

# Financial Institutions Webinar

## The Yates Memo: Individual Accountability and Best Practices for Corporate Executives

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## Webinar Guidelines

- Participants are in listen-only mode
- Submit questions via the Q&A box on the bottom right panel
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## Background

- After the financial crisis, DOJ heavily criticized for treatment of financial industry executives
- In particular, criticism from Congress, media, and consumer advocates stressed that no senior Wall Street executives imprisoned
- Critics alleged trend highlighted disparity in how prosecutors treat corporate executives and other defendants
- Although prosecutors collected billions of dollars from large banks, critics treated settlements as inadequate because individuals not prosecuted



## Press Coverage

- *The Economist*: “Why Have So Few Bankers Gone to Jail?”
- *The Atlantic*: “How Wall Street’s Bankers Stayed Out of Jail”
- *N. Y. Times*: “Why Only One Top Banker Went to Jail for the Financial Crisis”
- *The Guardian*: “Eric Holder Didn’t Send A Single Banker to Jail for the Mortgage Crisis. Is That Justice?”
- *New York Review of Books* (Judge Rakoff): “The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?”
- PBS Frontline: “The Untouchables”



## DOJ Response

- “Voluntary disclosure of corporate misconduct does not constitute true cooperation, if the company avoids identifying the individuals who are criminally responsible. Even the identification of culpable individuals is not true cooperation, if the company fails to locate and provide facts and evidence at their disposal that implicate those individuals.”
  - Marshall L. Miller, Principal Deputy Assistant Attorney General for the Criminal Division, at the Global Investigation Review Program (Sept. 17, 2014)



## DOJ Response

- “[W]hen it comes to financial fraud, the Department recognizes the inherent value of bringing enforcement actions against individuals, as opposed to simply the companies that employ them.”
- “Our record demonstrates that when the evidence and the law support it, we do not hesitate to bring charges against anyone. Between 2009 and 2013, the Justice Department charged more white-collar defendants than during any previous five-year period going back to at least 1994.”
  - Attorney General Eric Holder, Remarks at NYU School of Law (Sept. 17, 2014)



## Yates Memo

- On September 9, 2015, Deputy Attorney General Sally Q. Yates issued new policy intended to further the Department of Justice's efforts to hold individuals accountable for corporate wrongdoing
- The new policy – which consists of six key components – constitutes significant new guidance that further intensifies Justice Department focus on pursuing criminal and civil cases against individual corporate employees



## Yates Memo – Key Component 1

- To be eligible for any cooperation credit, corporations must provide to the Department of Justice all relevant facts about the individuals involved in corporate misconduct. The sliding scale or partial credit approach has been replaced by an “all-or-nothing” rule.



## Yates Memo – Key Component 2

- DOJ attorneys are directed to focus criminal and civil investigations on individuals from the beginning. Through this provision, the Department seeks to increase the likelihood that lower-level employees “will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy.”



## Yates Memo – Key Component 3

- Criminal and civil attorneys are directed to be in early and routine communication. This allows the government to consider the full range of civil and criminal options for pursuing individuals.



## Yates Memo – Key Component 4

- Except in extraordinary circumstances and with approval from senior decision-makers, DOJ will not release culpable individuals from civil or criminal liability when settling with corporate entities.



## Yates Memo – Key Component 5

- DOJ attorneys are instructed not to resolve matters with a corporation without a clear plan to resolve related individual cases. Declinations must be memorialized and approved by senior decision-makers.



## Yates Memo – Key Component 6

- Civil attorneys are encouraged to bring claims against individuals, even if the individuals have no ability to pay, to deter misconduct.

## Implications for Corporate Cooperation

- Given the heightened standard for cooperation, the assessment of whether to voluntarily disclose potential wrongdoing becomes more difficult.
- Some practitioners have questioned the practicality of this approach stating that it gives companies little reason to cooperate and will likely result in the government's "retreat from this all or nothing approach." (Former DAG Cole)
- Meanwhile, others such as DAG Yates are not convinced that it will impact corporate behavior since cooperation still offers "substantial benefits." (DAG Yates)

## Implications for Internal Investigations

- Mandate to broaden scope of the investigation to facilitate the discovery of evidence of individual knowledge and intent.
- Increased costs to ensure thorough investigation that can provide detailed facts on conduct of each employee.
- Shorter investigative timeframes to respond to DOJ's request for rolling, real-time disclosures and address statute-of-limitations concerns.

## Implications for Internal Investigations

- Should Upjohn warnings be modified?
- Should corporations enter joint defense agreements?
- Should individual employees and executives obtain separate representation?
- Should corporations more frequently discipline or terminate employees or executives involved in misconduct?
- How will the attorney-client privilege be affected?



## Effect on Civil Enforcement

- Increased attention to individual targets and culpability at the outset of a civil investigation or complaint.
- Complicated negotiation and execution of corporate resolutions given DOJ's unwillingness to release individual liability in the context of a corporate settlement.
- Increased emphasis on the deterrent value of civil claims brought against individuals irrespective of whether they can pay a large judgment.



## Implications for Prosecutions

- The Yates memo focuses DOJ prosecution priorities on individual accountability rather than enhanced corporate compliance or financial recovery.
- Cases in complex fields, like financial services and health care, will remain difficult to prove. Individuals at risk of imprisonment may be more willing to go to trial.
- Cases that can be brought against corporations using a collective knowledge theory may not be viable against individuals involved.

## Effect on Other Enforcement Agencies

- Across the enforcement and regulatory community, individual accountability is being prioritized.
  - Securities and Exchange Commission
  - Financial Crimes Enforcement Network
  - Consumer Financial Protection Bureau
  - New York Department of Financial Services
- Other agencies could embrace a similar approach to cooperation in an effort to be more consistent across agencies and more effective in uncovering key facts from potential wrongdoers.



# Questions?

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