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DOJ Policies on Corporate And Individual Prosecutions Should Be Reconsidered, Recalibrated

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As practitioners who represent corporations and individuals in Department of Justice investigations, we reliably anticipate that each new administration will revamp the policies and procedures for corporate prosecutions inherited from its predecessors.

The task of articulating new policy has traditionally fallen to the Deputy Attorney General, and the files are filled with memoranda that officially or unofficially bear their names. True to form, Deputy Attorney General Rod Rosenstein, speaking at the NYU Program on Corporate Compliance & Enforcement on Oct. 6, 2017, expressed his desire to reconsider both the form and substance of the Department's past guidance. He criticized the Department's practice of releasing guidance through successive speeches and memoranda, protested that such pronouncements are commonly referred to by the author's name, and proposed consolidating DOJ policy through regular updates to the U.S. Attorneys' Manual. As part of this effort, Rosenstein unsurprisingly announced that the Department would review former Deputy Attorney General Sally Yates' September 2015 memorandum on individual accountability for corporate wrongdoing, known of course as the "Yates Memo."

Issued after widespread public criticism of the DOJ's failure to prosecute corporate leaders in the wake of the 2008 financial crisis, the Yates Memo sought to "strengthen [DOJ's] pursuit of individual corporate wrongdoing." Most notably, the Yates Memo promulgated a new, higher standard for cooperation credit: For a corporation to be eligible for *any* cooperation credit under DOJ's Principles of Federal Prosecution of Business Organizations, it must provide all relevant information about individual misconduct. In other words, a company cooperating with the DOJ under the Yates Memo is required to identify to prosecutors all individuals involved in the misconduct, along with "complete factual information" about that individual misconduct, in order for its cooperation to be treated

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as a mitigating factor in the charging decision. Further, federal prosecutors were directed not to resolve cases against a company without also having a firm plan in place to resolve related cases against individuals, and prosecutors were strongly discouraged from agreeing to a corporate resolution that will provide protection from prosecution to individuals.

In his speech at NYU, Rosenstein did not reveal the details of his plans for a new policy to replace the Yates Memo. Though he stated that he "generally agree[d]" with the Yates Memo that federal prosecutors should be wary about resolving investigations through a corporate penalty without also pursuing individual wrongdoers, Rosenstein cautioned that he was not sure that current DOJ policy "got it exactly right." He then offered four "common themes" that would guide any revised DOJ policy: (1) "Any changes will reflect our resolve to hold individuals accountable for corporate wrongdoing;" (2) "They will affirm that the government should not use criminal authority unfairly to extract civil payments;" (3) "Any changes will make the policy more clear and more concise;" and (4) "They will reflect input from stakeholders inside and outside the Department of Justice." These "themes" are unobjectionable because they lack meaningful content. We hope this reflects caution and a desire to proceed deliberately, and not unwillingness to wrestle with difficult underlying issues. Our experience as practitioners under the Yates Memo is that its strict standards for cooperation credit have had a noticeable and often problematic impact on corporate and individual prosecutions, and we would encourage Deputy Rosenstein and his colleagues in the DOJ to thoughtfully reconsider these policies.

First, the contention that an individual must always be held accountable for corporate criminal activity should be revisited. Holding "individuals accountable for corporate wrongdoing" is a good sound bite, but we believe that the better formulation, and one with which most practitioners would agree, is that individuals should be held accountable for *their own individual* wrongdoing. While an individual should not be shielded from prosecution because his or her misconduct occurred in a corporate setting, an individual should also not be made to shoulder the blame for an organization's shortcomings just to satisfy a politicized impulse to "hold someone accountable." Whether an individual should be prosecuted has traditionally required consideration of factors far beyond whether the elements of a criminal statute can be satisfied. We can clearly envision, and have in fact seen, many situations in which no individual prosecutions are warranted even where misconduct has occurred. For example, a corporation whose junior-level employees are inadequately trained and learn by imitating the improper practices of fellow employees may be worthy of prosecution even if the individual employees are not. Similarly, where senior executives consulted the corporation's board and sought advice from its accountants and lawyers, prosecution against any individual officer for corporate decision-making also may not be appropriate.

Relatedly, any future guidance should recognize that an important part of the prosecutorial role is weighing evidence and deciding that a crime has *not* been committed or that insufficient evidence exists to bring charges. Good prosecutors recognize that justice is equally well served by a decision to prosecute and a decision not to prosecute, when both are the result of a diligent investigation and a fair-minded assessment of the facts. In its current form, the DOJ's guidance strongly chills a corporation's defense counsel from reaching, much less advocating to DOJ, the conclusion that a corporate employee has not engaged in misconduct because to receive any cooperation credit for the client, the corporation's attorneys must identify misconduct by someone. A better policy formulation would evaluate corporations on the diligence of their investigative efforts and whether they presented facts fairly and accurately, without

requiring a particular conclusion. In other words, a corporation that tells a prosecutor that, based on a thorough investigation, it is unable to find prosecutable misconduct should be met with no more disfavor than the line prosecutor in a typical case who gives the same report in good faith to a supervisor. In our experience, the Yates Memo has unfairly skewed this process by encouraging prosecutors to pressure corporations to search for individuals to prosecute even where the facts and circumstances do not warrant it.

Any new guidance on corporate cooperation should also not overlook the important differences between prosecutors and corporate attorneys when it comes to investigations. Our experience supports the commonly held view that a line prosecutor is among the most powerful government employees in the country. A prosecutor has the ability to compel the production of documents and testimony through grand jury subpoenas, and to make deals for cooperation in exchange for non-prosecution or reduced charges. With court orders that are routinely granted, prosecutors can confer immunity, search homes and offices, wiretap telephones and conduct other kinds of electronic surveillance. While a corporate defense lawyer can read email and talk to employees who consent to be interviewed, it should not come as a surprise that corporations and their counsel cannot always crack the case the way that a determined and methodical prosecutor could using the tools at his or her disposal. Any revised guidance should recognize that corporations can effectively assist prosecutors in investigations but cannot replace them. In addition, the new policy should also respect that corporations have obligations to treat their employees fairly, and should not be enlisted to unduly pressure their employees to forgo rights they may otherwise have in dealing with the government.

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Finally, we question whether it really makes sense to forestall corporate resolutions until there is a "clear plan to resolve individual cases," as the Yates Memo requires. In our experience, DOJ has affirmatively delayed reaching resolutions with corporations that are ready, willing and able to settle, while the quest for prosecutable cases against individuals drags on for months or years. Although the Yates Memo counsels that cases should be resolved within the time allotted by the applicable statute of limitations and suggests that tolling agreements should be used sparingly, we have observed that the ten-year limitations period for crimes affecting a financial institution, the available extension of time while a prosecutor seeks foreign evidence, and expansive views of the length of potential conspiracies or scheme crimes, provide considerable leeway to prosecutors. And when the end of a limitations period is in sight, we have found that most prosecutors have no trouble viewing their own case as the rare one in which tolling is warranted. We would like to see guidance from the Deputy Attorney General telling prosecutors not to delay corporate resolutions when a resolution that serves the public interest, including the interest of blameless corporate stakeholders, is available. Faster resolutions allow corporations and their employees and stockholders to move forward and focus on current issues without prejudicing the prosecution of individuals.

If, as promised, the current Deputy Attorney General learns from the experiences that practitioners have had under the Yates Memo, and revises DOJ's policies to better serve the goals of fairness and efficiency, perhaps he will not mind as much when the new guidance is referred to, as it inevitably will be, as the Rosenstein Memo.