

September 9, 2016

Yates Memorandum – Focus on Individual Wrongdoing to Promote Compliance

By Barry A. Pupkin, Partner in Competition and Antitrust at Squire Patton Boggs

This month marks the one-year anniversary of the [Yates Memorandum](#), the Department of Justice memorandum drafted by Deputy Attorney General Sally Quillian Yates, which announced revisions to the US Attorney's Manual (USAM). One purpose of the Yates Memorandum was to refocus corporate compliance on individual accountability. To do so, it created incentives for company officers to prioritize a compliance culture in an arena where compliance was often viewed as an unnecessary bureaucratic burden and secondary to success as measured by profit. The Yates Memorandum evidences a realization that without senior officer buy-in, and leadership by example, compliance is simply meaningless window dressing. How has implementation of the Yates Memorandum affected company culture, compliance, and trust among individual officers, employees and the company, and how will it do so going forward? These are important questions as companies balance and set their compliance objectives.

- *“Compliance is a culture, not just a policy.”* (Brent Snyder, Deputy Assistant Attorney General, Antitrust Division, US DOJ, September 2014)
- *“Companies should be fostering a corporate culture that encourages ethical conduct and a commitment to compliance with the law.”* (Bill Baer, Assistant Attorney General, September 2014)
- *“Compliance with laws of all types is the cornerstone of good corporate citizenship ... a compliance program must be combined with a real commitment by senior management to be truly effective.”* (Bill Baer)
- *“Corporate compliance starts at the top. The board of directors and senior officers must set the tone for compliance to ensure that the company's entire managerial workforce not only understands the compliance program but also has the incentive to actively participate in its enforcement.”* (Brent Snyder)

The statements above set a lofty corporate goal: creating a culture of compliance that is central to corporate decision-making and fits within a company's business incentives of profit maximization and competition. Although the Antitrust Division officials quoted above talk about a corporate culture of compliance, that compliance does not spring spontaneously from companies or their employees and officers; it is developed and implemented top-down and from all departments within a company.

The Yates Memorandum, with its focus on prosecuting individual wrongdoers from the inception of an antitrust investigation, is likely to provide a strong incentive in elevating compliance to become an integral part of a company's operations. The Yates Memorandum also encourages company officers and employees to make certain that their profit-making priorities are tempered by, and reinforced with, strict legal compliance and individual accountability.

Because corporate compliance is imposed and implemented by individuals, the new focus on individual wrongdoing should add real incentives to corporate compliance. Revisions to the USAM (section 9.28.700) make clear that DOJ attorneys are charged with investigating individuals “proactively . . . at every step of the process” and to “vigorously review any information” instead of “wait[ing] for the company to deliver the information about individual wrongdoers and then merely accept what the companies provide.” The USAM’s revisions also instruct the Justice Department to “obtain from the company as much information as possible about responsible individuals” before resolving the corporate case.

The DOJ has stated that it will not offer credit to companies that “decline to learn” facts related to individual wrongdoing. Along those lines, in revising section 9.28.700 of the USAM, the DOJ states that in assessing and determining the amount of cooperation credit to provide a company in plea agreement negotiations (“any consideration for cooperation”) the company must “identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority.” Further, the DOJ will assess the timeliness, diligence and thoroughness of the cooperation in assessing the amount of cooperation credit to provide.

One year out, what does this mean? The Yates Memorandum and the revisions to the USAM have encouraged a different emphasis in corporate compliance. Compliance programs today need to focus more on the development and implementation of programs that encourage individual responsibility. While the focus on individual prosecutions and wrongdoing can create a wall of suspicion between a company and its employees, such an outcome need not be the case. Individual responsibility is good for the individual and good for the company. There needs to be a mutuality of interest if compliance is to be successful. Emphasizing individual responsibility should make compliance easier.

Corporate wrongdoing has always been the result of individual wrongdoing. Where officers and employees know from the very start of their careers that individual misconduct will not be punished by the corporation, bad behavior will be much more likely. Similarly, where officers and employees do not understand that legal compliance is a prerequisite to continued employment, compliance becomes less important, and again, bad behavior becomes more likely. Where compliance is impressed individually on officers and employees at the beginning of their careers and regularly reinforced, the interests of the individual and the company will almost always be identical. This paradigm requires a robust compliance program that stresses training and the reporting of problematic behaviors by anyone in the company, from part-time employee to senior officer, who raises even a suspicion of wrongdoing.

The government’s new emphasis on individual responsibility and prosecution should incentivize companies to make sure that employee and corporate interests not only overlap, but are, in the antitrust context, the same. There should be no reason why companies would want to throw their officers and employees under the bus, and why officers and employees should be reluctant to disclose wrongdoing to the general counsel’s office if a compliance program is set up to reward the discovery of illegal behavior.

The picture painted above is of a perfect compliance world. Before we get to that point, however, it is likely that some level of distrust will remain between individual officers and employees and the company. The continued implementation of the Yates Memorandum needs to be monitored closely so that instead of building walls between the company and its employees, it encourages and creates a positive culture that incentivizes compliance.

The Yates Memorandum should help in expediting the discovery and identification of problematic behavior by encouraging officers and key employees to discover, report and correct misconduct. It should also be used as a tool for corporate compliance by eliminating the potential for misconduct in the long term. If, however, it discourages cooperation and vigorous corporate compliance, enforcement authorities need to develop processes that retain individual responsibility, but at the same time tie that responsibility directly to good corporate behavior.

One year on, it is hard to assess how much the Yates Memorandum has led to real change. DOJ officials have recently argued that the memorandum increased scrutiny in related civil enforcement matters as well as in criminal antitrust cases. Indeed, the United States Securities and Exchange Commission in a supposed nod to Yates, announced this year that it would occasionally require defendants to admit to wrongdoing in order to settle. More importantly, perhaps, is that a number of companies have noted that they have begun to foster a compliance-led culture based on individual responsibility. It is possible, therefore, – though perhaps not as quickly as some might like – that prioritizing individual accountability in assessing wrongdoing has incentivized more and more companies and their employees to work closely together to identify misconduct. If there is no misconduct, the interests of leadership and employees will be the same and, working to that end should promote a relationship of trust which will be necessary ultimately to foster a culture of corporate compliance going forward.

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