

# Criminal Prosecutions for Environmental, Safety and Health Violations: An Eventful Year Reviewed

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“Crime is crime” whether it occurs “on the street corner or in the boardroom. . . . The rules have just changed.”<sup>1</sup> With these words, Deputy Attorney General Sally Yates announced new guidelines related to white collar prosecutions, the first of two memos being watched closely by environmental, safety and health practitioners. In December 2015, Yates issued a second memo, an agreement between the U.S. Department of Justice (DOJ) and the U.S. Department of Labor (DOL) to increase criminal prosecutions of workplace safety violations. Although the impact of these changes remains uncertain, the message has been clarified following actions by DOJ and remarks given last month by John C. Cruden, Assistant Attorney General for the Environment and Natural Resources Division.

## I. FIRST YATES MEMO: INCREASED INDIVIDUAL RESPONSIBILITY FOR CORPORATE COMPLIANCE

The keystone change of the first DOJ memo is that corporations now must “identify all individuals involved in or responsible for the misconduct at issue” to be eligible for cooperation credit.<sup>2</sup> Yates called this the “all or nothing” policy.<sup>3</sup> One open question has been the treatment of privileged information. It has been unclear how the Agency will treat assertions of privilege over statements by individuals who may be potential targets of the prosecution (*e.g.*, interview memos). In May, Yates addressed privilege concerns in comments to the New York City Bar Association: “We’re asking for the facts,” she said. “And we have always asked for the facts. The only difference now is that companies cannot—in the name of privilege or otherwise—pick and choose which facts to provide if they

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<sup>1</sup> Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, Remarks at New York University School of Law (Sept. 10, 2015) [hereinafter Yates Remarks], <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school> [https://perma.cc/VPG9-56AJ] (last visited Feb. 27, 2017).

<sup>2</sup> Memorandum from Sally Quillian Yates, Deputy Att’y Gen., to All U.S. Att’ys, Individual Accountability for Corporate Wrongdoing 3 (Sept. 9, 2015) [hereinafter The Yates Memo], <http://www.justice.gov/dag/file/769036/download> [http://perma.cc/A9RM-6HDD].

<sup>3</sup> Yates Remarks, *supra* note 1.

want credit for cooperation.”<sup>4</sup> She added that if there is a valid privilege claim as to communications of a relevant fact, this circumstance should be brought to the prosecutors’ attention.

## II. SECOND YATES MEMO: ENHANCED COLLABORATION BETWEEN DOJ AND DOL

On December 17, 2015, DOJ and DOL signed a memorandum of understanding that seeks to improve the quality, and increase the quantity, of prosecutions of workplace safety crimes.<sup>5</sup> The memorandum assigns responsibility to DOJ for pursuing violations of the Occupational Safety and Health Act, the Mine Safety and Health Act, and the Migrant Seasonal Agricultural Worker Protection Act.<sup>6</sup> The memo arose out of a perceived weakness in the enforcement of worker safety laws. Although worker safety statutes generally provide for only misdemeanor penalties, the Memorandum of Understanding encourages prosecutors to consider charging other offenses that often coincide with worker safety crimes, such as false material statement, obstruction of justice, witness tampering, conspiracy, and environmental and endangerment crimes.<sup>7</sup> And DOJ recently noted that “[w]e have seen that employers who are willing to cut corners on worker safety laws to maximize production and profit, will also turn a blind eye to environmental laws.”<sup>8</sup>

## III. JOHN CRUDEN’S RECENT REMARKS

Last month, Cruden provided further clarity regarding DOJ’s perspective, over a year after the initial Yates memo.<sup>9</sup> He provided examples of recent guilty pleas that arose out of the 2015 Memorandum of Understanding, but also cited examples of “traditional” worker safety enforcement cases—without an

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<sup>4</sup> Stewart Bishop, ‘Yates Memo’ Author Defends Policy, Says Shift Is In Effect, LAW 360 (May 10, 2016, 8:57 PM), [http://www.law360.com/articles/794679/-yates-memo-author-defends-policy-says-shift-is-in-effect?article\\_related\\_content=1](http://www.law360.com/articles/794679/-yates-memo-author-defends-policy-says-shift-is-in-effect?article_related_content=1) [https://perma.cc/EN6E-2RXD].

<sup>5</sup> Memorandum of Understanding Between the U.S. Departments of Labor and Justice on Criminal Prosecutions of Worker Safety Laws (Dec. 17, 2015), <https://www.justice.gov/enrd/file/800526/download> [https://perma.cc/LAD5-UDVH].

<sup>6</sup> *Id.* at 2.

<sup>7</sup> Alex Arensberg, *U.S. Departments of Justice and Labor To Increase Criminal Prosecutions of Worker Safety Laws*, FRESH LAW BLOG (Dec. 22, 2015), <http://www.freshlawblog.com/2015/12/22/us-departments-of-justice-and-labor-to-increase-criminal-prosecutions-of-worker-safety-laws/> [https://perma.cc/3L5J-XFN2].

<sup>8</sup> *Id.*

<sup>9</sup> John C. Cruden, Ass’t Att’y Gen., U.S. Dep’t of Justice, Keynote Address at the American Bar Association, Section of Environment, Energy and Resources, Environmental and Workplace Safety Criminal Enforcement Conference (Oct. 26, 2016), <https://www.justice.gov/opa/speech/assistant-attorney-general-john-c-cruden-delivers-keynote-address-american-bar> [https://perma.cc/5RDN-FR2X].

environmental component—noting that “[n]ot all worker safety investigations will involve a potential violation of an environmental statute and worker safety laws may be the only enforcement mechanism.”<sup>10</sup> He also pointed to a recent plea agreement in which sanctions focused on changing corporate behavior by requiring Safety and Environmental Management System audits for key activities and mandating the hiring of subject matter experts, auditors, and ethics monitors to ensure future compliance and candor.<sup>11</sup> This example suggests an increased focus on individual behavior as a condition in plea agreements, not charging decisions alone.

#### IV. IMPACT OF CHANGE IN ADMINISTRATION

Although the results of the 2016 presidential election are expected to generate significant change within the Environmental Protection Agency (EPA), particularly in the area of federal rulemaking, the impact on its criminal prosecutions is less clear. A former federal prosecutor recently noted that “new leaders mean new priorities, but most investigations and prosecutions are handled by career lawyers,” so “the day-to-day work of prosecuting cases will continue with little difference in how the government proceeds.”<sup>12</sup> However, the same author noted that “[i]n a budgetary environment in which spending cuts are likely because of tax cuts and programs dealing with the infrastructure improvement that Mr. Trump promised during the campaign, the Justice Department can expect fewer resources from Congress.”<sup>13</sup>

#### V. CONCLUSION

These developments suggest an increased attention being paid to individual behavior, particularly in the context of worker safety regulation, although it remains to be seen precisely how the “rules have changed” and the extent to which this new focus will be applied during the new administration.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Peter J. Henning, *How Trump’s Presidency Will Change the Justice Dept. and S.E.C.*, N.Y. TIMES (Nov. 9, 2016), <http://www.nytimes.com/2016/11/10/business/dealbook/how-trumps-presidency-will-change-the-justice-dept-and-sec.html> [<https://perma.cc/S5BU-3LF9>].

<sup>13</sup> *Id.*