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## Yates Memo May Change DOJ Cartel Enforcement

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Law360, New York (September 17, 2015, 10:21 AM ET) -- Last week, Deputy Attorney General Sally Q. Yates announced new [U.S. Department of Justice](#) policies intended to strengthen the DOJ's efforts to hold corporate executives accountable for unlawful conduct in a memorandum titled "Individual Accountability for Corporate Wrongdoing." [1] This article will address potential implications of the new policy on criminal antitrust cases investigated and prosecuted by DOJ's Antitrust Division.

### The Justice Department's Policy Changes

The memorandum, also known as the Yates memo, outlines six policy changes or clarifications intended to strengthen the DOJ's efforts to hold corporate executives accountable. In explaining the rationale for the policy changes, Deputy Attorney General Yates emphasized the importance of individual accountability in corporate cases, noting that it "deters future illegal activity," "incentivizes changes in corporate behavior," and "ensures that the people who engage in wrongdoing are held responsible for their actions." [2]

The key policy changes outlined in the Yates memo are as follows:

- First, companies must "identify all individuals involved in the wrongdoing, regardless of their position, status, or seniority in the company" [3] to be eligible for any cooperation credit.
- Second, DOJ attorneys should focus on individuals from the outset of corporate investigations.
- Third, criminal and civil DOJ attorneys should remain in "early and routine communication" with each other because the best way to build a case is to ensure that "everyone's talking to each other from the very beginning." [4]
- Fourth, the DOJ will not release individuals from criminal or civil liability in corporate resolutions except in "extraordinary circumstances" [5] or where there are approved DOJ policies such as the Antitrust Division's Corporate Leniency program.
- Fifth, DOJ attorneys must have a "clear plan" [6] to resolve individual cases in order to seek a corporate resolution, and any individual releases or declinations must be approved by the relevant United States attorney or assistant attorney general.
- Lastly, civil attorneys should focus on individuals as well.

### Practical Implications

***No Appreciable Impact Foreseen for Antitrust Amnesty Applicants***

The Yates memo states that it will not alter the current operation of the Antitrust Division's Corporate Leniency Program, which has been highly effective over the past several decades in uncovering illegal cartel activities. Under the Leniency Program ("amnesty"), a company can avoid criminal convictions and fines and obtain a wholesale grant of immunity for all its employees by being the first to confess participation in illegal cartel conduct. Under existing policy, an amnesty applicant must make full disclosure of its cartel involvement in order to qualify; inasmuch as a qualifying applicant will secure both corporate immunity and an agreement to refrain from prosecuting any of its employees, it already has every incentive to disclose the full extent of its wrongdoing. Therefore, the new policy can be expected to have little, if any, effect on the Leniency Program. The real potential for a change in practice reveals itself when companies under investigation who are not amnesty applicants consider their options.

### ***Potential Implications for Non-Amnesty Companies in Antitrust Investigations***

The Yates memo's effect on cooperating companies in cartel investigations who are not leniency applicants remains to be seen. One of the most significant developments of the Yates memo is the instruction that a company's disclosure of information about individuals involved in or responsible for the wrongdoing is now a threshold requirement to receiving any cooperation credit at all, rather than simply one factor that the DOJ considers when deciding whether a company's cooperation warrants a reduction in a potential sentence. Moving forward, according to Deputy Attorney General Yates, the DOJ will not allow companies to "pick and choose what gets disclosed" or obtain "partial credit for cooperation that doesn't include information about individuals." [7] Further, she states that the DOJ will not "let corporations plead ignorance" and will require that they engage in investigations to identify all responsible individuals and then provide all nonprivileged evidence implicating those individuals. [8] Yates stated that the "purpose of this policy is to better identify responsible individuals, not to burden corporations with longer or more expensive internal investigations than necessary" [9] and encouraged defense attorneys to engage in detailed discussions with DOJ attorneys during their internal investigations.

The concept of zero credit for other forms of cooperation is new. Under prior policy, it was possible to provide substantial cooperation — by disclosing the conduct of colluding competitors, producing foreign-located documents, making available witnesses at the company's expense (frequently witnesses beyond the reach of the federal grand jury), and the like — and earn cooperation credit. Now, under the Yates memo, such efforts will earn no credit if they are not accompanied by a disclosure about culpability of individuals within the company.

It will be important to follow how this policy develops in practice, as it is typical in cartel cases that the amnesty applicant will already have disclosed culpable employees of competitors as part of the applicant's cooperation. As long as the new obligation is merely to proffer facts — such as documents exposing competitor communications — there will be no change. The DOJ's objective should be to learn facts that enable it to make a charging decision about individuals, not to hear counsel's opinions about what inferences to draw from the evidence. In international cartel cases, that interest, combined with the Yates memo's directive to bring cases against individuals (discussed below), may put increased pressure on companies to produce foreign located documents and witnesses. That kind of cooperation already is common in cartel cases.

If, however, the new policy becomes a tool for prosecutors to insist that company counsel express views on the potential culpability of senior executives — where there is often

disagreement about whether particular employees knew about or countenanced cartel conduct — the new policy could work a real change in interaction between the DOJ and cooperating companies.

### ***Pursuing Individual Employees of Non-Amnesty Companies***

Another departure from previous practice is the exhortation that DOJ attorneys "should not release individuals from civil or criminal liability when resolving a matter with a corporation, except under the rarest of circumstances."<sup>[10]</sup> The Yates memo requires that no corporate resolution will provide protection from civil and criminal liability for any individuals except where there are "extraordinary circumstances" or approved DOJ policies such as the Antitrust Division's Corporate Leniency program. Further, DOJ attorneys must have a "clear plan" to resolve related individual cases in order to seek a corporate resolution and must seek individual declinations approved by the relevant United States attorney or assistant attorney general if they decide not to bring charges against individuals.

In the past, corporate plea agreements for antitrust violations typically provided a guarantee of future nonprosecution to both the company signing the plea agreement and current and former employees who cooperate with the division's investigation.<sup>[11]</sup> These nonprosecution assurances often excluded a discrete and limited number of individuals (known as "carveouts") from the nonprosecution protections afforded by the company's plea agreement, but otherwise provided full immunity to all employees. One question will be whether the policy changes intend to bring about a wholesale change to that framework. We are inclined to doubt it, as the Yates memo expressly preserves the existing leniency policy, which incorporates protections for employees of non-amnesty applicant companies with the exception of certain carveouts. Thus, absent clarification from the Antitrust Division, we believe the current framework of carveouts will remain in place as an approved policy.

This does not mean there will be no implications for the Antitrust Division's carveout policy in corporate plea agreements. The renewed emphasis on individual prosecutions could play out in two different ways. The Yates memo and its emphasis on individual accountability may at face value make it somewhat more difficult for corporate and/or individual counsel to argue — or prosecutors to justify — that a particular culpable individual should be "carved in" to the corporate plea agreements, with a net effect of a shifting of the line between carved-out and carved-in individuals. For example, it may remain a strong argument that lower-level executives should be covered by a plea agreement — in effect, immunized — on the theory that they can provide evidence against others. But with the Yates memo's directive to focus on executives who appear "insulated"<sup>[12]</sup> from wrongdoing, prosecutors may demand that companies disclose more information about senior executives (whether or not such information really exists) in a bid to carve out more senior officials and as a condition of receiving cooperation credit.

Another question is whether the new policy will cause more carveouts to be prosecuted. It is not uncommon under current practice that the division carves out employees in order to reserve the right to prosecute them; the carveout decision is not, however, an indictment decision. The increased emphasis on prosecution of individuals potentially makes it more likely that individuals who are carved out will ultimately face prosecution. In light of that, the new policy offers opportunities to argue for increased rigor in carveout decisions. For persons against whom the government's evidence is limited or who are merely the object of unresolved suspicion, the new policy could offer a strengthened hand, as any individuals carved out may be more likely to face criminal charges. The government's interest in obtaining those person's cooperation in the investigation may outweigh any benefit from placing such persons in carveout status,

particularly as the new policy makes prosecution of such individuals more likely. However, they will likely face even more pressure to expose knowledge of wrongdoing in more senior levels of the company.

The new memo also requires DOJ attorneys to focus on individuals from the outset of corporate investigations in order to create a better factual record against individuals, to "increase the likelihood that [corporate employees] will cooperate with the investigation, [and] maximize the chances of [a] final resolution ... against culpable individuals."<sup>[13]</sup> However, this early focus on individual culpability coupled with the renewed emphasis on individual prosecution may make it more likely that company and employee interests diverge earlier in the investigative process. As a result, companies and their counsel may face more difficulties when attempting to secure complete cooperation from executives in internal investigations. Executives may fear implicating themselves in suspected wrongdoing if they believe that the DOJ is under a mandate to prosecute individuals. Indeed, while tensions between corporate and individual interests in the investigative process are a familiar concern, the new policy initiatives create additional obstacles for companies performing internal investigations.

## Conclusion

Given the nuances of practice before the Antitrust Division, which has criminal prosecution policies that differ significantly from other prosecuting units at the Department of Justice, it may take time to see what real effect, if any, the Yates memo has on cartel investigations and prosecutions. Companies must incorporate the new policy memo into their approach to cooperation, and it would be useful if the division itself clarified its policies to the extent they may incorporate or diverge from the Yates memo.

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[1] Department of Justice Memo, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <http://www.justice.gov/dag/file/769036/download>.

[2] Department of Justice Speech, 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 (Sept. 10, 2015), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.

[3] Id. (emphasis added).

[4] Id.

[5] Department of Justice Memo, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <http://www.justice.gov/dag/file/769036/download>.

[6] Department of Justice Speech, 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 (Sept. 10, 2015), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] Id.

[12] Department of Justice Memo, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <http://www.justice.gov/dag/file/769036/download>.

[13] Id.