

The Yates Memo's "All Relevant Facts" Requirement Leaves Privilege Protections in Flux

The Individual Accountability for Corporate Wrongdoing Memorandum (the Yates Memo), issued by the US Department of Justice (DOJ) on September 9, 2015, lays out a new, six-part policy relating to the investigation and prosecution of individuals involved in corporate wrongdoing.¹ Perhaps the most significant aspect of the new policy requires that a company must provide the government with "all relevant facts relating to the individuals responsible for the misconduct" in order for the company "to be eligible for any cooperation credit."² Historically, "cooperation credit was a sliding scale of sorts" for companies allowing them to receive "at least some credit for cooperation, even if they failed to fully disclose all facts about individuals."³ Under the new policy, "providing complete information about individuals' involvement in wrongdoing is a threshold hurdle that must be crossed" before the DOJ will consider any cooperation credit.⁴ This all-or-nothing requirement begs many unanswered questions about the consequence to the attorney-client and work product privileges as part of both the corporation's internal investigation process and the government's cooperation credit analysis.

In the wake of the new policy, the government attempted to clarify concerns surrounding the DOJ's change in approach. For example, Assistant Attorney General Leslie Caldwell remarked that the DOJ will not expect companies to "present[] a prosecution memo to [the DOJ] for specific individuals."⁵ According to Deputy Attorney General Yates:

[T]here is nothing [in the memo] that requires companies to waive attorney-client privilege or in any way rolls back protections already in place. The policy specifically requires only that companies turn over all relevant non-privileged information. We're asking for the facts. We have always asked for the facts. The only difference now is that companies cannot—in the name of privilege or otherwise—pick and choose which facts to provide if they want credit for cooperation.⁶

Notwithstanding the DOJ's effort to quell fears that the new policy erodes privilege protections, comments by Yates suggest that under the new policy the government will afford less respect to privilege claims regarding communications involving lawyers conducting internal investigations for corporate clients. For example, Yates has stated that in order to obtain cooperation credit, a corporation would be expected to produce "all relevant facts" obtained through the course of interviews with outside counsel and corporate employees during an investigation. While on one hand, Yates criticizes a purported picking and choosing of facts disclosed by corporations, on the other hand, the new policy seeks to allow the government, not the corporation under investigation, to make the ultimate determination of whether "all" relevant facts were provided to the government. Even less clear is the government's expectation that the corporation or its counsel will disclose "facts" gleaned from employee interviews, while keeping protected privileged communications and work product created by or provided to legal counsel during the course of the same interview or investigation. The new policy raises several issues that should be considered by corporate counsel when faced with an internal investigation that may involve a request for cooperation credit:

- While outside counsel may be better situated to conduct an impartial and exhaustive investigation, the use of outside counsel does not appear to provide heightened privilege protection to the investigation process;
- Without the availability of partial cooperation credit, counsel will need to assess early on whether the impact of the alleged conduct is so grave that it warrants waiving the privilege upfront in exchange for credit;
- The new policy may affect the willingness of employees to participate candidly in the interview process if they fear communications with counsel or facts provided during interviews will no longer be protected by privilege, potentially inhibiting the investigation process;
- The likelihood that the contents of employee interviews will be disclosed to the government is significantly higher under the new policy. Hence, there is an increased importance to providing the Upjohn Warning during interviews with investigating counsel;

¹ <https://www.justice.gov/dag/file/769036/download>

² *Id.* at pp. 2-3.

³ <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0>, Nov. 16, 2015.

⁴ *Id.*

⁵ <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-second-annual-global-0>, September 22, 2015.

⁶ <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association-0>, May 10, 2016.

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- The need to parse facts from privileged communications and work product will likely entail greater care and legal expense for corporations conducting internal investigations; and
 - While the government may not view the disclosure of facts derived from witness interviews conducted by counsel as a waiver of privilege, such conduct could be viewed by courts as a partial or complete subject matter waiver in subsequent civil litigation.

While a thorough internal investigation process appears even more important under the shadow of the Yates Memo, the impact of the “all relevant facts” policy on privilege will continue to evolve as federal prosecutors apply the new policy to ongoing and future investigations.

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