

ALERT

# Revising Yates: Deputy Attorney General Announces New Policy for Pursuing Individuals in Corporate Enforcement Actions

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**WHAT:** Deputy Attorney General Rod Rosenstein announced that DOJ has revised its policy for pursuing individuals in civil and criminal corporate enforcement matters. Under the new policy, DOJ will continue to rigorously pursue individuals for criminal violations but allow more discretion on corporate enforcement in civil actions.

**WHEN:** Mr. Rosenstein announced the new policy on November 29, 2018 at the ACI International Conference on the Foreign Corrupt Practices Act.

**WHAT DOES IT MEAN FOR INDUSTRY:** Three years after the Memorandum on Individual Accountability for Corporate Wrongdoing (the “Yates Memo”) made individual enforcement a key priority in *all* corporate enforcement matters, DOJ has changed course—creating separate policies for criminal and civil actions.\* The new policies promise to crackdown on individual criminal violations, while providing DOJ attorneys with more discretion to reward corporations for partial cooperation in civil matters. This increased discretion is intended to promote the efficient resolution of civil investigations by permitting corporations to cooperate—and obtain cooperation credit—without spending excessive resources to uncover every individual with even an attenuated connection to the company’s misconduct. Companies, however, cannot use the policy to shield individuals the company knows engaged in misconduct. And companies must still disclose all individuals substantially involved in the misconduct, particularly senior managers and directors, if they wish to receive any credit for their cooperation.

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### *Criminal Policy*

DOJ's revised criminal policy amplifies the Department's focus on holding individuals responsible for corporate criminal misconduct. Under the policy, a corporate resolution will not prevent DOJ from pursuing the individuals responsible "absent extraordinary circumstances." Corporate resolutions alone, Mr. Rosenstein explained, are insufficient to deter people from further misconduct and often "penalize innocent employees and shareholders without effectively punishing the" wrongdoers. Echoing former Deputy Attorney General Yates, Mr. Rosenstein reiterated that "[t]he most effective deterrent to corporate criminal misconduct is identifying and punishing the people who committed the crimes."

The policy also reinforces companies' obligations to fully disclose their employees' involvement in criminal conduct. Companies seeking cooperation credit "must identify every individual who was substantially involved" in the wrongdoing. On the other hand, the new policy seeks to make clear that investigations should not be delayed to collect information about individuals "whose involvement was not substantial, and who are not likely to be prosecuted." If DOJ determines that a company has not made a good faith effort to identify all substantially involved or responsible individuals, it will decline to award *any* cooperation credit. Thus, while DOJ's strict criminal enforcement policy intends to deter individual wrongdoing, companies must be aware that their cooperation in these investigations is critical to alleviating their own penalties.

### *Civil Policy*

Unlike criminal actions, which are meant to punish individuals and deter fraud, DOJ's "primary goal" in civil enforcement actions "is to recover money." Accordingly, the new policy gives DOJ attorneys greater discretion to decide when to pursue individuals. Attorneys may now consider not only the severity of an individual's conduct, but their ability to pay. Mr. Rosenstein explained that DOJ should not waste its limited resources "pursuing civil litigation that is unlikely to yield any benefit." Instead, civil enforcement should focus primarily on corporate investigations and cooperation.

The crux of the revised civil enforcement policy is DOJ's willingness to provide partial cooperation credit. Using a civil False Claims Act case as an example, Mr. Rosenstein distinguished prior DOJ guidance following the Yates Memo, which required companies to turn over all non-privileged material about all individuals connected to the company's misconduct to receive *any* cooperation credit. In essence, the former policy was all or nothing. It forced companies to spend significant time and resources uncovering every individual potentially involved in the company's misconduct or lose the opportunity to obtain credit. Recognizing that this policy was inefficient and delayed corporate resolutions, DOJ has changed tack. The new policy requires companies to identify every person "substantially involved in or responsible for the misconduct" to receive maximum credit. This lessens the company's burden to uncover every employee who may have some connection to the underlying issue. Further, where a company "honestly" and "meaningfully" cooperates in the investigation, "civil attorneys now have discretion to offer some credit even if the company does not qualify for maximum credit."

Although DOJ's new approach to cooperation credit is likely a boon to companies willing to cooperate, there are still pitfalls to avoid. Mr. Rosenstein emphasized that companies cannot shield their senior officials, managers, or directors from liability. They must identify "all wrongdoing" by these individuals if they want to receive "any credit." Indeed, the new policy prohibits DOJ from "awarding any credit whatsoever" to a company that conceals such misconduct or that "otherwise demonstrates a lack of good faith in its representations."

The revised policy has the potential to quicken the resolution of civil corporate enforcement actions and give companies more opportunities to earn credit. Companies hoping to benefit from the new policy, however, must now balance efficient investigations with full, good-faith disclosure of those substantially responsible for the company's wrongdoing.

Mr. Rosenstein's full remarks are available [here](#).

\*The policy revisions can be found in various sections of the *Justice Manual*.