

## DOJ's Yates Memorandum 5 Years Down the Road: Alive but is it Kicking? FCPA Enforcement of Individuals Post-"Yates"

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In 2015, then-Deputy AG Sally Yates (Attorney General Eric Holder's second-in-command) published DOJ's new policy statement on the investigation and prosecution of corporate offenses, heavily increasing focus on individuals as a matter of policy. That DAG Memo became – and remains—enshrined in the DOJ US Attorney's Manual under title 9: Section 28.210, emphasizing a new, clearly articulated policy entitled "Focus on Individual Wrongdoers." Some thought it a seismic shift; although perhaps just as many assumed that with the administration shift in 2017, that very pointed policy targeting individuals in corporate investigations and enforcement actions would be shown the door. That focus, which was – and remains – the subject of attention, continued speculation, and examination – rather clearly articulated the general principles designed to guide DOJ's approach to crimes within and by corporations: "Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation..."<sup>[1]</sup> The Department's *intent* was clear: to break with traditional prosecutions focused exclusively on corporate entities themselves, thus holding officers, employees and culpable individuals accountable wherever possible. DAG Yates went on to state to the ABA in May of 2016 that "I can tell you now that we're seeing a shift in how we approach cases at the Department, both on the criminal side and the civil side." Did that happen? Would that redirected policy survive? Whether it ever effected a true shift remains debatable, although it seems alive and well.

Fast forwarding to the end of the Obama administration which produced "Yates," that policy has not only *not been repudiated*, but has at least in theory been embraced in criminal matters—albeit with a less strident insistence on *all* offenders—nevertheless continuing to focus on those in the corporate structure who have significant or decision-making culpability. At the end of 2018, Deputy Attorney General Rod Rosenstein announced that modification in DOJ policies in the USAM relating to individual accountability in corporate investigations, albeit without backing away from the overarching theme that the DOJ remained focused on punishing those culpable controlling individuals: "The most effective deterrent to corporate criminal misconduct is identifying and punishing the people who committed the crimes."<sup>[2]</sup>

Interestingly, the adjustment to existing Yates-driven policies seemed to go beyond DOJ's continuing focus on individuals, not only reiterating its focus on responsible individuals in the corporate constellation, but providing that... "Absent extraordinary circumstances...no corporate resolution should provide protection from criminal liability for any individuals."<sup>[3]</sup> From a policy standpoint (probably to the surprise of many), "Yates" has remained viable (albeit with practical, evolutionary changes), dictating as a matter of policy the importance of DOJ enforcement actions against truly culpable, responsible individuals in the context of corporate criminal and civil enforcement actions. How is it playing out? A look at reported trends, for instance, involving DOJ actions against individuals for violations of the Foreign Corrupt Practices Act reveals that since 2006, Some 78% of DOJ corporate enforcement actions *have not* resulted in any DOJ FCPA charges against company employees.<sup>[4]</sup>

That conclusion is based on the observation that according to *FCPA Professor*, since 2006, of 119 corporate enforcement actions, only 26 of those have yielded charges against corporate individuals. On the other hand, a comparison of 2010-2014 with 69 individuals charged versus 72 in the period from “Yates” to present (2015-2019) suggests somewhat of a 2019 surge if (and only if) the pre-Yates 2010 Africa Sting’s 22 are discounted or at least diminished as somewhat of an anomaly. In fact, with individual indictments or guilty pleas from 34 individuals (26 over 2018), Michael Volkov called 2019 a record year in this area.<sup>[5]</sup> DOJ’s efforts against individual offenders also got passing marks from Harvard’s Law School Forum on Corporate Governance: “Over the past year, DOJ’s implementation of [its] new policies provides helpful insight into the government’s evolving approach to criminal enforcement in the white collar context.”<sup>[6]</sup>

The fact is, however, that against some expectations, the articulated shift in DOJ charging policies which began with the previous administration have been retained, embraced, and continue somewhat modified—although without as yet any conclusive statistical results. But because that policy focusing on individual offenders survives fundamentally intact; and because the Department’s enhanced USAM policy incentivizing corporate self-reporting, cooperation and remediation includes the prosecution of significant culpable individuals—it is safe to anticipate that those individuals involved in corporate transgressions will remain very much in DOJ’s crosshairs from now on.

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[1] United States Attorney’s Manual: Principles of Federal Prosecution, 9-28:210.

[2] Deputy Attorney General Rod J. Rosenstein delivers remarks at the 35th International Conference on the Foreign Corrupt Practices Act (November 29, 2018) <https://www.justice.gov/opa/speech/deputy-attorney-general-Rod-J-Rosenstein-delivers-remarks-American-conference-institute-0>

[3] United States Attorney’s Manual: Principles of Federal Prosecution, 9-28:210: Focus on Individual Wrongdoers.

[4] “A focus on DOJ Individual Actions”, *FCPA Professor*, 21 Jan. 2020, available at <http://fcpaprofessor.com/focus-doj-individual-actions-3/>

[5] Volkov: Corruption, Crime and Compliance; *FCPA 2019: A Record Year in Enforcement and Compliance (Part I of III)*, January 6, 2020.

[6] Harvard Law School Forum on Corporate Governance; *White-Collar and Regulatory Enforcement: What Mattered in 2019 and What to Expect in 2020*, February 4, 2020.