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3 Ways The Yates Memo May Affect FCA Cases

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In September 2015, Deputy Attorney General Sally Quillian Yates announced a new U.S. Department of Justice policy memo setting forth "six key steps" designed to better hold individuals accountable for illegal corporate conduct. Two months later, the DOJ incorporated these steps into the U.S. Attorney's Manual, which governs federal criminal and civil corporate investigations and charging decisions.

In the aftermath of the Yates memo, most of the public focus has been on its first "key step," namely that "[t]o be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct." Commentators have focused on whether this represents a significant change to DOJ policy or is simply a new attempt to message an old policy. While this debate has been understandable, it has also tended to overshadow the Yates memo's remaining five steps, several of which expressly address civil cases and thus have the potential to impact DOJ practices and procedures when it comes to the False Claims Act.

In this article, we take a closer look at the Yates memo's third "key step" — the requirement that "[c]riminal and civil attorneys handling corporate investigations should be in routine communication with one another" — and examine its potential spillover effect on corporate FCA cases.

A Greater Emphasis on Parallel Individual Investigations May Lead to More Corporate Scrutiny.

Parallel criminal and civil investigations have become the norm in many areas of federal law. In 1970, in U.S. v. Kordel,[1] the U.S. Supreme Court recognized the general legality of such investigations. Ten years later, in U.S. Securities and Exchange Commission v. Dresser,[2] the D.C. Circuit expounded on the benefits of parallel proceedings, reasoning that, because civil and criminal investigations take time, prosecutors cannot wait for civil attorneys to finish investigations, and vice versa, without endangering their respective cases. As the court in Dresser explained, "the statute of limitations may run, witnesses may die or move away, memories may fade, or enforcement resources may be diverted."

The DOJ has long encouraged the use of parallel investigations. In January 2012, for example, then-Attorney General Eric Holder issued a policy statement encouraging early coordination between criminal prosecutors and civil trial counsel and extolling the benefits of parallel proceedings. The Holder statement specifically noted the application of this policy in the FCA context, stating that the filing of a qui tam action should be considered a referral to any and all DOJ components and suggesting ways in which DOJ civil attorneys and criminal prosecutors could best share evidence in FCA cases.

Consistent with this policy, in September 2014, Assistant Attorney General Leslie R. Caldwell announced a new Criminal Division procedure in which "all new qui tam complaints" would be "shared by the Civil Division with the Criminal Division as soon as the cases are filed." Prosecutors will immediately review the cases to "determine whether to open a parallel criminal investigation" and then "coordinate swiftly with the Civil Division and U.S. Attorney's Offices about the best ways to proceed." AAG Caldwell emphasized the importance of sharing facts about a case early in the investigation so that each Division can provide unique legal tools and investigative techniques.

The Yates memo furthers these earlier policies by focusing specifically on parallel civil and criminal investigations of individuals. According to the memo, "Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company." Unlike the earlier DOJ statements discussed above, this section of the Yates memo does not expressly reference qui tam complaints, but, given the dual criminal and civil nature of the statute, it has obvious applications in FCA cases.

Although focused on individuals, the Yates memo's emphasis on quick and coordinated parallel criminal and civil investigations of individuals has the potential to affect corporate resolutions with the DOJ as well; building better cases, more quickly, against individuals could affect DOJ's view of the culpability of those individuals' employers as well. Companies should also be aware that, although DOJ policy has long stressed the value of parallel proceedings, DOJ officials have remarked recently that the Yates memo has put this emphasis in even sharper focus, and coordination between criminal and civil components has begun at a much earlier stage than in the past.

In addition to creating an opportunity for faster resolution, having the civil and criminal components engaged at the same time may also present companies with a better opportunity to persuade the DOJ to forgo criminal charges in favor of an alternative resolution, especially if the company "fully cooperates" within the meaning of the Yates memo. Such an outcome is reinforced by changes made to the USAM in the wake of the Yates memo. For example, the Federal Principles of Prosecution of Business Organizations[3] now encourages criminal prosecutors handling corporate investigations to "maintain early and regular communication with their civil counterparts and regulatory attorneys" to determine whether a noncriminal corporate resolution may be more appropriate.

Limitations on DOJ's Abilities to Share Information in Parallel Investigations

In light of the potential impact of the DOJ's renewed emphasis on parallel investigations, companies should be aware of certain legal limits on the ability of criminal prosecutors and civil trial attorneys to share evidence. By learning these limitations, companies facing FCA investigations can conduct more effective internal investigations, respond more effectively to requests for information, and ultimately resolve the matter as efficiently as possible.

The most significant restriction on evidence sharing is grand jury secrecy. Under Federal Rule of Criminal Procedure 6(e), criminal prosecutors are generally unable to provide evidence gathered during a grand jury investigation to their civil counterparts. Thus, for example, if a company receives a grand jury subpoena to produce documents during an FCA investigation, criminal prosecutors typically cannot provide these documents — or the substance of these documents — to civil trial attorneys, absent an express exception to Rule 6(e).[4]

In order to facilitate evidence sharing in FCA investigations, the DOJ encourages the use of other means of gathering evidence — such as administrative subpoenas, Health Insurance Portability and Accountability Act subpoenas, civil investigative demands, and voluntary document productions and interviews — that do not carry such restrictions. But even here there are important limits. First, a civil investigation may not be conducted in bad faith, that is, civil attorneys may not conduct an investigation solely to collect evidence for a criminal investigation. Second, civil investigators may not affirmatively mislead or deceive the subject of a parallel investigation into believing that the investigation is exclusively civil. Company counsel may want to ask a Civil Division attorney conducting an FCA investigation whether the Criminal Division is also involved. Knowing that the Civil Division attorney cannot affirmatively mislead the company, a "no comment" response may very well suggest that the Civil Division is coordinating with the Criminal Division.

Several high-profile cases in the mid-2000s, such as U.S. v. Scrushy and U.S. v. Stringer,[5] vividly illustrated the consequences of exceeding these limitations, when the respective district courts suppressed critical evidence and dismissed an indictment for perceived abuses of parallel proceedings. Moreover, under the Brady/Giglio doctrine and certain DOJ policies, parallel investigations may increase prosecutors' discovery burdens if a criminal case proceeds to trial. In U.S. v. Gupta,[6] the court ordered the DOJ to review and produce any exculpatory material contained in memoranda prepared by noncriminal government attorneys summarizing certain portions of 44 interviews conducted jointly during the parallel investigation. Seeking to avoid such increased burdens may impose practical limitations on the extent to which prosecutors and civil attorneys coordinate their investigations.

Will Employees Be Less Likely to Cooperate in Internal Investigations?

Effective internal investigations are critical in limiting FCA liability and obtaining cooperation credit under 31 U.S.C. § 3729(a)(2). Under that provision, a company is eligible for reduced damages, not less than two times the amount of damages which the government sustained due to the violation, if it fully cooperates with the investigation. The Yates memo also makes clear that, "[t]o be eligible for any cooperation credit" under the FCA, the company must provide "all relevant facts about individual misconduct." Further, the effectiveness of an internal investigation will depend, at least in part, on the willingness of employees to come forward with relevant information.

There has been much debate as to whether the Yates memo's increased focus on individual accountability will make employees less likely to cooperate in internal investigations and more likely to seek individual representation early in the process. Those who think that the Yates memo is merely a restatement of pre-existing policy typically conclude that it will have no effect on an employee's willingness to cooperate. However, even assuming that is true, the DOJ's restatement of an existing policy increases the likelihood that more employees will now become aware of the DOJ's position, potentially affecting the behavior of employees during the course of an internal investigation.

Furthermore, parallel investigations create additional complexity for individuals, making it more likely that an individual will be held accountable in some manner — whether it be civilly or criminally. Although this has always been true in the event of parallel investigations, an employee's unwillingness to cooperate in an internal investigation now carries the additional complexity created by the Yates memo and a company's ability to receive cooperation credit under the FCA.

Conclusion

It is too early to tell what effect the Yates memo will ultimately have on the DOJ's pursuit of corporate

and individual wrongdoing. However, because the Yates memo's focus on parallel investigations has encouraged criminal prosecutors and their civil counterparts to begin coordinating efforts earlier in investigations, companies that do business with the U.S. government should be aware of the potential for this "key step" to impact the likelihood of criminal and civil liability under the FCA.

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[1] 397 U.S. 1 (1970).

[2] 628 F.2d 1368 (D.C. Cir. 1980).

[3] USAM 9-28.000.

[4] For example, 18 U.S.C. § 3322 provides that a criminal prosecutor may disclose information to a civil trial attorney for use in enforcing § 951 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) or for use in connection with any civil forfeiture provision of Federal law.

[5] United States v. Scrushy, 366 F. Supp. 2d 1134 (N.D. Ala. 2005); United States v. Stringer , 408 F. Supp. 2d 1083 (D. Or. 2006), rev'd in part, vacated in part, 535 F.3d 929 (9th Cir. 2008).

[6] United States v. Gupta, 848 F. Supp. 2d 491 (S.D.N.Y. 2012).