Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Updated Yates Memo Still Has Force In Civil Domain

By **Rebecca Martin and Sarah Walters**
(December 19, 2018, 11:20 AM EST)


Rebecca Martin


Sarah Walters

In September 2015, Deputy Attorney General Sally Yates issued the Yates memo on individual accountability in the context of corporate investigations. It is no understatement to say that this memo created a near-cottage industry of articles and panels on the memo's impact on government investigations and officer/director liability.

After the change in administration, a favorite parlor game of the defense bar was wagering on the memo's survival. And after Deputy Attorney General Rod Rosenstein revealed, in September and October 2017, that the Yates memo was under active reconsideration, discussions turned serious about whether the memo would be preserved, diluted or outright reversed and whether the distinctions between criminal and civil False Claims Act matters would receive needed nuance.

Announcement of Significant Changes to Individual Accountability in Criminal and Civil Cases

On Nov. 29, the deputy attorney general put an end to much speculation, announcing the much-awaited changes to U.S. Department of Justice policy on individual accountability in the corporate context. The Yates memo still lives, but is scaled back in the criminal context and further downsized in the context of civil (i.e., FCA) matters — in a manner that seems designed to lessen inefficiencies, but not in way that, on its face, eases the focus on senior management.

As a starting point, the deputy attorney general emphasized that under the revised policy, "pursuing individuals responsible for wrongdoing" will continue to be "a top priority in every corporate investigation." In the criminal context, the revised DOJ policy makes clear that "absent extraordinary circumstances, a corporate resolution should not protect individuals from criminal liability."

The revised policy, however, unquestionably reins in the level of disclosure previously required by the Yates memo. As then-Acting Associate Attorney General Bill Baer previously outlined in 2016, the DOJ expected companies to disclose "all facts relating to the individuals involved in the wrongdoing, no matter where those individuals fall in the corporate hierarchy in order to obtain cooperation credit in criminal matters under the Yates regime." This concept may sound, on its face, straightforward, but implementation in the context of alleged culpable conduct spanning a long time period or involving routine corporate operations and hundreds of individuals has proven inefficient and problematic to expeditious resolutions — as the deputy attorney general explicitly acknowledged. To complicate matters further, the principles of the Yates memo were interpreted, and applied, inconsistently among districts even in the criminal context.

Now, under the revised DOJ policy, companies under criminal investigation need "only" identify individuals who were "substantially involved" in the alleged conduct. Notably, however, in the context of Foreign Corrupt Practices Act matters, the Justice Manual still requires, "disclos[ing] ... all relevant facts about all individuals involved in the violation of law" in order "to receive credit for voluntary self-disclosure of wrongdoing" and DOJ representatives have stated publicly that these same principles will be applied more generally in non-FCPA corporate cases as well.[1] How this tension with the revised criminal policy gets resolved is an open question. And while, overall, the revised policy should lift part of the burden of investigations, there is little doubt that the meaning of "substantially involved" will be fertile ground for dispute and if not managed with care, could create a minefield for defense counsel when identifying the appropriate individuals.

Indeed, the deputy attorney general expressly noted, "If we find that a company is not operating in good faith to identify individuals who were substantially involved in or responsible for wrongdoing, we will not award any cooperation credit." In a nod to these risks, the deputy attorney general encourages defense counsel to have "full and frank discussions with prosecutors about how to gather the relevant facts" — a practice that could mitigate a negative outcome. The new policy on cooperation in corporate criminal matters can be found in the updated Justice Manual.

Civil Cases Are Different

The deputy attorney general emphasized that principles of individual accountability continue to apply in the civil/FCA context, but was also clear that "civil cases are different." Indeed, the primary focus of civil fraud investigations — as Rosenstein acknowledges — has always been the money, and although many districts historically focused on individual liability, the Yates-driven changes created inefficiency and needless delay in civil resolutions:

The idea that a company that engaged in a pattern of wrongdoing should always be required to admit the civil liability of every individual employee as well as the company is attractive in theory, but it proved to be inefficient and pointless in practice. Our civil litigators simply cannot take the time to pursue civil cases against every individual employee who may be liable for misconduct, and we cannot afford to delay corporate resolutions because a bureaucratic rule suggests that companies need to continue investigating until they identify all involved employees and reach an agreement with the government about their roles.

However, Yates still has force in the civil realm. Although the revised policy jettisons Yates's "all or nothing" approach, it stakes out the type of disclosure required for minimum and maximum credit, with a pointed focus on senior management and the board of directors. To receive "*any credit* for cooperating in a civil case" under the revised policy, a company "must identify all wrongdoing *by senior officials, including members of senior management or the board of directors*." At the other end of the spectrum, the revised civil policy echoes the criminal policy by providing for "maximum credit" only when a company "identif[ies] every individual person who was substantially involved in or responsible for the misconduct."

There is also a gray zone between the minimum- and maximum-credit boundaries, where a company can get “some credit” in exchange for “meaningful assistance.” In an example (that bears little relevance to the majority of FCA investigations), the deputy attorney general noted that “some credit” could be awarded where a company makes a “voluntary disclosure” but without “stipulating about which *non-managerial* employees are culpable).” Presumably, the deputy attorney general is not foreclosing the types of assistance that have been highlighted in other DOJ pronouncements, including as recently as June 2018 when then-Acting Associate Attorney General Jesse Panuccio detailed types of assistance that the DOJ regarded as significant in FCA matters, such as sharing results of an internal investigation, making witnesses available or identifying culpable individuals.

However, it is clear that under the new policy, the DOJ can reward meaningful assistance without a company having to agree about every nonmanagerial employee with potential individual liability. In addition, the revised policy reaches back in the direction of the pre-Yates practice of granting releases for individuals. Yates eliminated the DOJ’s typical practice of granting releases to employees, officers and directors in corporate FCA settlements. Now, civil fraud attorneys are again “permitted to negotiate civil releases for individuals who do not warrant additional investigation in corporate civil settlement agreements, again with appropriate supervisory approval.” Whether the DOJ reverts to the prior broad releases as the new norm will be a key factor to monitor.

In addition to these unanswered questions, there is the enduring mystery about what “credit” actually means in a practical, dollars-and-cents way. While most companies wish to cooperate with the government and can identify clear benefits, the Yates memo left practitioners scratching their heads regarding how the government actually quantifies “cooperation credit” in FCA matters. Credit and how it is calculated is well understood in criminal matters, but has not been a comfortable fit in the FCA arena.Notably, the only example the Yates memo gave on how cooperation credit might apply in a civil case related to the “reduced damages” provision of the FCA, 31 U.S.C. § 3729(a)(2), which already, as a statutory matter, provided for reduced damages where a party voluntarily discloses misconduct before knowledge of any investigation — the very small minority of FCA matters and an irrelevance to the vast majority of FCA settlements.

In 2016, Baer spoke on what “credit” meant in FCA cases, but ultimately gave no more than an “assurance” that civil fraud attorneys would use their discretion to reward true cooperation in terms of the measure of damages, multipliers and penalties. Similarly, in June 2018, Panuccio explained that the DOJ has “tremendous enforcement discretion” with respect to FCA settlements and can provide a “material discount” based on cooperation. The deputy attorney general’s speech in November of this year also fails to put any meat on the bones of civil cooperation credit. Indeed, while the Justice Manual addresses credit in a civil context, it still fails to clarify what “maximum,” “minimum” or “some” cooperation credit means.[2]

In October 2018, Director of Civil Frauds Michael Granston (a highly experienced, career DOJ attorney), announced at the HCCA Healthcare Enforcement Compliance Conference, that before year-end, civil frauds will be issuing written guidance to DOJ attorneys regarding: (a) the types of cooperation that qualify an FCA defendant for cooperation credit; and (b) the types of cooperation credit. Whether this augurs more specific guidance on cooperation credit in FCA cases is another open question, but such guidance would clearly be key to better understanding the benefits of cooperation in FCA matters.

Rebecca C. Martin is a partner at McDermott Will & Emery LLP. She previously served as co-chief of the Civil Frauds Unit at the U.S. Attorney’s Office in the Southern District of New York.

Sarah E. Walters is a partner at McDermott. She previously served as chief of the economic crimes unit at the U.S. Attorney's Office for the District of Massachusetts.

[1] FCPA Corporate Enforcement Policy, Section 9-47.120. See March 1, 2018 Remarks by then-Assistant Attorney General John Cronan at the ABA White Collar Conference.

[2] See Justice Manual, 4-3.000 at https://www.justice.gov/jm/jm-4-3000-compromising-and-closing.