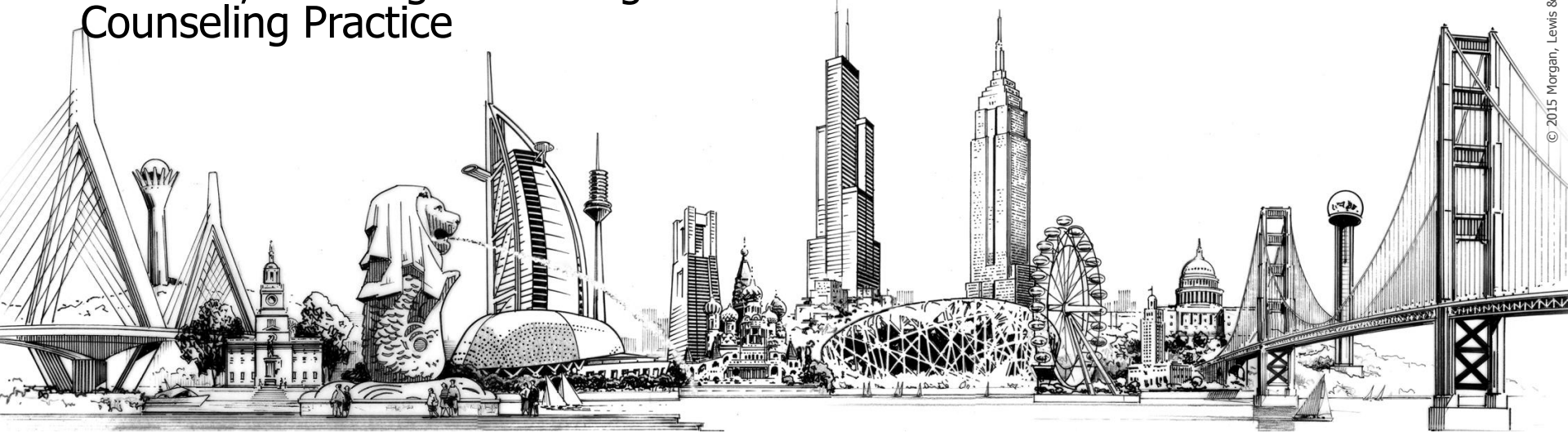


Morgan Lewis

CHALLENGES POSED BY THE YATES MEMO AND DOJ'S NEW THRESHOLD FOR CORPORATE COOPERATION

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DOJ's Guidance for Corporate Prosecution Decisions

- Beginning with the Clinton administration, DOJ has issued a series of internal memos to guide federal prosecutors on what they should and should not consider when deciding whether to prosecute a business organization.
 - These memos have all been largely consistent, listing eight or nine factors for prosecutors to consider.
 - This guidance received greater attention following the corporate fraud scandals of the early 2000s.

DOJ's Guidance for Corporate Prosecution Decisions (Cont'd)

- Factors from DOJ's guidance memos have included such things as **the seriousness of the company's wrongdoing**, degree of **corporate cooperation** with DOJ, and whether the company has a **history of similar misconduct**.
- Some prior memos have been controversial in that they allowed for demands for waiver of attorney-client privilege.

Principles of Prosecution of Business Organizations (USAM 9-28.000)

Since 2008, DOJ attorneys have been guided by nine factors (“**Filip Factors**”) set forth in the US Attorney’s Manual to evaluate whether to prosecute a business organization for criminal misconduct.

1. Nature & seriousness of offense
2. Pervasiveness of wrongdoing
3. History of similar misconduct
4. **Voluntary disclosure & cooperation**
5. Existence and effectiveness of pre-existing compliance program
6. Remedial actions
7. Collateral consequences
8. Adequacy of individual prosecutions
9. Adequacy of civil/administrative remedies

Yates Memorandum

In September 2015, Deputy Attorney General Sally Quillian Yates issued a new DOJ policy memo outlining new expectations for corporate cooperation credit and prosecution decisions.

- 1. All-or-Nothing Approach to Cooperation Credit**
- 2. Increased Focus on the Culpability of Individual Actors**
- 3. Broadening Pursuit of Remedies With Increased Civil/Criminal Communication**
- 4. No Protection for Individuals in Corporate Resolutions**
- 5. Requirement of Clear Plan for Individual Resolution**
- 6. Focus on Deterrence and Retribution**

So DOJ Will Decide Whether to Give Credit Only After it Receives All the Bad Evidence?



- DOJ's All-or-Nothing standard pretty much asks companies to turn over all evidence as to culpable conduct – for itself and its employees – in hopes that DOJ will decide at the end to give credit.
- Many view DOJ's policy as an effort to free-ride on corporate resources in an effort to build corporate cases.

Yates Memorandum (Cont'd)

All-or-Nothing Approach to Cooperation Credit

- No cooperation credit in pursuing corporations unless the company has provided **all** relevant information about **any** individual involved in potential misconduct
- DOJ will “vigorously review” the information a company provides to ensure it is complete and fully reflects the behavior and role of all parties involved
- Plea or settlement agreements with a corporation will now require continued corporate cooperation in individual investigations

Yates Memo Incorporated into USAM

In November 2015, the Yates Memo was incorporated into the USAM's Principles of Prosecution of Business Organizations.

New Section Entitled “Focus on Individual Wrongdoers” – USAM makes clear that prosecutors should look to identify and prosecute culpable individuals early in investigations, and any decision to pursue charges or a resolution against a corporation, but not an individual, now requires high-level approval and documentation.

New Threshold for “Cooperation” -- USAM now makes clear that, to receive any cooperation credit, including DOJ support for cooperation at sentencing, corporations must meet “threshold requirement of providing all relevant facts with respect to individuals. . . .”

Increased Focus on Individuals

- The Yates Memo has been referred to as DOJ's new "Individual Accountability Policy," which signals an increased focus on individual prosecutions.
- In the aftermath of the Global Economic Crisis, many criticized DOJ for not bringing cases against individuals who were believed to be responsible.
- Fairly or unfairly, the Yates Memo has been criticized as a political reaction to that criticism.

"Simply an urge to have bodies swinging from lamp posts isn't a very edifying way for the justice department to proceed."

Former Attorney General Michael Mukasey

Companies are Expected to Explain What They Can't Find

- **New Burden to Explain What Can't be Found or Disclosed** – In a strange footnote, the Yates Memo revisions to the USAM state that that corporations now bear the burden of explaining why they “cannot get access to certain evidence or [are] actually prohibited from disclosing it to the government.”
- This new burden will inevitably lead corporations to explain their investigation methodology to the government and even chase theories and perceived missing evidence that the government believes may exist.

How Can A Company Explain What it Can't Find?

Companies and their lawyers are understandably confused by the new requirement that they must now explain what they are unable to find.

“There are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know.”

Former Defense Secretary Donald Rumsfeld

Bottom Line: More Scrutiny

- The Yates Memo signals that DOJ will apply greater scrutiny to the completeness of corporate investigations and disclosures.
- DOJ has also signaled that it is going to scrutinize any individual conduct that is reported and that it will hold culpable individuals accountable.
- Of significance, DOJ claims that it will no longer allow global corporate settlements that avoid culpability for individual actors.
- **DOJ's new focus puts greater compliance pressure on individual employees at every level.**

What is the Impact of the Yates Memo?

Yates Memo



Filip Factors

1. Nature & seriousness of offense
2. Pervasiveness of wrongdoing
3. History of similar misconduct
4. Voluntary disclosure & cooperation
5. Existence and effectiveness of pre-existing compliance program
6. Remedial actions
7. Collateral consequences
8. Adequacy of individual prosecutions
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Will the Yates Memo Continue into Trump Administration?



- The Yates Memo follows prior corporate prosecution guidelines and similar memos that were issued in the Bush and Clinton administrations.
- It is possible that President-Elect Trump's Department of Justice could replace the Yates Memo with a new version with new standards.
- Nonetheless, it is unlikely that such a change will occur in the near term and any such change would likely not occur until 2018 or later.