fines or restitution amounts. As a medium of exchange, however, credit is given only for other value received. That other value is cooperation: accepting responsibility for wrongdoing and providing assistance to the government's enforcement efforts by identifying responsible individuals and evidence proving their responsibility.

Some prosecutors and white-collar practitioners maintained that the Yates Memo did not change, and instead just memorialized, the way the DOJ prosecuted corporate crime. But regardless of

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that debate, there is no question that the Yates Memo focused attention on individual accountability. It also focused attention on the ability of corporations that were intent on cooperating to maintain the attorney-client privilege.

The carrot-and-stick approach to cooperation credit puts companies on the horns of two dilemmas concerning the attorney-client privilege in most cases. First, if a company decides to cooperate at or near the beginning an investigation, such as after receiving a subpoena, it is an open question whether the company's ensuing internal investigation is protected by the attorney-client privilege. One of the critical elements for establishing the privilege is demonstrating that its holder—the corporation—intended to take and took steps to keep the relevant subject matter confidential. If a company intends from the very beginning to share its findings with the government, a court could find that the content of employee interviews, interim communications between attorneys and corporate executives or the board of directors, and other investigative efforts carried out by or at the direction of counsel are not privileged, as discussed by Randall R. Lee and Michael J. Berkovits in their August 26, 2019, article for the Securities Litigation Committee, "*United States v. Connolly*: District Court Scrutinizes Longtime Corporate Practices for Internal Investigations," and by Melissa Ho, Andrew Fox, and the author in a September 2, 2020, roundtable discussion hosted by the Commercial and Business Litigation Committee, "Navigating 'Outsourced' Government Investigations." Obviously, such a finding could have a major effect not only on the present enforcement action but also on any third-party litigation, such as shareholder or employment lawsuits, arising from the investigation or a later finding or admission of wrongdoing.

The second dilemma is the specific requirement to disclose "all relevant facts about individual misconduct." While facts are not protected by the attorney-client privilege, it is often difficult, if not impossible, to disclose facts without revealing the privileged communication associated with the discovery of those facts. This is even more problematic when the facts being disclosed include the identities of culpable individuals.

In 2019, the DOJ revised its individual accountability policy to "focus on the individuals who play significant roles in setting a company on a course of criminal conduct." This emphasis on primarily "senior officials" maintained the carrot-and-stick approach to cooperation credit while giving practitioners more flexibility when conducting investigations and disclosing information to prosecutors. By eliminating the requirement that companies disclose *all* facts about *all* responsible individuals, the revised policy gave white-collar defense counsel a chance to be more selective when communicating with prosecutors without sacrificing a claim to cooperation credit. In addition, this flexibility arguably allowed (or promoted) less-thorough internal investigations. By requiring the identification of only "apex wrongdoers," the revised policy opened a loophole potentially allowing companies to obtain cooperation credit without thoroughly rooting out and addressing all sources of misconduct.

The loophole was closed quickly. On October 28, 2021, Deputy Attorney General Lisa Monaco reinstated the Yates Memo. The current policy makes clear that "[t]o receive any consideration for cooperation, the company must identify all individuals *involved in or responsible for* the misconduct at issue, regardless of their position, status, or seniority." (Emphasis added.) The new

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memo also specifically eliminates the flexibility offered by the 2019 policy: "To receive such consideration, companies cannot limit disclosure to those individuals believed to be only substantially involved in criminal conduct. This requirement includes individuals inside and outside the company."

The current policy, together with other DOJ guidance for developing and implementing corporate compliance programs, also threatens to penalize companies that have been lax in identifying and addressing wrongdoing or wrongdoers. Monaco's memo directs prosecutors "to consider all misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it, including any such actions against the target company's parent, divisions, affiliates, subsidiaries, and other entities within the corporate family." This is a significant change from existing policy, which provides only that "[p]rosecutors may consider a corporation's history of similar conduct . . . in determining whether to bring criminal charges and how best to resolve cases." Practitioners must, therefore, be mindful of a company's entire history of misconduct when fashioning compliance programs and investigating new allegations. Even if prior misconduct is unrelated or dissimilar to the facts underlying a current investigation, white-collar counsel must be prepared to substantively address the prior misconduct and explain why it should not factor into prosecutorial decision-making.

The return to the Yates Memo also marks the return of questions about how to comply with the DOJ's requirements while maintaining the corporate attorney-client privilege. Although the current policy makes clear that only "nonprivileged information relevant to all individuals involved in the misconduct" must be disclosed, it remains difficult, if not impossible, to convey such information without revealing—directly or by inference—the privileged communication associated with counsel's discovery of those facts.

Practitioners and their corporate clients must thoroughly weigh the implications of the revived DOJ policy when considering cooperating with federal prosecutors. Preserving the attorney-client privilege during an investigation is a constant, active process. Typing the word "privileged" on documents and emails created during the investigation is helpful but not dispositive. How—and whether—to preserve the privilege must be front-of-mind at all times, from documenting changes to a compliance program to drafting the engagement letter for a new investigation matter, from conducting and documenting interviews to hiring outside consultants, from preparing (or not preparing) a final report to meeting with prosecutors.

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