Yates Memorandum
(September 9, 2015)

• Deputy Attorney General Sally Quillian Yates issued a memorandum regarding individual accountability for corporate wrongdoing
• Provides guidance for both civil and criminal investigations
• Emphasizes the need to hold individuals who perpetrated corporate wrongdoing accountable, "particularly in the aftermath of the financial crisis"
Six Principles of the Yates Memo

1) To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in the misconduct under investigation.

2) The Department’s criminal and civil corporate investigations should focus on individuals from their inception.

Six Principles of the Yates Memo

3) Criminal and civil attorneys handling corporate investigations should routinely communicate with one another.

4) Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

Six Principles of the Yates Memo

5) Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases should be memorialized in writing.

6) Civil attorneys should consistently focus on individual liability as well as entity-level liability and should look beyond the question of an individual’s ability to pay in evaluating whether to bring suit against that individual.
Discussion – “The Big Picture”

• What is the intended impact?
  — More cooperation for the government?

• Potential unintended consequences?
  — Less cooperation for companies?
  — Less effective internal investigations?

Potential Consequences

• Will outside counsel need to enhance their *Upjohn* warnings to employees during interviews?
• What if employees refuse to be interviewed?
• Does the Memo encourage employees to seek individual counsel earlier and more often?
• Will individuals attempt to place restrictions on being interviewed?

Potential Consequences

• How will the Memo impact settlement discussions?
• Will companies be willing to settle matters with DOJ while cases are still pending against their (indemnified) individual employees?
Updated OIG Permissive Exclusion Authority

(April 18, 2016)

OIG revised policy statement containing the new criteria that OIG intends to use in implementing permissive exclusion authority under 42 U.S.C.A. § 1320a-7(b)(7) (Revised Policy).

- Examples of Key Aspects of the Revised Policy
  - Individual Accountability
    - In the case of an individual, if the individual organized, led, or planned the unlawful conduct, this indicates higher risk
    - If the person’s cooperation resulted in criminal, civil, or administrative action or resolution with or against other individuals or entities, this further indicates lower risk
Updated OIG Permissive Exclusion Authority

- Examples of Key Aspects of the Revised Policy
  - Internal Investigations
    - If the person initiated an internal investigation before becoming aware of the Government’s investigation to determine who was responsible for the conduct, and shared the results of the internal investigation with the government, this indicates lower risk
    - If the person self-disclosed the conduct cooperatively and in good faith as a result of the internal investigation, prior to becoming aware of the Government’s investigation, this indicates lower risk

Questions