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## Department of Justice Announces Important Revisions to the Yates Memo

*By Peter W. Baldwin and Antonio M. Pozos*

In a November 29, 2018 [speech](#) delivered at the American Conference Institute's International Conference on the Foreign Corrupt Practices Act, Deputy Attorney General Rod Rosenstein announced several important revisions to the Justice Manual's corporate enforcement policy regarding individual accountability. Specifically, the revisions modify the Department of Justice ("DOJ") policies originally announced in a September 2015 [memorandum](#) from then-Deputy Attorney General Sally Yates (the "Yates Memo").

The Yates Memo required companies to provide DOJ with "all relevant facts about the individuals involved in corporate misconduct" to be eligible to receive cooperation credit in resolving investigations. This policy effectively required the identification and disclosure of all participants in misconduct – regardless of their seniority within the company – before any cooperation credit would be awarded. In his speech, Rosenstein acknowledged that, while it "seemed like a great idea" to require companies to identify every person involved in misconduct before a company was eligible for cooperation credit, in practice the policy had resulted in delays and had hindered resolutions, which led to the policy not being "strictly enforced in some cases."

While reiterating that pursuing individuals who are responsible for corporate wrongdoing will remain a top priority for DOJ, the revised policy scales back the level of disclosure required by companies who are the targets of criminal investigations. Specifically, under the revised policy, companies are no longer required to expend time and resources identifying and collecting information about every individual involved in misconduct. Instead, companies seeking cooperation credit must identify only those individuals who were "substantially involved in or responsible for the criminal conduct." The phrase "substantially involved in or responsible for" is the key distinction from the previous, broader "involved in" formulation from the Yates Memo.

The new policy recognizes that, when the government investigates violations that involved pervasive activities that occurred over a long period of time, "it is not practical to require the company to identify every employee who played any role in the conduct." Moreover, DOJ has no interest in delaying investigations and dispositions "merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted." Instead, DOJ will focus its investigative resources on those individuals "who play significant roles in setting a company on a course of criminal conduct" and "who authorized the misconduct."

Rosenstein also announced significant changes to DOJ's corporate enforcement policies in the civil context. Recognizing that civil cases are different from criminal cases, Rosenstein stated that "[t]he primary goal of affirmative civil enforcement cases is to recover money[.]" Thus, the new policy aims to restore some of the discretion and flexibility that civil DOJ attorneys had to "accept settlements that remedy the harm and deter future violations, so they can move on to other important cases." Rosenstein noted that DOJ's "civil litigators simply cannot take the time to pursue civil cases against every individual employee who may be liable for misconduct, and we cannot afford to delay corporate resolutions because a bureaucratic rule suggests that companies need to continue investigating until they identify all involved employees and reach an agreement with the government about their roles."

The policy also allows civil DOJ attorneys to offer partial cooperation credit to companies that "meaningfully assist" in an investigation. In a repudiation of the Yates Memo's "all or nothing" approach to cooperation credit, companies will no longer be required to identify all individual wrongdoers in order to be eligible to receive cooperation credit. Instead, a company is now required to "identify all wrongdoing by senior officials, including members of senior management or the board of directors, if it wants to earn any credit for cooperating in a civil case." If a company seeks to earn maximum credit, "it must identify every individual person who was substantially involved in or responsible for the misconduct."

However, Rosenstein was clear to emphasize that the new policy "does not allow corporations to conceal wrongdoing by senior officials." As such, companies which hide misconduct by senior officials or fail to act in good faith will not be eligible for cooperation credit.

The new DOJ policy is a positive development for companies facing DOJ investigations. It is intended to provide flexibility in conducting investigations and negotiating dispositions. The practical effect of the new policy should be to allow companies to focus their resources on addressing the underlying misconduct and dealing with the key employees who were responsible for the misconduct. The new policy also allows for cooperation credit even if companies cannot provide information about all relevant individual wrongdoers.

However, the prosecution of culpable individuals clearly remains a top priority for DOJ. Companies must not interpret the new policy to mean that they can protect culpable executives or employees. DOJ attorneys maintain discretion to refuse cooperation credit "to any corporation

who conceals misconduct by members of senior management or the board of directors, or otherwise demonstrates a lack of good faith in its representations.”

In addition, it remains to be seen how the new policy will be implemented in practice and the effects that the policy will have on the outcomes of individual investigations. Most notably, there are unanswered questions about what standard DOJ will set to determine whether an individual was “substantially involved in or responsible for” criminal conduct. In sum, while the new policy loosens the requirements of the Yates Memo and provides more opportunities for companies to cooperate, there are still questions about how the policy will work going forward.

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