

March 2016

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The Yates Memo: Six Months Later

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It has been six months since U.S. Deputy Attorney General Sally Yates announced the now well-known “Yates Memo,” which, at least initially, suggested a policy shift by the Department of Justice (“DOJ”). The Yates Memo focuses squarely on the investigation and prosecution of individuals for corporate wrongdoing and represents an effort to address public perception that individuals were not being sufficiently investigated and prosecuted.¹ Since its publication, the Yates Memo has been further clarified and incorporated into DOJ’s policy manual. In addition, although a handful of individuals have been charged since Yates’ announcement (presumably under the guidance of the Yates Memo’s directives), the resolution of an unknown number of current DOJ investigations, which pre-date and post-date the Yates Memo, will continue to shape how and when the Yates Memo will impact corporate investigations. Two recent developments within DOJ’s Fraud Section—namely, an informal policy requiring corporations to confirm their disclosures under the Yates Memo, and a one-year “fast-track” approach for investigations involving companies that self-report FCPA violations—may also impact the effects of the Yates Memo on future investigations.

This article traces the developments since the Yates Memo’s inception, highlighting key takeaways and applicable enforcement actions. The long-term effects of the Yates Memo remain to be seen, but it is clear that the policy has already had practical implications.

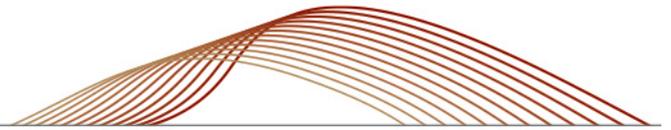
The Yates Memo Focuses on Corporate Cooperation Credit

To “strengthen” DOJ’s “pursuit of individual corporate wrongdoing,” the Yates Memo outlines six key policies, the most significant of which is that DOJ will not give cooperation credit to a corporation unless the corporation provides “all relevant facts” regarding individual misconduct. When it was announced, the Yates Memo policy concerning cooperation credit raised more questions than it answered: What facts are relevant? What about companies that fail to uncover individual wrongdoing despite their best efforts—have they lost the opportunity for cooperation credit? Does “all relevant facts” include information protected by attorney-client or work-product privileges?

The announcement of the Yates Memo was followed by multiple clarifications from DOJ officials, which perhaps affected the intended scope and impact of the new policy.

DOJ Clarifies the Yates Memo

Since the Yates Memo’s announcement, there have been two notable clarifications by DOJ. On September 22, 2015, U.S. Assistant Attorney General Leslie Caldwell highlighted the Yates Memo’s requirement that corporations must disclose all relevant facts regarding individuals’ misconduct to receive cooperation credit. While Caldwell reiterated that corporations must affirmatively learn about



misconduct, she also addressed concerns about a company's inability to unearth misconduct by individuals. She confirmed that where a company "provides the government with the relevant facts and otherwise assists [the government] in obtaining evidence," the company would still be eligible for cooperation credit even if it cannot identify culpable individuals.² This implies that companies seeking cooperation credit may be held to a best-efforts standard when prosecutors assess the disclosure of relevant facts.

Caldwell also quelled some commentators' concerns that the Yates Memo signaled a change in DOJ's approach to privilege waivers, confirming the continuation of the policy prohibiting prosecutors from requesting that companies waive privilege to receive cooperation credit. As to the degree of disclosure expected from the company, Caldwell added that DOJ was not seeking to deputize in-house counsel, stating that the company will not be expected to "present[] a prosecution memo to [DOJ] for specific individuals."³

On November 16, 2015, Yates further clarified the meaning of the memo. Like Caldwell, she focused her remarks on the conditions necessary for companies to obtain cooperation credit. Yates clarified the treatment of those cooperating companies that are unable to identify culpable individuals, stating that they will be presumed to have access to inculpatory evidence unless they can make an affirmative showing that the companies do not have access to it or are legally prohibited from producing it. These statements were consistent with Caldwell's best-efforts approach.

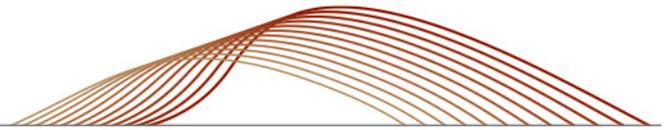
She also elaborated on the issue of privilege, affirming that providing legal advice is protected, but that the underlying facts are not. Elaborating on this distinction, she noted that where a company interviews an employee during an internal investigation, "the notes and memos generated from that interview may be protected, at least in part," but "all relevant facts" learned are unprotected and must be disclosed. Thus, while Caldwell confirmed that prosecutors will not seek waivers of privilege, Yates' comments suggest that counsel should be cautious when asserting privilege as a basis for withholding information.

Although time will tell whether DOJ's position will hold, it appears, based on these recent comments, that DOJ is taking the position that a corporation's perceived best efforts to identify misconduct might dictate whether cooperation credit will be available. This approach will place a premium on outside counsel's ability to explain effectively a corporation's findings.

DOJ Codifies the Yates Memo

Yates' November 16, 2015, speech also announced the release of a revised U.S. Attorneys' Manual, which incorporates the Yates Memo's directives and mirrors the substance of Yates' and Caldwell's remarks.⁴ The changes include a new section—"Focus on Individual Wrongdoers"—to introduce the policy reasons for the new focus on individuals,⁵ and includes other revisions reflecting the Yates Memo's new approaches to cooperation credit,⁶ coordination between criminal and civil enforcement authorities,⁷ and assertions of privilege.⁸

Individual DOJ units have even incorporated the Yates Memo into internal policies. DOJ's Antitrust Division, in particular, has already begun a comprehensive revamping of its procedures "to ensure that each of [its] criminal offices systematically identifies all potentially culpable individuals as early in the investigative process as feasible," according to U.S. Deputy Assistant Attorney General Brent Snyder.⁹ The Antitrust Division's focus is not surprising given that, in the last five years, Antitrust has prosecuted almost three times as many individuals (352) as corporations (123).¹⁰



Recent DOJ Actions

Pharmaceutical / Healthcare Sector

Two recent DOJ cases involving the healthcare sector may offer clues as to future individual prosecutions under the Yates Memo.

One case arose not long after the memo's publication. On October 29, 2015, DOJ announced that pharmaceutical company Warner Chilcott agreed to plead guilty to healthcare fraud and pay \$125 million to resolve criminal and civil liability to resolve allegations that it (1) paid kickbacks to physicians in exchange for prescribing Warner Chilcott drugs; (2) submitted fraudulent prior authorization requests to government payors; and (3) made unsubstantiated claims about the superiority of its drugs.¹¹

Prosecutors simultaneously unsealed a criminal indictment (dated the previous day, October 28, 2015) charging the company's former president, W. Carl Reichel, for his involvement in the company's kickback scheme. According to the indictment, Reichel oversaw the company's "medical education program," which amounted to encouraging sales representatives to take healthcare providers out for expensive, largely social dinners devoid of educational content.¹² Allegedly, the sales representatives were instructed to "build relationships" and to "gain a commitment" from the provider to prescribe the company's drugs.¹³ Reichel allegedly oversaw the payment of "speaker" fees to high-prescribing providers who had gained sufficient "clinical experience" with Warner Chilcott's drugs.¹⁴

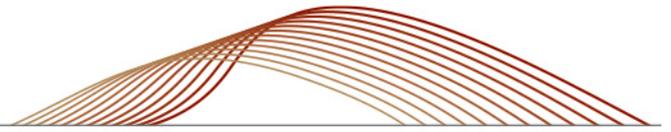
While Reichel is the fourth Warner Chilcott employee to be charged, the other three individuals were relatively low-level district managers. Given the senior position that Reichel held, the indictment of Reichel may be evidence of the Yates Memo at work, especially in light of Yates' comments to the *New York Times* that DOJ was "not going to be accepting a company's cooperation when they just offer up the vice president in charge."¹⁵

A similar case brought against David Bostwick, the founder, owner, and chief executive officer of Bostwick Laboratories, was resolved on January 8, 2016. Although these allegations arose in the context of a civil action, this case is illustrative of the government's pursuit of a corporate executive in a post-Yates Memo environment. According to DOJ's press release, from 2006 to 2011 Bostwick directed his laboratory to bill federal government payors for medical tests that were neither necessary nor recommended by treating physicians.¹⁶ Additionally, Bostwick allegedly provided incentives to treating physicians in exchange for referrals of patients who would then be subjected to these tests.¹⁷ Under the civil settlement resolving False Claims Act violations, Bostwick agreed to pay over \$2.6 million to resolve these charges plus an additional \$1.125 million if certain financial contingencies occur within the next five years (for a total potential payment of up to \$3.725 million). Critically, the corporate entity, Bostwick Laboratories, had previously settled the same False Claims Act charges in two separate agreements for a total of \$6.5 million.¹⁸

The cases against Bostwick and Warner Chilcott's Reichel may demonstrate the early impact of the Yates Memo on individual executives in the healthcare sector, which traditionally has not been known to involve criminal charges or civil resolutions against individual executives.

Financial Services Industry

While the financial services industry has not yet seen the same treatment as Reichel and Bostwick, it may simply be too early to tell.



Some commentators have noted that several recent settlements in the financial services industry lacked follow-on individual prosecutions. This is noteworthy, they argue, because the failure to prosecute individuals following the financial crisis partially inspired the Yates Memo.¹⁹ On the other hand, certain of these settlements explicitly do not release individuals from potential liability, leaving the door open for actions against culpable individuals at a later date. In fact, recent non-prosecution agreements with a number of foreign banks have contained even stricter terms in that the agreements explicitly require the banks to cooperate in identifying individuals, regardless of whether the individuals were employees or third parties, and to provide ongoing assistance with information requests and treaty assistance.

Because the recent financial services settlements related to aged conduct, and the investigations were well underway by the time the Yates Memo was released, those settlements are unlikely to act as a barometer for DOJ's pursuit of future financial services investigations with the guidance of the Yates Memo.

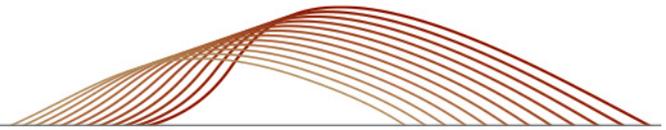
A Requirement for Corporations to Clarify Their Disclosures

On February 4, 2016, the *Wall Street Journal* reported that the DOJ Fraud Section was finalizing a new requirement—pursuant to the Yates Memo's directives—that companies expressly certify they have “fully disclosed all information about individuals involved in wrongdoing” prior to settling charges. According to the article, a DOJ spokesman noted that such a confirmation is necessary to ensure that companies understand that “investigations cannot end with a conclusion of corporate liability, while stopping short of identifying those who committed the underlying conduct.”²⁰ While this report was widely characterized as imposing a new “certification” requirement on companies, on March 3, 2016, Caldwell clarified DOJ's approach, flatly stating that “[t]here is no requirement that people certify that they've given us every fact they have.” Caldwell noted that, while DOJ was “not looking for perfect cooperation,” DOJ may sometimes ask a company to clarify it has provided DOJ with all relevant facts.²¹ Caldwell referred to this approach as an informal DOJ policy.²²

Any clarification or confirmation requirement, regardless of whether it is pursuant to a formal or informal policy, leaves open a number of questions. For example, under what circumstances will a corporation's confirmation of its disclosures be reviewed, and what impact will that review have on the corporation's ability to receive cooperation credit? Additionally, will a confirmation from counsel to the settling corporation be sufficient in all circumstances, or might an officer of the corporation be required to make such a representation? These and other questions remain to be answered until such time as DOJ has had the opportunity to develop and implement this policy—and perhaps further clarify this new “informal” process.

“Fast-Track” Treatment for Self-Disclosing Companies in the FCPA Context

On February 9, 2016, DOJ Fraud Section Chief Andrew Weissmann announced the FCPA Unit's new approach to “fast-track” cases for corporations that voluntarily disclose their potential wrongdoing. Acknowledging the slow and costly pace of some DOJ investigations, Weissmann stated that self-disclosing companies will not be subjected to a “never-ending, ongoing process,” despite the inherently time-consuming nature of overseas investigations. Instead, the FCPA Unit would try to bring those cases to resolution within a year.²³ To implement the “fast-track” approach, Weissmann cited an increased attorney headcount and additional FBI resources. This new approach builds on other leniencies the FCPA Unit has considered for self-disclosing companies, including a greater number of declinations.²⁴



The inclusion of such a “fast-track” process will obviously impact the timing of a company’s ability to seek cooperation credit. Additionally, given a company’s Yates Memo burden to identify all relevant facts, it will also place a premium on a company’s ability to conduct an effective and efficient internal investigation. This “fast-track” approach may also encourage prosecutors to resolve prosecutorial decisions (both corporate and individual) in a timely manner.

It is also apparent that DOJ’s commitment to the prosecution of individuals in the FCPA context preceded the announcement of the Yates Memo. In fact, 80% of 2015 FCPA prosecutions by DOJ were against individuals, and there were no instances where a corporation was charged without executives also being charged. These 2015 statistics suggest a significant shift in approach from DOJ FCPA prosecutions in years past, which were largely thought to have focused on the conduct of the entity.

Conclusion

In some respects, the Yates Memo has had a modest impact in the six months since its publication. But there are ample reasons why its full impact has not yet been felt. Several of its directives have not yet been incorporated into practice. DOJ prosecutors are still in the process of applying the Yates Memo, to the extent they were not already, to existing and new investigations. Once the meaning of the Yates Memo’s various policies has been fully examined and internalized, we may see greater transparency in the manner with which DOJ applies those policies.

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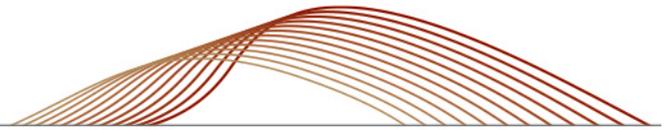
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¹ See Memorandum from Deputy Att’y Gen. Sally Quillian Yates, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) (“Yates Memo”), available at <http://www.justice.gov/dag/file/769036/download>.



- ² Remarks of Asst. Att’y Gen. Leslie R. Caldwell delivered at the Second Global Investigations Review Conf. (Sept. 22, 2015), available at <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-second-annual-global-0>.
- ³ *Id.*
- ⁴ See generally Dep’t of Justice, U.S. Attorneys’ Manual 9-28000 (1997), available at <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.
- ⁵ Dep’t of Justice, U.S. Attorneys’ Manual 9-28.210 (1997), available at <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.
- ⁶ Dep’t of Justice, U.S. Attorneys’ Manual 9-28.700 and 9-28.720 (1997), available at <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.
- ⁷ Dep’t of Justice, U.S. Attorneys’ Manual 9-28.1200 (1997), available at <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.
- ⁸ Dep’t of Justice, U.S. Attorneys’ Manual 9-28.720 (1997), available at <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.
- ⁹ Remarks of Deputy Asst. Att’y Gen. Brent Snyder, Individual Accountability for Antitrust Crimes (Feb. 19, 2016), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust>.
- ¹⁰ *Id.*
- ¹¹ Dep’t of Justice, “Warner Chilcott Agrees to Plead Guilty to Health Care Fraud Scheme and Pay \$125 Million,” Press Release (Oct. 29, 2015), available at <https://www.justice.gov/usao-ma/pr/warner-chilcott-agrees-plead-guilty-health-care-fraud-scheme-and-pay-125-million>.
- ¹² United States v. Reichel, No. 15cr10324, ¶11 (D. Mass. Oct. 28, 2015), available at <http://www.justice.gov/opa/file/789086/download>.
- ¹³ *Id.* at ¶11.d–f.
- ¹⁴ *Id.* at ¶11.i–m.
- ¹⁵ Matt Apuzzo and Ben Protess, “Justice Department Sets Sights on Wall Street Executives,” *New York Times* (Sept. 9, 2015).
- ¹⁶ Dep’t of Justice, “Former Owner of Bostwick Laboratories Agrees to Pay Up to \$3.75 Million to Resolve Allegations of Unnecessary Testing and Illegal Remuneration to Physicians,” Press Release (Jan. 8, 2016), available at <https://www.justice.gov/opa/pr/former-owner-bostwick-laboratories-agrees-pay-375-million-resolve-allegations-unnecessary>.
- ¹⁷ *Id.*
- ¹⁸ Jonathan K. Tyckom, “Bostwick Laboratories Agrees to Pay U.S. Government \$6.05 Million for Allegedly Violating the Anti-Kickback Statute; Whistleblower to Receive Reward,” *The National Law Review* (Oct. 28, 2014), available at <http://www.natlawreview.com/article/bostwick-laboratories-agrees-to-pay-us-government-605-million-allegedly-violating-an>.
- ¹⁹ See Remarks by Att’y Gen. Eric Holder at New York University School of Law (Sept. 17, 2014), available at <http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law> (cited extensively by Yates a year later when announcing the Yates Memo).
- ²⁰ Stephen Dockery, “U.S. Justice Dept to Require Certification of Cooperation in Investigations,” *Wall Street Journal* (Feb. 4, 2016), available at <http://blogs.wsj.com/riskandcompliance/2016/02/04/u-s-justice-dept-to-require-certification-of-cooperation-in-investigations/>.
- ²¹ Adam Dobrik, “Caldwell: Companies do not have to certify their full cooperation,” *Global Investigations Review* (Mar. 4, 2016), available at <http://globalinvestigationsreview.com/article/1025259/caldwell-companies-certify-cooperation>.
- ²² *Id.*
- ²³ Remarks of Dep’t of Justice Fraud Section Chief Andrew Weissmann at a Global Investigations Review Conf. (Feb. 9, 2016), available at <http://globalinvestigationsreview.com/article/1024941/gir-live-dc-weissmann-speech>.
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