

The Yates Memo: Looking for “Individual Accountability” in All the Wrong Places

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The Department of Justice has received a great deal of criticism for its failure to prosecute both corporations and individuals involved in corporate fraud, especially those associated with the financial collapse in 2008. Companies were labeled “too big to fail” and it was difficult to determine the responsible individuals within the corporations. In an effort to quiet some of that criticism, on September 9, 2015, then Deputy Attorney General Sally Q. Yates issued the latest installment of the Department of Justice’s charging guidelines. The policy, entitled, “Individual Accountability for Corporate Wrongdoing,” or the “Yates Memo,” as it has been called, does not focus on criminal charges against corporations. Instead, the focus is on prosecuting individuals within the corporate entity. The Yates Memo announces six steps to pursue individual corporate wrongdoing, but the main thrust of the Memo is that the Department of Justice should pursue individuals within the corporation from the outset of the investigation and that a corporation’s cooperation will be judged by whether the corporation provides all relevant information about culpable individuals. In other words, in order to receive any credit for cooperating with the government and obtain leniency in the form of a deferred prosecution agreement, the corporation must conduct an internal investigation and point the finger at culpable employees. The Yates Memo puts a particular emphasis on the need to hold high-level officials responsible for misconduct.

This [Article](#) argues that the Yates Memo is a misguided attempt to further put law enforcement responsibilities on the backs of corporations rather than the Department of Justice. The government has always required some level of cooperation on the part of the corporation in exchange for leniency. For many years, corporations were required to waive the corporate attorney-client privilege to demonstrate cooperation. After intense criticism of what was deemed the “culture of waiver,” the Department of Justice publicly changed its cooperation policy so that it did not focus on waiver of the corporate attorney-client privilege. The Yates Memo, however, puts the issue front and center once again. It states that, “[i]f a company seeking cooperation credit declines to ... provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor.” Without cooperation, the likelihood of a deferred prosecution agreement is incredibly low.

The problem concerning the corporate attorney-client privilege is two-fold. First, if a corporation agrees to cooperate with the government from the outset, there is a question as to whether any part of the internal investigation is protected by the attorney-client privilege because one of the most important requirements for the application of the privilege is the expectation of confidentiality. If the company never intends to keep the results of the investigation confidential, a court may find that the privilege never attached to the communications with employees. Second, even if the communications with the employees are protected by the corporate attorney-client privilege, there is still the problem of waiver of the privilege. The government asserts that it just wants the “facts” and is not looking for corporations to waive the attorney-client privilege. Although “facts” are not protected by the attorney-client privilege, it is nearly impossible to reveal the “facts” in the context of an internal investigation without revealing the client communication. This is especially true if the corporation must identify culpable individuals. Once the corporate attorney-client privilege is waived as to one party, it is waived as to all parties. Thus, a third party could sue the corporation and obtain all of the information that was given to the government. Therefore, it is hard to see how the Yates memo is anything other than a return to the old days of the Department of Justice explicitly

forcing corporations to waive the corporate attorney-client privilege in order to be eligible for cooperation credit and a deferred prosecution agreement.

In addition to the problems concerning the protection of the corporate attorney-client privilege, the Yates Memo is particularly problematic for employees during internal investigations. Employees have little to no protection during internal investigations. Employees participate in interviews under the threat of termination for failure to cooperate and cannot later prevent the corporation from waiving the privilege due to their incriminating testimony. The typical employee would not understand that the corporation might choose to save itself by waiving the corporate attorney-client privilege and corporate counsel has never had an obligation to explain that before conducting the interview. The Yates Memo makes the internal investigation even more perilous for employees because it conditions cooperation on providing all of the relevant facts about individual misconduct. Therefore, corporate counsel looks more like an agent of the government than defense counsel.

This Article maintains that if Department of Justice truly wants to find “individual accountability,” it must stop relying on corporations and conduct its own investigations into corporate wrongdoing. It is in the public interest for the government to perform the investigations. If the government performs the investigation, employees will understand the seriousness of the investigation and the need to have their own legal counsel to advise them. They will also be able to exercise their Fifth Amendment right without the threat of being fired from their jobs. Furthermore, if the government wants to obtain criminal convictions of high-level corporate executives, there may be a need for legislation (perhaps modeled after the Responsible Corporate Officer doctrine) to hold high-level executives accountable for the criminal misdeeds of their subordinates.

The complete article is available here:

<https://corpgov.law.harvard.edu/2017/10/09/the-yates-memo-looking-for-individual-accountability-in-all-the-wrong-places/>