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Individuals Face New Challenges Following Yates Memo

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It is never a good time to be an individual under criminal investigation. While corporate punishment is often harsh, involving fines, reputational damage and possible suspension and debarment, individuals facing criminal prosecution are confronted with a potential loss of liberty, forfeiture and fines.

Every decision made in response to a criminal investigation is significant. The recently issued Yates Memorandum has redoubled the complexity of advising an individual with potential criminal exposure.

The Yates Memorandum makes individuals a focus of the U.S. Department of Justice's enforcement efforts, and requires a company to disclose all information about individual wrongdoing in order for the company to be considered for cooperation credit.[1] Because of the Yates Memo's focus on individuals, employees of companies may be reluctant to cooperate in civil lawsuits and internal investigations for fear—justified or not—that what they say will be disclosed by their employer to the DOJ in an attempt to garner cooperation credit. This, in turn, raises difficult issues about whether to assert one's Fifth Amendment right against self-incrimination and whether to refuse to cooperate at all in a company's own internal investigation. Of course, refusing to cooperate in an employer's investigation can have consequences all their own, but perhaps not as dire as the alternative. Individuals and their counsel will have to navigate these challenging issues carefully as the Yates Memo metastasizes into daily prosecutorial decision-making.

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Issue Triggered by the Yates Memo. On Sept. 9, 2015, the DOJ issued a policy memorandum authored by Deputy Attorney General Sally Yates that signaled a sea change in how the government investigates and prosecutes cases of corporate wrongdoing. Simply put, the Memo places a significant focus on prosecuting responsible individuals, not just amorphous corporations. The emphasis on individual accountability is not surprising given the tenor of public opinion toward Wall Street in the wake of the most recent financial crisis.

The Yates Memo marks an official policy shift whereby companies under investigation, in order to cooperate, *must* provide to the Department of Justice *all* relevant facts about individuals involved in corporate misconduct in order to be eligible for *any* cooperation credit. More particularly, the Memo states: "Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company

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must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct."[2] And it is only by meeting that threshold requirement of providing all relevant facts that companies will even be considered *eligible* for credit. The government will still evaluate the extent of that credit, if any.[3] In other words, the DOJ has established an "all or nothing" standard for companies under federal investigation: If the government believes that a company has failed to either investigate or turn over all of the factual information about individual wrongdoers involved in an alleged misdeed, the company's cooperation will not be considered a mitigating factor in the government's charging decision.

This policy shift creates serious challenges for corporations about which many commentators have written. But here, we focus on the consequences and challenges facing corporate employees.

It is not unusual for conduct that gives rise to white-collar criminal investigations to also trigger civil lawsuits or investigations, or corporate internal investigations. Because white-collar matters often involve a civil and criminal component, an employee might find his or her corporate employer under investigation for criminal wrongdoing by the DOJ at the same time that a regulator such as the SEC or a private plaintiff is investigating the matter for civil liability. Additionally, a company may also be conducting its own internal investigation of the matter, knowing that the DOJ is lurking with potential criminal charges. Individuals who are being deposed in a civil lawsuit or interviewed in an internal investigation therefore may be forced to grapple with a difficult choice of what to do in the face of investigations into their employer's conduct from multiple angles and multiple actors.

A corporate employee asked to testify in a civil suit or asked to submit to an employer's interview during an internal investigation in connection with allegations of misconduct must consider that his or her employer has an incentive to find individual wrongdoing and to turn all information over to the DOJ to qualify for cooperation credit. Furthermore, the DOJ's pronouncement requiring the disclosure of all pertinent facts could cause companies to choose to disclose both privileged as well as non-privileged communications and documents. Although the Yates Memo does not explicitly ask companies under investigation to waive attorney-client privilege, the "all or nothing" nature of the directive puts immense pressure on companies to serve up implicated employees to the government, regardless of whether the relevant evidence is privileged. While companies and the DOJ will likely attempt fairly and reasonably to identify whether conduct constitutes civil or criminal wrongdoing, the Yates Memo unavoidably incentivizes company counsel to find improper conduct to demonstrate complete cooperation and incentivizes prosecutors who have been instructed to prosecute individuals as well as corporations that engage in wrongful conduct.

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Take, for example, an insider trading investigation. An employee may be asked to submit to an interview by an outside law firm conducting an internal investigation into trades in the company's stock. At the same time, the SEC, civil plaintiffs, and the DOJ may be looking into the trades. At the interview, the employee is given the usual Upjohn warnings—that the law firm conducting the interview represents the company, not the employee, and that the investigation is privileged but the company can decide to waive privilege and share the information the employee provides with outsiders, including the government. The employee does not believe she did anything wrong, but she is in a tough spot because her employer may be more sensitive, after the Yates Memo, to try to find evidence of individual wrongdoing.

In the past, employees who did not believe they did anything wrong and who believed their employer did not think they did anything wrong, routinely cooperated with internal investigations. In theory, that should not change because of the Yates Memo. An individual who legitimately does not believe she engaged in any wrongdoing should still be able to cooperate in an internal investigation and give civil testimony without fear that her conduct will be the subject of civil or criminal charges by the DOJ. But the practical reality may be different.

Companies need to protect themselves in response to government investigations, and they often do that by cooperating with the government and then asking the government to forgo prosecution in favor of a deferred prosecution agreement or some other lesser charge. Cooperation credit continues to be the Holy Grail but now *requires* the company to provide *all* information about individual employees' misdeeds. A company therefore may need to try to ferret out individual wrongdoing from the moment it starts an internal investigation. That could mean more aggressive investigation tactics, more frequent waiver of privileged communications, and an interpretation of facts and circumstances that trends toward a finding of individual wrongdoing versus a more defensive posture by the company. And the individual employees are caught squarely in the cross-hairs.

Refusing to Cooperate in Investigations or Invoking the Fifth Amendment in Civil Cases. One way for the individual to protect herself in an internal investigation is to refuse to answer the investigator's questions. The company cannot force an employee to provide information, but there certainly may be employment consequences for the uncooperative employee, including termination.

An option in civil cases, where the employee is asked to give deposition testimony but is concerned about parallel criminal proceedings, is to invoke the privilege against self-incrimination. The well-known Fifth Amendment privilege against self-incrimination—or "right to remain silent"—is a bedrock of our criminal justice system.[4] In practice, however, navigating the Hobson's choice of deciding whether to invoke the privilege against self-incrimination is difficult where there are civil proceedings that parallel a criminal investigation. The Yates Memo has made it even more difficult for individuals to decide whether to give testimony in a civil matter when there is a prospect of criminal prosecution hanging overhead.

It is easy enough for an individual to decide not to speak with a criminal prosecutor when the individual is a known subject or target of a criminal investigation. But what if the individual is giving a deposition in a civil case and there is only the possibility of a parallel criminal matter relating to the same conduct? The calculus behind an employee's decision whether to testify in that civil case has long yielded murky tradeoffs: On the one hand, talking could result in self-incrimination for the employee; on the other hand, not talking could damage his or her or the company's defense in a civil suit, as triers of fact in federal civil proceedings are permitted, in some cases, to make a negative inference based on a witness's invocation of the Fifth Amendment.[5] Moreover, an individual's invocation of the Fifth Amendment can result in the DOJ drawing an adverse inference in connection with a civil charge against the individual, which the DOJ is authorized to pursue, and which the Yates Memo encourages, when appropriate. In addition, an individual's refusal to testify could result in adverse employment actions.

The Yates Memo makes this decision even more difficult. Now, an employee needs to consider that her employer may be looking for wrongdoing to obtain cooperation credit, which could be motivation for employees to invoke the Fifth Amendment more readily than they did in the past. However, invoking the Fifth Amendment is not uniformly an available option. As the Supreme Court said many years ago, the protection of the Fifth Amendment "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer."[6] A witness cannot simply declare that, by testifying, he will incriminate himself.[7] It is possible that an employee's fear that her employer will consider her statements evidence of wrongdoing will cause the employee to invoke the Fifth Amendment where she is not otherwise justified in doing so. This could raise significant questions for courts that are tasked with assessing the appropriateness of invoking the privilege.[8]

Conclusion. How the DOJ, companies and individual employees respond to the Yates Memo is a work in progress. But one thing is certain: The Memo's focus on individual accountability gives rise to difficult choices that employees, employers and counsel will have to consider when the government comes knocking.

1. Sally Quillian Yates, U.S. Dep't of Justice, Individual Accountability for Corporate Wrongdoing (2015) (emphasis in the original).
2. Id.
3. Id.
4. U.S. Const. amend. V (no person "shall be compelled in any criminal case to be a witness against himself").
5. See, e.g., *Louis Vuitton Malletier S.A. v. LY USA*, 676 F.3d 83, 97-98 (2d Cir. 2012) ("A defendant in a civil proceeding who invokes the Fifth Amendment as a result of an overlapping criminal investigation or proceeding "risk[s] the adverse inference arising from [his or her] assertion of the privilege.").
6. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).
7. Id.
8. Id. at 486-87.