

The Value Of Separate Employee Counsel After Yates Memo

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One potential consequence of the U.S. Department Of Justice's increased focus on individual culpability in corporate investigations is a greater likelihood of companies and entities considering the provision of separate counsel for employees involved in the investigation. The engagement of separate employee counsel in some circumstances can enhance the position of a company under investigation in the eyes of the DOJ, both because it illustrates the independence of the company counsel's investigation, and because it protects and supports the employees participating in interviews.

The DOJ's increased focus on individual culpability was announced in the Sept. 9, 2015, memorandum issued by Deputy Attorney General Sally Quillian Yates, known as the "Yates Memo." Noting that "[o]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing,"[1] the Yates Memo directs that DOJ attorneys "focus on individual wrongdoing from the very beginning"[2] of any investigation related to wrongdoing by business organizations[3] from the inception of the investigation. Last month, the Yates Memo was codified in the U.S. Attorney's Manual, the key document guiding federal prosecutors' exercise of their duties.

The Yates Memo requires that companies seeking leniency under the Principles of Federal Prosecution of Business Organizations must provide "all relevant facts with respect to individuals." [4] With additional emphasis on assessment of individual culpability, and the reminder that the entity must disclose all relevant facts related to individuals, companies and other entities may place additional weight on the scale for providing separate counsel for these employees than in the past.

There are some cases in which separate counsel is unnecessary for an efficient and thorough internal investigation. In many investigations it is, appropriately, not even considered. However, in cases where

it is considered, assessing whether to provide separate counsel to these employees is a multifaceted determination. The policy articulated in the Yates Memo presents an additional factor in this calculation. Under the new policy, the use of separate employee counsel may have additional benefits, including potentially by being viewed more favorably by prosecutors, and thus worth the additional cost and potential inefficiencies.[5]

Role of Separate Employee Counsel

In nearly every investigation, witness-based evidence is critical to fully understand the documentary evidence. Often, it is difficult or impossible to determine whether criminal intent does or does not exist without witness statements. Interviews of individuals with relevant information are thus a critical part of the investigative process. In investigations related to corporations or other entities, those individuals are frequently employees, and sometimes also former employees or even members of the board of directors.

In some investigations, companies and entities confront the decision of whether to engage separate counsel for employees participating in the investigation. Sometimes, this step is advisable due to the potential for a conflict between the interest of one or more employees (e.g., where an employee has apparent criminal exposure) or in what is the rare circumstance where an employee refuses to participate in the investigation without her own counsel. Companies and organizations under investigation by the government have also had another possible reason for seeking independent employee counsel, even absent a potential conflict or employee demands: The provision of independent employee counsel (and the agreement to pay for counsel) can serve as a signal to the government that the company will spare no expense to ensure that the government is able to obtain any relevant information, without the appearance of or potential for interference by the company.

How the Yates Memo Affects This Calculation

Although the use of separate employee counsel has always been an option in certain investigations, the policy embodied in the Yates Memo adds another factor to an entity's analysis of this issue. The Yates Memo changes the calculation in two ways. First, where an entity's cooperation credit — critical to negotiating a more favorable disposition — hinges on the government's belief that the entity has been completely forthcoming regarding facts about individual culpability, the decision to bifurcate the legal representation of the entity from the legal representation of the individuals can provide entity counsel with greater credibility when it states that there are no such culpable employees. Second, from the employee's perspective, knowing that the entity's lawyers are essentially required to report any relevant fact regarding their individual involvement to obtain any benefit for the entity itself, an employee may be much more reluctant to participate in interviews without his or her own counsel present.

With the increased focus on identifying culpable individuals, companies and entities may find that on the margins, when debating whether to use separate employee counsel, the use of separate counsel affords worthwhile benefits in engaging with both the government and employees. These benefits — in particular, the enhanced independence of company counsel and the protection and support provided to the employees — may prove increasingly valuable under certain circumstances.

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[1] Mem. from Deputy Att'y Gen'l Sally Q. Yates to the Ass't Att'y Gen'l, Antitrust Div., et al., "Individual Accountability for Corporate Wrongdoing," dated Sep. 9, 2015, at 1, available at <http://www.justice.gov/dag/file/769036/download>.

[2] Id. at 4.

[3] U.S.A.M. § 9-28.200 n.1 (the term "corporation" refers to "all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations").

[4] See, e.g., U.S.A.M. §§ 9-28.010, 28.210 (new November 2015), available at <http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.

[5] Mem. from Deputy Att'y Gen'l Sally Q. Yates to the Ass't Att'y Gen'l, Antitrust Div., et al., "Individual Accountability for Corporate Wrongdoing," dated Sep. 9, 2015, at 3, available at <http://www.justice.gov/dag/file/769036/download>.