

8 Thoughts On Cartel Investigations Post-Yates Memo

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Many have said that the Yates memorandum marks a significant, or even revolutionary, change in how the U.S. Department of Justice will prosecute individuals. Whether the Yates memorandum will materially change cartel prosecutions and investigations is unclear. While the broad strokes of this policy are clear enough, it is not obvious how it will be implemented in practice. What documents and information will the DOJ request from a company regarding individuals beyond the usual requests for documents, calendars and expense reports and company phone records? How much information and at what level of detail will a company need to disclose regarding its employees before receiving cooperation credit? When will the DOJ request these disclosures? These questions remain to be answered as the DOJ implements the Yates memorandum.

The Yates Memorandum

In September 2015, the DOJ made public a memorandum drafted by Deputy Attorney General Sally Yates announcing new DOJ policies intended to hold corporate executives accountable for criminal conduct. The memorandum, colloquially known as the “Yates memo,” outlines six policy changes or clarifications that are intended to strengthen existing DOJ policies concerning corporate executives. These policies include:

1. Companies 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” in order to be eligible for a cooperation credit.
2. The memorandum directs DOJ attorneys to focus on individuals at the outset of the corporate investigation.
3. The DOJ’s criminal and civil attorneys should maintain “[e]arly and regular communication” with each other to ensure that parallel proceedings are coordinated.
4. The DOJ will not release executives from criminal liability except in “extraordinary circumstances” or as a part of the DOJ’s corporate leniency program.



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5. DOJ attorneys must have a “clear plan” to resolve criminal cases against executives in order to seek resolution of the corporate investigation, and any releases of executives must be approved by the relevant U.S. attorney or assistant attorney general.

6. The DOJ’s civil attorneys should “consistently focus on individuals as well as the company,” and “[p]ursuit of civil actions against culpable individuals should not be governed solely by those individuals’ ability to pay.”

The Yates Memorandum’s Implications

The preliminary reaction from DOJ officials suggests that the Yates memo will have some impact on cartel investigations, but that it will not significantly change the DOJ’s enforcement practices. In articulating this view, Deputy Assistant Attorney General Brent Snyder explained that “[t]he [A]ntitrust [D]ivision has long prioritized prosecution of individuals” and that it “continues to be a fundamental policy of the [A]ntitrust [D]ivision, and both that practice as well as the way we investigate and resolve our cases, we believe, is entirely consistent with the Yates Memo.” Snyder acknowledged, however, that the Yates memo may speed up the prosecution of certain individuals. Whether this is the case, there are some conclusions concerning the Yates memo’s impact on criminal cartel investigations and prosecutions that seem apparent.

1. DOJ’s Leniency Program Will Not Change

As a practical matter, the Yates memo, by its own terms, has no effect on antitrust amnesty applicants and their executives. Even under the Yates memo, amnesty means amnesty — if a company perfects a corporate amnesty application, it can protect itself and its employees from criminal prosecution in the United States. In this sense, the DOJ’s leniency program will continue to create different challenges and opportunities for companies and their executives than are created by most other federal criminal enforcement programs.

2. Companies May Need to Disclose More About Individual Executives To Obtain Cooperation Credit

Outside of the amnesty context, the Yates memo could signal changes for U.S. cartel enforcement. The Yates memo appears to indicate that companies must provide detailed information regarding all of its culpable executives — including very senior officials — prior to receiving cooperation credit. For example, the Yates memo’s reference to “determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs,” may cause prosecutors to demand additional, detailed information about senior executives at a non-amnesty company seeking cooperation credit.

This could mark a significant practical change. Many companies have cooperated over the years in different ways and to varying degrees of specificity when it comes to their senior executives. Part of this depends on the extent to which the executives themselves are involved in the conduct being investigated; the size of the company involved and whether it is public; whether it has any formal compliance protocols to deal with internal investigations; whether the board of the company becomes actively involved; whether the company deals with the government; and the scope of the problem. While companies have taken several steps to show their “substantial cooperation” with the DOJ’s investigation, they generally have not gone out of their way to implicate high-level executives in wrongful conduct when they do not have to (unless it cannot be avoided) and have provided only the

information necessary to resolve their issues. It is always difficult and dangerous to generalize because some companies have done more and some have done less depending upon many of the factors listed above. The Yates memo appears to discourage this practice by tying cooperation credit to the disclosure of specific information about specific executives. However, it is still unclear when companies seeking a cooperation credit will be required to disclose information regarding their executives, and how much information the DOJ will require to be disclosed.

3. Executives May Need to Retain Their Own Counsel Earlier in the Investigation

The Yates memo may force individual representation earlier in the investigative process. The memorandum requires DOJ attorneys to focus on individuals from the outset of corporate investigations in order to create a better factual record against individuals, to “increase the likelihood that [employees] with knowledge of the corporate misconduct will cooperate with the investigation and maximize the chances [of a] final resolution ... against culpable individuals.” This early focus on individual culpability coupled with the renewed emphasis on individual prosecution may make it more likely that company and employee interests diverge early in the investigative process. As a result, companies and their counsel may face more difficulties when attempting to secure complete cooperation from executives during internal investigations.

4. Company Counsel May Need to Provide More Robust Upjohn Warnings

The Yates memo also highlights the difficulties that executives may face early in a corporate investigation. It provides additional guidance regarding what it means when the DOJ demands that a company produce nonprivileged information. To earn cooperation credit, a company must produce all relevant facts, including the facts obtained through interviews conducted as part of its internal investigation. As a result, an executive’s early interviews with company counsel, including damaging admissions of culpable conduct (or false exculpatory claims), will likely be disclosed to the DOJ.

Given this increased focus on individuals, companies should consider making more robust Upjohn warnings and memorialize them to ensure that employees understand the scope of the attorney-client relationship, and that the company can disclose facts learned during the interview at its sole discretion. These Upjohn warnings should be made early in the company’s internal investigation because executives may choose to retain their own counsel, often at the expense of the company, at a much earlier stage of the investigation. It is unclear as a practical matter whether corporate counsel must now advise that the company will provide the details of any interview to the government to ensure employees fully understand their rights. Certainly, such a warning would likely chill an employee from speaking freely or without counsel.

5. Internal Investigations May Be Complicated by Individual Liability

The government’s increased focus on individual liability may complicate compliance efforts. Employees may be more wary of speaking with investigators because they know that companies need to identify individuals in order to get credit for cooperating with an investigation. While individuals may be reluctant to provide information to internal investigators, a company still needs to ensure that it receives all possible information for its proffers to the DOJ. These competing issues may lead to increased tensions between the company and its executives during an internal investigation.

6. Foreign Executives Are Increasingly Likely to Face Charges in the U.S.

The Yates memo's increased emphasis on both corporate cooperation and the prosecution of individuals, especially culpable executives of multinational companies who are located abroad, means that they are at a greater risk of prosecution in the United States. And when coupled with the DOJ's recent success on the extradition front, as well as the increasing criminalization of cartel offenses around the world, the Yates memo may mean that more foreign executives will be prosecuted in the United States.

7. The Yates Memorandum May Change Some Carveout Decisions

More broadly, the combination of the DOJ's increased cartel enforcement efforts and the Yates memo would seem to mean that it will be increasingly difficult for corporate and individual counsel to argue, and for prosecutors to justify, that a particular executive should be "carved in" to a corporate plea agreement without substantial corporate disclosure about his or her conduct. But how broadly will this extend? Will it impact an employee's willingness to cooperate with his employer thereby jeopardizing the employee's continued employment? Does cooperation mean disclosing knowledge about other employees? Does it undermine the employee's attorney-client privilege? Does it require a company to terminate an executive at some point? Does cooperation mean a company has to somehow support or agree not to interfere with the possible extradition of an employee by say, agreeing to disclose his location and travel plans? Will the demand for cooperation by DOJ's different offices and staff attorneys be applied consistently?

The answers to these questions are not known yet but raise significant issues concerning striking an appropriate balance between aggressive investigations and prosecutions and protecting the due process rights of those being investigated and prosecuted. Broadly speaking, however, the Yates memo could prompt prosecutors to "carve out" a larger number of individual executives.

8. Executives May Face Civil Liability

Following the spirit of the Yates memo, the DOJ recently announced that it will consider bringing civil enforcement actions against individuals alleged to have participated in price-fixing. The DOJ has not provided any guidance on when or whether it will pursue civil actions against executives. This leaves many unanswered questions. How would DOJ evaluate an individual's culpability when determining whether to bring a civil action, especially when it prosecutes that individual? Would knowing but passive acquiescence in a subordinate's conduct be enough for the DOJ to pursue a civil case too? What would an appropriate remedy be — a fine, disgorgement or injunctive relief? Will civil prosecution be limited to conduct in certain industries like the banking, financial and securities sectors, which are already regulated by other agencies? Until the DOJ provides further guidance, companies will need to update their corporate compliance programs to inform employees about their possible exposure to civil antitrust prosecution.

Conclusion

While it is too soon and still unclear how the Yates memo will be implemented, the memo will likely provide the DOJ with additional leverage in its criminal cartel investigations. Companies will need to make difficult decisions regarding how robust an Upjohn warning they should provide, when to provide legal counsel to their employees, and how much information they should provide to the government regarding its employees. Likewise, individuals will need to determine the extent to which they will cooperate with a corporate internal investigation, given the DOJ's increased focus on criminal and civil liability for individual wrongdoing. Stay tuned; there is more to come.

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