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## *The Yates Memorandum: Increasing the Perils of Parallel Proceedings*

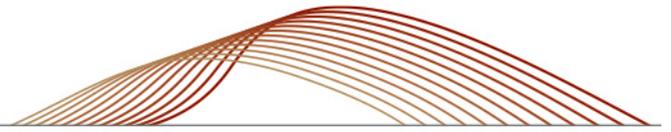
By [William Sullivan](#), [John Durrant](#) & [Jenifer Doan](#)

On September 9, 2015, the Department of Justice (“DOJ”) issued new policies in the form of “six specific steps”<sup>1</sup> intended to strengthen the DOJ’s efforts in holding individual corporate wrongdoers accountable (the “Yates Memorandum”). Though most of the announced policies in the Yates Memorandum are not entirely new, many represent institutional policy shifts that change the way the DOJ will investigate, develop, charge, and resolve cases, according to Deputy Attorney Sally Yates.<sup>2</sup> These policies may have wide-reaching implications for companies and corporate executives dealing with parallel proceedings, as outlined below. The following overview focuses on the potential impact to civil litigation rather than criminal issues.<sup>3</sup>

### Overview of the Yates Memorandum

Briefly, the six guidelines are as follows:<sup>4</sup>

1. **Cooperation credit only available if companies provide “all relevant facts.”** To be eligible for any cooperation credit, corporations must provide to the DOJ all relevant facts about the individuals involved in corporate misconduct. Specifically, if known, the company 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.<sup>5</sup>
2. **Criminal and civil corporate investigations should focus on individuals from inception.** Criminal and civil corporate investigations should focus on individuals from inception.<sup>6</sup>
3. **Criminal and civil DOJ attorneys should communicate and refer.** Criminal and civil attorneys handling corporate investigations should be in routine communication with one another. As early as permissible, the DOJ’s criminal and civil attorneys should notify each other of conduct that might give rise to potential liability under each department’s purview.<sup>7</sup>
4. **No more protection for individuals from criminal and civil liability.** Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or a contrary approved departmental policy, DOJ lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees.<sup>8</sup>



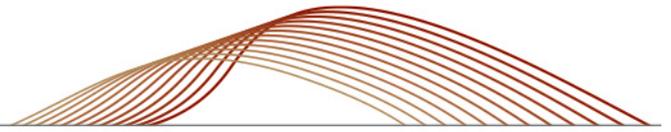
5. **Individual cases must be efficiently prosecuted.** Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires, and declinations as to individuals in such cases must be memorialized. Delays in the corporate investigation should not affect the Department's ability to pursue potentially culpable individuals and tolling agreements should be the rare exception.<sup>9</sup>
6. **Reduce focus on an individual's ability to pay.** 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. Rather, in deciding whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person's misconduct was serious, whether it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest.<sup>10</sup>

## The Potential Impact on Parallel Proceedings

As an initial matter, the Yates Memorandum leaves many questions unanswered regarding what exactly the DOJ will require in order to receive "cooperation credit." Will it be that corporations must "point the finger" at some individual in order to receive cooperation credit, even if their thorough investigation demonstrates that there is no culpable individual? What about individuals—will those who cooperate and identify others culpable be entitled to any similar cooperation credit? These questions, among others, are likely to remain unanswered until we see how the guidance in the Yates Memorandum is applied in future criminal and civil cases.

Importantly, the Yates Memorandum expressly recognizes and reaffirms the "importance of parallel development of civil and criminal proceedings," citing to Chapter 1-12.000 of the U.S. Attorneys' Manual titled "Coordination of Parallel Criminal, Civil, Regulatory and Administrative Proceedings." While the DOJ has had a longstanding policy that DOJ prosecutors and civil attorneys handling white-collar matters "should timely communicate, coordinate, and cooperate with one another and with agency attorneys to the fullest extent appropriate to the case and permissible by law,"<sup>11</sup> the Yates Memorandum not only reinforces this policy but broadens it, advising that criminal attorneys should notify civil attorneys "*as early as permissible*" of potential individual civil liability, and vice versa. Further, the Yates Memorandum notes that "if there is a decision not to pursue a criminal action against an individual—due to questions of intent or burden of proof, for example—criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance."<sup>12</sup> Considering that the burden of proof is generally easier to meet in civil cases, this guidance is likely to result in more civil cases being filed as a result of referrals from DOJ attorneys handling ongoing criminal actions.

As such, parallel proceedings involving individuals are likely to become even more common in cases involving alleged violations of federal or state securities laws. Of course, in addition to an increased risk of parallel proceedings originating at the DOJ, individuals accused of corporate wrongdoing may still simultaneously face investigations and enforcement proceedings at the state and local level, inquiries by self-regulatory organizations, and private civil actions such as securities class actions and shareholder derivative suits. Clients should work with their counsel to develop a comprehensive strategy to address these competing risks.



## ***Retaining separate counsel for individuals.***

Companies and individuals should make early decisions about the need for separate counsel for employees at all levels when misconduct is identified. Considering the DOJ's call for companies to identify *all* individuals culpable of wrongdoing (see item 1), there is a strong possibility that the interests of the business may become adverse to those of a particular individual. In light of the Yates Memorandum, it may be proper for individuals to consider obtaining separate counsel earlier than usual, or even at the outset of any investigation. The heightened possibility of a criminal indictment further down the line increases the dangers of a potential conflict of interest that may damage an individual's ability to protect (or waive) the attorney-client privilege, depending on the best course of action for that particular individual.

Individuals with indemnification clauses in their employment contracts should confirm that clauses 1) indemnify individuals for separate counsel from the outset of any investigation; 2) allow individuals free rein over the choice of separate counsel; and 3) provide adequate fee protection. Individuals should also consider the risk that their companies may not be able to indemnify them at all if the the companies, for cooperation credit, name the individuals as involved in the wrongdoing. (See *supra*, item 1.) Side-A coverage (*e.g.*, insurance coverage which provides "direct" indemnification to individuals for acts for which the company is not legally required to indemnify) should become a priority for corporate executives who can negotiate such a benefit. Even insurance carriers have reacted to the Yates Memorandum, using the opportunity to reiterate the benefits of some of their Side-A programs.<sup>13</sup>

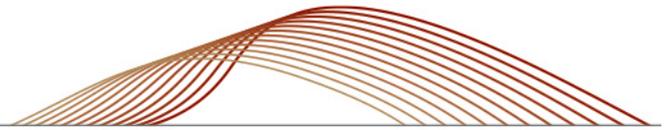
Additionally, companies should reexamine any outstanding D&O policies to see if policy limits should be increased to protect the company from cost increases that may result if individuals opt for separate counsel earlier.

## ***Determining when to testify or invoke the privilege.***

Careful thought should be given to choosing to assert the Fifth Amendment right against self-incrimination, which can have repercussions that emanate across the multiple venues and investigations that may be implicated in parallel proceedings. While the Yates Memorandum has not changed any of the analysis for determining when to invoke the self-incrimination privilege, the increased threat of parallel proceedings makes it vital that individuals accused of wrongdoing, at the outset of any investigation or indictment, should sit down with their attorney and discuss what the individual may be willing to say and the implications of asserting the Fifth Amendment privilege.

An accused individual's failure to assert the privilege in an initial proceeding may impact his or her ability to assert the privilege in future proceedings. Unlike criminal cases, reliance on the privilege in civil cases may give rise to an adverse inference against the party claiming its benefits.<sup>14</sup> However, if asserting the privilege substantially helps defend a criminal case, the risks to any civil case are likely to be insignificant compared to the possibility of losing the criminal case.

Determining whether to invoke the self-incrimination privilege should be based on, among other things, the level of the individual's exposure, the amount of incriminating evidence, the seriousness of the charges, the number of parallel proceedings brought against the individual, and the value the government may place on cooperation.



## *Considering strategic stays.*

Again, even though the Yates Memorandum has not altered the law on stays, accused corporations and individuals should know how to address the issue of stays at the outset of any investigation. An accused corporation or individual should consider requesting a stay for the civil action in the event that a parallel criminal action is brought. Because pre-trial discovery rules for civil proceedings are much broader than for criminal proceedings, providing discovery in a civil proceeding may prove disadvantageous. While courts are not required to stay civil proceedings in the absence of “substantial prejudice,” courts have discretion to enter a stay based on a particularized inquiry into the circumstances of each case.

While it remains to be seen exactly how a post-Yates Memorandum future will play out, the practical effects of the Yates Memorandum, if applied, are significant. In light of the increased public outcry for executive accountability, there is a high likelihood that the DOJ will begin taking a more aggressive approach on prosecutions. Companies and their executives should take time to ensure that they have adequate insurance to handle risk in the new legal landscape. In addition, they should work with counsel to develop strategies that comprehensively address risk—not just from parallel proceedings brought by the DOJ but also from other simultaneous non-federal actions and private civil litigation.



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<sup>1</sup> “Acting Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing,” September 10, 2015 (“Yates Announcement”), available at <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.

<sup>2</sup> See *id.*

<sup>3</sup> A short analysis of the Yates Memorandum’s impact on criminal proceedings is available from Kenneth M. Breen. See DOJ’s New Focus on Corporate Executives: The Practical Effects, Breen et al., available at <http://www.paulhastings.com/docs/default-source/PDFs/stay-current-doj-s-new-focus-on-corporate-executives-the-practical-effects.pdf>.

<sup>4</sup> Yates Memorandum, Department of Justice, September 9, 2015, available at <http://www.justice.gov/dag/file/769036/download>.

<sup>5</sup> See *id.* at 3-4.

<sup>6</sup> See *id.* at 4.

<sup>7</sup> See *id.* at 4-5.

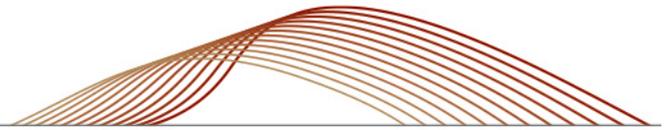
<sup>8</sup> See *id.* at 5.

<sup>9</sup> See *id.* at 6.

<sup>10</sup> See *id.* at 6-7.

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- <sup>11</sup> U.S. Attorneys' Manual, "Coordination Of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings", Title 1, Chapter 1-12.000, *available at* <http://www.justice.gov/usam/usam-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings>.
- <sup>12</sup> Yates Memorandum, Department of Justice, September 9, 2015, p. 5, *available at* <http://www.justice.gov/dag/file/769036/download>.
- <sup>13</sup> AIG recently disseminated marketing materials on their Side-A Matching Edge ("SAME") endorsement product, emphasizing the importance of Side-A coverage given the changes in the Yates Memorandum. SAME is an endorsement that can be added to a primary D&O policy when an insured places both its primary D&O and lead Side-A coverages with AIG, which broadens the Side-A coverage of the primary D&O policy. See A New Standard for Side-A Directors and Officers' Liability, AIG, *available at* [http://www.aig.com/Chartis/internet/US/en/SideA\\_External\\_FINAL\\_012414%20PRINT\\_tcm3171-573044.pdf](http://www.aig.com/Chartis/internet/US/en/SideA_External_FINAL_012414%20PRINT_tcm3171-573044.pdf).
- <sup>14</sup> See *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).