



THE YATES MEMO: THE DEPARTMENT OF JUSTICE ATTEMPTS TO REFOCUS CORPORATE INVESTIGATIONS ON INDIVIDUAL WRONGDOERS IN BOTH CRIMINAL AND CIVIL INVESTIGATIONS

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Here we go again! First, it was the Holder Memorandum (1999); next it was the Thompson Memorandum (2003); then, the Thompson Memorandum was clarified by the McCallum Memorandum (2005); then, the McCallum Memorandum was replaced by the McNulty Memorandum (2006); the McNulty Memorandum was refined by the Filip Memorandum (2008); and now, the current Deputy Attorney General – Sally Quillian Yates – has issued her own memorandum altering the Department of Justice’s rules governing the investigation and prosecution of business organizations. The changes are potentially profound and raise many questions for corporations and businesses that find themselves in the crosshairs of a Justice Department investigation.

The Yates Memorandum¹, as it inevitably will be called despite Department of Justice protests to the contrary, substantially alters some long-held policies and practices in federal investigations and prosecutions. More emphasis is now placed on the targeting of individual decision-makers within a corporation under investigation. Prosecutors must now begin their effort with an individual target, and the corporation will get no credit for cooperating without delivering its people up on a silver platter. But to understand where we are, we must understand the road that got us here.

A. The History of the DAG Memos

For more than 15 years the United States Department of Justice has been struggling to find an appropriate approach to the investigation and prosecution of business organizations. These changing policies, and an ever shifting balance between corporate legal rights and the needs and demands of law enforcement, have been memorialized in memoranda issued by the respective Deputy Attorneys General (DAGs). These memoranda have reflected successive Administrations’ policies, priorities, constituencies and philosophies. And they often have been issued in response to a wave of high-profile investigations and prosecutions and the related outcry from the Congress and the public.

¹ Memorandum from Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice to Heads of Dep’t Components, U.S. Attorneys, regarding Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), available at <http://www.justice.gov/dag/file/769036/download>.



In 1999 then Deputy Attorney General Eric Holder issued a directive² that emphasized the value of corporate cooperation in federal investigations and identified several factors that prosecutors could consider in mitigating a company's exposure to criminal liability. Prosecutors were encouraged, but not required, to consider a company's 1) decision to waive the attorney-client and/or work productive privileges; 2) refusal to provide advancement/indemnification to officers and directors charged with or suspected of misconduct; 3) implementation of remedial and restitution programs; 4) discipline of culpable employees; and 5) decision to avoid joint defense agreements. The terms of the Holder Memo were advisory and were not made mandatory for prosecutors.

Not long after issuance of the Holder Memorandum, the Enron and Worldcom scandals, among others, burst on the scene. Shareholders claimed they had been defrauded and misled, and public faith in the country's financial system was tested and shaken. The resulting public outcry demanded that the responsible parties be brought to justice.

At the federal level a number of measures were instituted in the wake of these financial scandals. Investigative resources were organized behind a Corporate Fraud Task Force, Congress passed the Sarbanes-Oxley Act of 2002³, the Federal Sentencing Commission issued new guidelines increasing the range of potential penalties for financial crimes, and the Justice Department issued new guidance to its prosecutors.

The Thompson Memorandum⁴, issued on January 20, 2003, and given the formal name "Federal Prosecution of Business Organizations," largely mirrored the terms of the Holder Memorandum, except that it imposed mandatory guidelines on federal prosecutors as they considered whether and how to proceed against corporations and business organizations. While prosecutors were given "wide latitude" in determining the proper treatment of a business entity, they were required to consider nine specific factors:

1. The nature and seriousness of the offense;
2. The pervasiveness of wrongdoing within the corporation;
3. The corporation's history of similar conduct;
4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protections;

² Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys, regarding Federal Prosecution of Corporations (June 6, 1999), available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/Chargingcorps.html>.

³ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered section of 11 U.S.C., 15 U.S.C., 18 U.S.C. and other chapters).

⁴ Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys, regarding Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.



5. The existence and adequacy of the corporation's compliance program;
6. The corporation's remedial actions, if any;
7. Collateral consequences of a corporate criminal conviction (e.g., potential harm to shareholders, pension holders and non-culpable employees);
8. The adequacy of the prosecution of responsible individuals; and
9. The adequacy of civil and regulatory action.

Following mandatory implementation of the Thompson Memorandum's provisions, voices of criticism began to rise up all around. Corporations and their counsel began to complain that, in order to avoid the stigma of being labeled as uncooperative, corporations and businesses felt pressure to acquiesce in prosecutor's demands that they waive attorney-client and work product privileges. Despite the Department of Justice's public statements that it never asked corporations to waive these privileges if it was not in their business interest to do so, many around the country complained otherwise. The United States Sentencing Commission further fueled these complaints when it added language to Section 8C2.5 of the Federal Sentencing Guidelines that included privilege waivers as an indicator of substantial assistance if "such waiver [was] necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

As criticism intensified through 2003 and 2004, the Department of Justice looked for ways to quell the storm. Its first response came in the form of another memorandum from Department leadership. On October 21, 2005, then-acting Deputy Attorney General Robert McCallum issued a set of directives to federal prosecutors⁵. The McCallum Memorandum sought to limit and control the demands for privilege waivers from prosecutors by tasking supervisory prosecutors (Criminal Chiefs, for example) with approving requests for waivers before any such demand was made by line attorneys. It also encouraged each of the 94 United States Attorney's Offices to adopt its own local policies as to when to seek waivers. These new directives came under almost immediate criticism for their lack of standards, lack of uniformity and lack of oversight.

The Sentencing Commission also felt the heat of criticism. In its Guideline Amendments for 2006, the Commission reversed its 2004 position and removed the language from Section 8C2.5 that encouraged privilege waivers as part of legally recognizable cooperation.

The Department of Justice took another giant step back in December of 2006 when Deputy Attorney General Paul McNulty issued his own memorandum entitled "Principles of

⁵ Memorandum from Robert D. McCallum, Jr., Acting Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys, regarding Waiver of Corporate Attorney-Client and Work Product Protection (October 21, 2005), available at http://federalevidence.com/pdf/Corp_Prosec/McCallum_Memo_10_21_05.pdf.



Federal Prosecution of Business Organizations”⁶. This directive explicitly replaced both the Thompson and McCallum Memoranda and purported to “expand” upon long-standing Department policies concerning the valuation of a corporation’s cooperation in a government investigation. The Memorandum attempted to balance the Department’s goal of gaining access to corporate information concerning wrongdoing with the valid concerns about the public policy importance of the attorney-client and work product privileges. McNulty also made substantial changes to the waiver process while not forbidding such requests.

In sum, the McNulty Memorandum set up a two tiered system in which prosecutors were required to evaluate and proceed on any request for a corporate privilege waiver. One tier focused on “purely factual information, which may or may not be privileged, relating to the underlying misconduct,” while the other tier addressed “attorney-client communications or non-factual attorney work product.” In order to seek a waiver as to the first category of information, prosecutors were required to establish a legitimate need for the information in order to accomplish the legitimate goals of law enforcement and balance that against the purposes served by the privileges. If the prosecutor balanced these competing principles and concluded that he/she should request a waiver, he/she was then required to obtain written authorization from the presidentially appointed United States Attorney who was required to consult with the office of the Assistant Attorney General for the Criminal Division before agreeing to or refusing the request. If a prosecutor sought a waiver as to the other category of information (true attorney-client or work product information), then the process was the same but required the approval of the Assistant Attorney General. The McNulty Memorandum also included notice requirements to the corporation under investigation and limits on the use of any information obtained.

The McNulty Memorandum tamped down, but did not extinguish, the criticism of the Department’s position on waivers. So, on August 28, 2008, Deputy Attorney General Mark Filip took a stab at the problem. His memorandum⁷, which was incorporated into the United States Attorney’s Manual as a more formalized policy, focused heavily on the valuation of cooperation. Recognizing the potential for abuse, the Filip Memorandum shifted prosecutors’ focus away from the waiver issue to whether the corporation has disclosed relevant facts about the alleged misconduct, from whatever source. Companies could receive credit for cooperation if they disclosed all relevant facts. The nature of the information – privileged or non-privileged – was deemphasized. The Filip Memorandum also directly prohibited prosecutors from asking for corporate waivers in an effort to alleviate the concern about coercion of corporate targets and defendants. But, voluntary waivers were permitted and rewarded as part of a full factual

⁶ Memorandum from Paul J. McNulty, Jr., Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components, U.S. Attorneys, regarding Principles of Federal Prosecution of Business Organizations (undated), available at http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

⁷ Memorandum from Mark Filip, Deputy Att’y Gen’l, U.S. Dep’t of Justice, to Heads of Dep’t. Components, U.S. Attorneys, regarding Principles of Federal Prosecution of Business Organizations (August 28, 2008), available at <http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>.



disclosure. Notes, memoranda and communications made for the purpose of seeking or dispensing legal advice were distinguished and accorded a more proper position. And, the Memorandum emphasized that incomplete disclosure was one of several facts to be considered in making a determination about the value of corporate cooperation and the benefit, if any, that a company might receive in return.

B. The Yates Memorandum

Interestingly, the Filip Memorandum enjoyed the longest shelf life of the series of DAG memos. That is, until last week. On September 9, 2015, current Deputy Attorney General Sally Quillian Yates, issued her own memorandum dramatically redirecting prosecutors' pursuit of corporate wrongdoing. The Yates Memorandum altered Department of Justice policy in six important ways:

1. Corporations must provide both criminal and civil investigators and prosecutors all relevant facts in order to be eligible for any credit for cooperation. Henceforth, the Department will "demand" the identification of all involved individuals, will insist on continued cooperation against individuals even after the corporation has resolved the matter as to itself, and will require the production of all relevant facts about responsible individuals. The memo touches on the issue of privilege only by instructing prosecutors that the "requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges" does not absolve the prosecutors of their responsibility to independently investigate. Prosecutors are admonished not to "merely accept what companies provide."
2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation. This requirement is designed, according to the Memorandum, to focus investigative efforts on individuals as the most effective way to ferret out corporate misconduct, increase the likelihood of cooperation by knowledgeable insiders (by using the threat of prosecution as leverage to make them talk) and increase the likelihood that the investigation will result in the charging of individuals and not just the corporation itself.
3. Criminal and civil attorneys within the Department are urged to have early and regular consultation and to coordinate their work where possible. This, the memo states, will permit consideration of a fuller range of possible remedies and settlement options to include incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment.
4. Absent extraordinary circumstances, no corporate resolution will provide protection for criminal or civil liability for any individuals. In other words, prosecutors will



rarely be able to accept a corporate plea or other resolution but let culpable individuals avoid prosecution or civil liability for their legally cognizable conduct.

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. This provision is essentially a mirror image of requirement number 2 above. The Department's priority clearly will be individual prosecutions, and this provision is designed to prevent the corporation from running out the clock on individual prosecutions. And, it incorporates the supervisory approval requirements for declination of individual prosecutions reminiscent of the much maligned McCallum Memorandum.
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 any judgement that might be obtained. Here the Department clearly abandons any "ability to pay" analysis by saying that "the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit."

This latest DAG pronouncement, like its predecessors, leaves many questions unanswered. And, like its predecessors, it imposes many hurdles for corporate America and for clients and prospective clients:

-The Memorandum fails to address the Department's approach going forward as to attorney-client and work product privileges, the single most controversial issue in the long history of the policy pronouncements. It only passingly references the "bounds of the law and legal privileges" and references sections 9-28.700 through 9-28.760 of the United States Attorneys Manual, which it earlier announces will be revised. So, real questions remain about whether the Department will respect those privileges and how it will view waivers, or the decision not to waive, by a corporate target. Corporations and their counsel must carefully navigate any request for cooperation and must understand the prosecutor's approach on this issue when making a decision about whether and how to cooperate.

-The Department has drawn some very bright line rules with respect to its evaluation of cooperation: the corporation must disclose all relevant facts, name all involved individuals, and require the production of all relevant information. And, further, prosecutors are warned not to generally accept a corporation's representations regarding the extent of its effort to find relevant facts and information concerning the scope of the wrongdoing.

-The single-minded focus on individual prosecutions, and the requirement that both criminal and civil investigations target individuals from the outset, impose a standard that may actually chill prosecutions. Significant questions arise as to whether this will create an



atmosphere within corporations that discourages cooperation and that places the corporation at odds with its agents and employees from the beginning.

-Related to the focus on individuals will be the adequacy of warnings given by corporate counsel to individual employees when talking with them during internal investigations. These warnings, known as Upjohn Warnings, clarify for employees that counsel represents the corporation and not the employees individually.⁸ But, now, questions arise as to the scope of those warnings. For example, must corporate counsel now advise employees that the attorney represents only the corporation, that the corporation is looking to cooperate in order to resolve this matter and that it will provide the details of any interview directly to the Government in order to ensure that it is deemed to have cooperated fully under the Yates Memorandum? Certainly, such warnings may chill any effort to get to the bottom of the problem within the corporation.

-In recent years the Department has resolved a number of complex cases through the use of Deferred Prosecution and Non-Prosecution Agreements. These tools have been useful in resolving criminal and civil issues while allowing the subject corporations to acknowledge wrongdoing, restructure, revise procedures and survive. The Memorandum is silent as to how these tools may be used, and they are not among the settlement options listed where the Memorandum encourages criminal and civil attorneys within the Department to cooperate more closely with each other.

-By clearly setting forth the principle that settlement of corporate liability does not necessarily settle individual liability, the Memorandum raises real questions about when a corporation or other business entity might consider a matter concluded so that it may return to a focus on its business.

-Finally, the directive that one's ability to pay "should not control the decision on whether to bring [a civil] suit" raises real issues about the use of limited federal resources against individuals who likely cannot satisfy a judgment against them and who, therefore, are unlikely to be able to pay for a defense to the claims brought against them. Do we really want a Government willing to sue its own citizens even when it knows they cannot possibly pay if they lose?



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⁸ The frequently used term "Upjohn warning" derives from *Upjohn Co. v. United States*, 449 U.S. 383 (1981). *Upjohn* did not actually involve an issue directly related to an Upjohn warning. Rather, *Upjohn* provided a flexible framework to identify when employee communications with corporate counsel qualify as protected attorney-client exchanges.