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Danger Ahead? The Yates Memo and Some Strategic Considerations for Corporations and Individuals [Ober|Kaler]

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If you are a corporate executive or employee, the U. S. Department of Justice has a message for you: Investigating you for potential misconduct is clearly a top priority.

Recently, the DOJ issued a policy memorandum (Yates memo) that directs all civil and criminal federal prosecutors to follow a series of steps when investigating corporate wrongdoing. According to Deputy Attorney General Sally Yates, these measures are designed to "ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct."

The Yates memo sets forth six DOJ policy directives: (1) all criminal and civil corporate investigations shall also focus on individuals at the outset; (2) absent extraordinary circumstances, individuals will not be released from civil or criminal liability when a matter is resolved with a corporation; (3) civil prosecutors should evaluate whether to prosecute individuals based on factors beyond ability to pay; (4) corporations will not receive *any* cooperation credit without providing to DOJ *all relevant facts* about individuals involved in alleged corporate wrongdoing; (5) no DOJ prosecutor should resolve a matter with a corporation without "a clear plan to resolve related individual cases;" and (6) civil and criminal prosecutors should consistently and routinely consult with each other during all phases of investigations.

It is too soon to know whether the recent DOJ directives will translate into more prosecutions of corporate executives. Similarly, it is too early to know how a company will receive "cooperation credit" based on its disclosures to federal prosecutors. Regardless, even though the policies in the Yates memo relate to holding individuals accountable for corporate wrongdoing, these mandates also have ramifications for companies and organizations, and raise a host of issues to consider when conducting internal investigations.

For instance, if a company decides that DOJ now requires it to focus its internal investigations on identifying culpable individuals, then corporations would be well advised to ensure that the *Upjohn* warning it provides to employees who are interviewed is adequate.

In addition, attorneys assisting a company with an internal investigation will have to determine earlier on whether the entity's interests conflict with a particular employee's interests. A decision might need to be made sooner rather than later whether separate counsel is appropriate for certain managerial employees. A collateral issue that a company may want to consider is whether its current D & O insurance policies are still appropriate.

Moreover, a company must be careful when disclosing all "relevant facts" to the government that it does not inadvertently disclose attorney-client privileged information or work product.

Finally, these current DOJ policies presage that parallel investigations of corporate conduct will likely be the "new normal."[1] Thus, companies should not be surprised if DOJ resorts in the future to certain investigative techniques, like search warrants or Civil Investigative Demands, so that civil prosecutors can use all evidence obtained without running afoul of grand jury secrecy protections afforded by Rule 6(e) of the Federal Rules of Criminal Procedure.

1 As reported in Worthless Services Investigations and Settlements: The Enforcement Trend Continues (*Health Law Alert*, Issue 5, 2015), DOJ Assistant Attorney General Leslie Caldwell announced last September that DOJ's civil and criminal prosecutors would simultaneously review all new *qui tam* complaints to evaluate whether parallel investigations are appropriate. The policy requiring civil and criminal prosecutors to collaborate merely reduces to writing a DOJ investigatory practice.