

James P. Melendres - Conducting Corporate Internal Investigations

In conducting corporate internal investigations, one of the most significant developments in recent times was the issuance of the Yates Memo. This guidance was issued by Sally Yates, the Deputy Attorney General of the Department of Justice, and it impacts civil and criminal corporate investigations conducted across the Department of Justice by emphasizing a focus on individual culpability from healthcare fraud to export control, from the Foreign Corrupt Practices Act to the False Claims Act. In support of its emphasis on pursuing individual wrongdoers, the Yates Memo outlines six key steps intended to guide Federal prosecutors in evaluating corporate investigations.

First, to qualify for any cooperation credit at all, corporations now must provide to the DOJ all relevant facts relating to the individuals responsible for the misconduct. Second, corporate investigations should focus on individuals from the inception of the investigation. Third, at the Department of Justice, criminal and civil attorneys handling corporate investigations should be in route communication with one another. Fourth, the Department of Justice will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation, with only a few limited exceptions. Fifth, prosecutors should not resolve matters with corporations without a clear plan to resolve related individual cases. And sixth, 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 person's ability to pay.

Taken together, the biggest changes brought about by the Yates Memo are the significant role the individuals now play in the investigation of a corporation as a whole, and the fact that corporations may no longer receive partial credit for their cooperation in investigations. That is, a corporation is now expected to identify all individuals involved in or responsible for the misconduct at issue and provide the DOJ all facts relating to that misconduct.

The best defense to the new requirements set forth in the Yates Memo is a proactive business response to possible violations. Specifically, companies should review their existing policies and procedures to both avoid violations that may lead to an investigation and to be prepared if and when an investigation begins. Although the existence of the compliance program is not a bar to prosecution or to investigation, companies should review their existing ethics and compliance policies, and if necessary, bolster them to deter possible violations.

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