

The US Department of Justice (DOJ) has softened its policy known as the “Yates Memo.” That policy required companies to produce **all** relevant information on individuals involved in misconduct in order to be eligible to receive **any** cooperation credit with DOJ lawyers. Rather than the prior “all or nothing” approach, the new policy requires the company to “identify all individuals substantially involved in or responsible for the misconduct at issue.”

New Policy Incorporated Into Justice Manual

The new policy is incorporated into the DOJ’s revised Justice Manual (formerly, the US Attorneys’ Manual) in the section on the DOJ’s [Principles of Federal Prosecution of Business Organizations](#), particularly [9-28.700 \(The Value of Cooperation\)](#).

Reason for the Change

DOJ Deputy Attorney General Rod J. Rosenstein announced the revised policy in a [speech](#) to the American Conference Institute’s International Conference on the Foreign Corrupt Practices Act on November 29. During the same speech, Rosenstein explained the rationale for the policy change, advising that the [Yates Memo](#) had unrealistic consequences, saying “we learned that the policy was not strictly enforced in some cases because it would have impeded resolutions and wasted resources,” and that “[o]ur policies need to work in the real world of limited investigative resources.” He further said, “[w]hen we allow only a binary choice – full credit or no credit – experience demonstrates that it delays the resolution of some cases while providing little or no benefit.”

The Yates Memo, introduced in 2015, drove a hard line. Its “all-or-nothing” approach required that a company undertake a careful analysis before beginning cooperation to determine whether it could meet the threshold to earn credit. The approach also exacerbated prosecution conflicts between a company and its employees.

Civil Attorneys May Exercise Discretion

In addition, the Deputy Attorney General explained that DOJ civil attorneys will have more discretion to resolve litigation. “When criminal liability is not at issue, our attorneys need flexibility to accept settlements that remedy the harm and deter future violations, so they can move on to other important cases.” He added, “[o]ur 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.”

Analysis

The change marks a shift similar to the manner in which the DOJ handled corporate cooperation from 2006 to 2015. It appears that DOJ expects that these changes will increase companies’ willingness to cooperate with the DOJ and lead to more efficient prosecution efforts.

This shift is likely to increase the pace of False Claims Act settlements because of the discretion now afforded civil attorneys. The DOJ’s stated goal is to resolve matters by remedying whatever harm may have occurred rather than trying to assess the actions of every individual involved.

For more information about this ruling, please contact one of the individuals listed in this publication.

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