THE YATES MEMORANDUM'S IMPACT ON U.S. CARTEL ENFORCEMENT: EVOLUTION OR REVOLUTION?

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The Yates Memorandum marks a significant, or even revolutionary, change in the Department of Justice's ("DOJ") approach to investigating and prosecuting individuals. More than a decade ago, DOJ's Antitrust Division (the "Division") instituted a policy of seeking to prosecute the highest-ranking responsible executives for cartel behavior. Many of the changes that the Yates Memorandum requires were already anticipated by the Division's policies. While the Yates Memorandum may have profound effects in many areas of law, for the criminal cartel bar, the changes it introduces appear to be more evolutionary than revolutionary.

I. THE YATES MEMORANDUM

In September 2015, DOJ made public a memorandum drafted by Deputy Attorney General Sally Yates announcing new policies intended to hold corporate executives accountable for criminal conduct. The memorandum, colloquially known as the "Yates Memo," outlines six policy changes or clarifications regarding DOJ's approach to corporate executives, as follows:

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1. In order to be eligible for cooperation credit, companies must "identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority and provide to [DOJ] all facts relating to that misconduct."

2. DOJ attorneys must focus on individuals at the outset of corporate investigations.

3. DOJ's criminal and civil attorneys must maintain "[e]arly and regular communication" with each other to ensure that parallel proceedings are coordinated.

4. DOJ may not release executives from criminal liability except in "extraordinary circumstances" or as a part of the Division's Leniency Program.

5. DOJ attorneys must develop a "clear plan" to resolve criminal cases against executives before resolving a corporate investigation and any releases of executives must be approved by the relevant U.S. Attorney or Assistant Attorney General.

6. DOJ's civil attorneys should "focus on individuals as well as the company," and the decision as to whether to pursue "civil actions against culpable individuals should not be governed solely by those individuals' ability to pay."

II. THE DIVISIONHAS LONG FOCUSED ON INDIVIDUAL ACCOUNTABILITY

Almost twenty years ago, the Division began adopting policies and developing enforcement techniques based on the proposition that individual accountability was the most effective way to deter cartel conduct. Those policies appear, in retrospect, to have been ahead of their time.

A. The Division's Approach to Prosecuting Executives For Cartel Conduct

Price-fixing has not always been viewed as a serious criminal offense. Until 1974, price-fixing and bid-rigging were misdemeanors. Even until the 1990s, the Division still often recommended non-custodial sentences for foreign nationals who voluntarily surrendered to the United States. For business executives—especially foreign business executives, who generally faced little or no risk of extradition—the prospect of serving significant prison time for cartel offenses must have seemed remote.[2]

These policies began to change in the 1990s, as the Division began steadily escalating the pressure on executives. As part of its leniency programs, the Division adopted a series of carrots and sticks to convince foreign companies and their executives to plead guilty and to agree to serve prison time. At the same time, the Division abolished "no jail time" plea agreements for foreign executives. The Division also embarked on a remarkably successful global lobbying effort to convince other nations to criminalize cartel conduct. Today, more than 30 countries impose criminal liability for cartel activities, including major

[2] This is not to say that there were not significant improvements in DOJ's cartel enforcement program between 1974 and the 1990s. In 1978, DOJ announced its original Corporate Leniency Policy. In 1990, the maximum fine for a corporate violation of the Sherman Act was increased from $1 million to $10 million. In 1994, DOJ announced its Individual Leniency Policy.

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economic powers like Australia, Brazil, Canada, Israel, Japan, Mexico, South Korea, the United Kingdom, and Russia.

The Division's prosecution of foreign executives has also increased and been successful. Prior to 2010, the Division had never successfully extradited a foreign executive. That year, however, after a long effort, the United Kingdom extradited Ian Norris, the former CEO of Morgan Crucible PLC, to the United States. Even though Norris was extradited to face a charge of conspiring to obstruct justice, not for a violation of the Sherman Act, the fact that the Division succeeded in bringing a fugitive to the United States was a landmark development.

In March 2012, on the heels of Mr. Norris' extradition, the Division won its first trial victory against foreign executives accused of price-fixing. As part of its case against AU Optronics Corporation, the Division alleged that many of its top executives had conspired with competitors to fix the price of thin-film transistor liquid crystal display panels. After an eight week trial, a jury found AU Optronics' President, Hsuan Bin Chen, and Vice President, Hui Hsiung, guilty of violating the Sherman Act.[3]

In April 2014, the Division announced that Germany had agreed to extradite Romano Pisciotti, an Italian citizen, to face U.S. antitrust charges—making Pisciotti the first person ever to have been extradited to the United States based solely on antitrust charges. The story behind Pisciotti's extradition reflects the Division's commitment to pursuing fugitives. Pisciotti was an Italian-based executive at Parker ITR Srl ("Parker"). In 2010, Parker pled guilty to price-fixing in the marine hose industry between 1999 and May 2007. In Parker's plea agreement, the Division "carved out" Pisciotti (*i.e.* retained the right to prosecute him), who ran Parker's marine hose business from 1985 to 2006. Six months later, the Division secured an indictment against Pisciotti, alleging that he participated in a global price-fixing conspiracy among manufacturers of marine hoses. Notably, the Division filed the indictment under seal, presumably because Pisciotti refused to travel to the United States to face the charges.

The Division then set out to try to secure Pisciotti's presence in the United States. Because Italy did not criminalize cartel conduct until after the events at issue in the case, extradition appeared to be out of the question.[4] The Division thus elected to file a "Red Notice" with Interpol, which obligated member countries to seek to detain Pisciotti with an eye towards his potential extradition. In June 2013, as he sought to clear customs at Frankfurt Airport while flying from Nigeria to Italy, German authorities arrested Pisciotti. At the U.S. government's request, German prosecutors initiated extradition proceedings.

Pisciotti challenged the validity of his extradition in various European courts, but without success. On April 3, 2014, the Higher Regional Court of Frankfurt ceded to requests from the Division and ordered the extradition of Pisciotti. Just three weeks later, Pisciotti agreed to plead guilty to participating in a conspiracy to rig bids, fix prices and allocate

[3] The jury acquitted two other AU Optronics' executives, and a mistrial was declared as to the fifth.
[4] Most extradition treaties require "dual criminality," meaning that extradition is only available when the conduct at issue is illegal in both the countries making and considering the extradition request.

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market shares of marine hose sold in the United States. Pisciotti agreed to serve two years in prison—with credit for the nine months and 16 days he was held in custody in Germany—and to pay a $50,000 fine.

While the Division has made significant progress in extraditing executives accused of price-fixing, its record is far from perfect. The Division has great difficulty compelling the appearance of foreign executives. Even after Pisciotti and Norris, extradition appears to be the exception, rather than the rule. It remains to be seen how foreign governments will handle the Division's extradition requests for criminal antitrust charges.

B. The Division's Tools for Investigating and Prosecuting Cartelists

These developments highlight the Division's increasing use of all of the cartel enforcement tools at its disposal. Some of those tools are as follows:

Sealed indictments. One of the lessons of the Pisciotti extradition is that an executive may not even know that he or she has been indicted in the United States. By way of example, Pisciotti was indicted under seal on August 26, 2010. The indictment remained sealed until August 1, 2013, when Pisciotti was detained by German authorities. While it is not publicly known how many other foreign executives have been indicted under seal, it seems likely that the Division has obtained numerous sealed indictments of foreign executives.

INTERPOL Red Notices. The Division has long used Interpol Red Notices to make international travel difficult for indicted foreign executives. However, the recent criminalization of cartel offenses in many countries makes international travel increasingly treacherous for foreign executives that may be the subject of an Interpol Red Notice.

To be sure, Red Notices are far from perfect, as illustrated by the marine hose cartel. Although Pisciotti was extradited from Germany to the United States, his co-conspirator Uwe Bangert remains at large despite being detained twice under an Interpol Red Notice. Bangert, a German national, was detained in Columbia and Spain, but each time he was returned to Germany. Likewise, in December 2002, Tamon Tanabe, a Japanese national who was indicted for fixing the prices of nucleotides, was detained in India pursuant to an Interpol Red Notice. Although Tanabe was held in India for several months, the Division was not able to extradite him. Despite the increasing use of Interpol Red Notices, a 2012 law review article estimated that a total of 47 individuals of varying nationalities who were charged in the United States with international price fixing during the period 1990-2009 are fugitives.

Increasing Prosecution of Carve-Outs. Another factor that shows the Division's "get tough" approach toward individuals including foreign executives accused of fixing prices is the increasing prosecution of carve-outs. By way of example, since January 20, 2009, the Division has prosecuted 417 individuals. At least 65 percent of these individuals were U.S. citizens. In the ongoing investigation of the automobile parts industry, the Division has filed charges against 58 executives—a surprisingly large number when compared to the Division's other recent international cartel investigations, as shown in the table below.

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International Cartel Investigation	Prosecutions/Carve Outs	Percentage of Individuals Prosecuted
Optical Disk Drive	4/4	100%
Marine Hose	12/14	85.7%
DRAM	17/22	77.3%
TFT-LCD	16/27	59.3%
Automotive Parts	46/78	58.9%
Refrigerant Compressors	2/6	33.3%
Air Passenger and Air Cargo	16/86	18.6%
Freight Forwarders	0/19	0%
Total	**113/256**	**44%**

As a result of the success and strength of the Division's criminal cartel enforcement efforts, the Division has recently persuaded a number of foreign executives to voluntarily travel to the United States, plead guilty to a Sherman Act violation, and serve a sentence in a federal prison. In many cases, foreign executives do so because pleading guilty allows them to avoid the risk of an unexpected arrest during travel based on an international arrest warrant. Moreover, the negotiated sentence in a plea agreement is likely to be lower than one imposed by a court following a criminal conviction.

III. THE YATES MEMORANDUM'S IMPLICATIONS FOR U.S. CARTEL ENFORCEMENT

While the broad strokes of the Yates Memorandum are clear enough, it is not obvious how the Division will implement it in practice. What documents and information will the Division request from a company regarding individuals beyond the usual requests for documents, calendars and expense reports and company phone records? How much information and at what level of detail will a company need to disclose regarding its employees before receiving cooperation credit? When will the Division request these disclosures? These questions remain to be answered.

The preliminary reaction from Division officials suggests that the Yates Memorandum will have some impact on cartel investigations, but not a significant impact. Deputy Assistant Attorney General Brent Snyder explained that "[t]he [A]ntitrust [D]ivision has long prioritized prosecution of individuals" and that it "continues to be a fundamental policy of the [A]ntitrust [D]ivision, and both that practice as well as the way we investigate and resolve our cases, we

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believe, is entirely consistent with the Yates Memo."[5] Snyder acknowledged, however, that the Yates Memorandum may speed up the prosecution of certain individuals.[6]

Whether this is the case, there are some conclusions concerning the Yates Memorandum's impact on criminal cartel investigations and prosecutions that seem apparent.

A. The Division's Leniency Program Will Not Change

The Yates Memorandum, by its own terms, will have no effect on antitrust amnesty applicants and their executives. Even under the Yates Memorandum, amnesty means amnesty—if a company perfects a corporate amnesty application, it can protect itself and its employees from criminal prosecution in the United States. In this sense, the Division's Leniency Program will continue to create different challenges and opportunities for companies and their executives than are created by most other federal criminal enforcement programs.

B. Companies May Need to Disclose More about Individual Executives to Obtain Cooperation Credit

Outside of the amnesty context, the Yates Memorandum could signal changes for U.S. cartel enforcement. The Yates Memorandum appears to indicate that companies must provide detailed information regarding all of its culpable executives—including very senior officials—prior to receiving cooperation credit. For example, the Yates Memorandum's reference to "determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs," may cause prosecutors to demand additional, detailed information about senior executives at a non-amnesty company seeking cooperation credit.

This could mark a significant practical change. Many companies have cooperated over the years in different ways and to varying degrees of specificity when it comes to their senior executives. Part of this depends on the extent to which the executives themselves are involved in the conduct being investigated; the size of the company involved and whether it is public; whether it has any formal compliance protocols to deal with internal investigations; whether the board of the company becomes actively involved; whether the company deals with the government; and the scope of the problem. While companies have taken several steps to show their "substantial cooperation" with the Division's investigation, they generally have not gone out of their way to implicate high-level executives in wrongful conduct when they do not have to (unless it cannot be avoided) and have provided only the information necessary to resolve their issues. It is always difficult and dangerous to generalize because some companies have done more and some have done less depending upon many of the factors listed above. The Yates Memorandum appears to discourage this practice by tying cooperation credit to the disclosure of specific information about specific executives. However, it is still unclear when companies seeking a cooperation credit will be required to

[5] Leah Nylen, *Yates Memo Won't Change DOJ Criminal Antitrust Investigations, Snyder Says*, MLex (Sept. 29, 2015).
[6] *Id.* ("there will probably be some cases where we see earlier prosecution of individuals" but that "there will be other cases where the nature of the investigation and the speed at which companies come in and begin to cooperate will mean companies resolve before individuals do.").

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disclose information regarding their executives, and how much information the Division will require to be disclosed.

C. Executives May Need to Retain Their Own Counsel Earlier in the Investigation

The Yates Memorandum may force individual representation earlier in the investigative process. The memorandum requires DOJ attorneys to focus on individuals from the outset of corporate investigations in order to create a better factual record against individuals, to "increase the likelihood that [employees] with knowledge of the corporate misconduct will cooperate with the investigation and maximize the chances [of a] final resolution . . . against culpable individuals." This early focus on individual culpability coupled with the renewed emphasis on individual prosecution may make it more likely that company and employee interests diverge early in the investigative process. As a result, companies and their counsel may face more difficulties when attempting to secure complete cooperation from executives during internal investigations.

D. Company Counsel May Need to Provide More Robust Upjohn Warnings

The Yates Memorandum also highlights the difficulties that executives may face early in a corporate investigation. It provides additional guidance regarding what it means when DOJ demands that a company produce non-privileged information. To earn cooperation credit, a company must produce all relevant facts, including the facts obtained through interviews conducted as part of its internal investigation. As a result, an executive's early interviews with company counsel, including damaging admissions of culpable conduct (or false exculpatory claims), will likely be disclosed to DOJ.

Given this increased focus on individuals, companies should consider making more robust Upjohn warnings and memorialize them to ensure that employees understand the scope of the attorney-client relationship, and that the company can disclose facts learned during the interview at its sole discretion. These Upjohn warnings should be made early in the company's internal investigation because executives may choose to retain their own counsel, often at the expense of the company, at a much earlier stage of the investigation. It is unclear as a practical matter whether corporate counsel must now advise that the company will provide the details of any interview to the government to ensure employees fully understand their rights. Certainly, such a warning would likely chill an employee from speaking freely or without counsel.

E. Internal Investigations May Be Complicated by Individual Liability

The government's increased focus on individual liability may complicate compliance efforts. Employees may be more wary of speaking with investigators because they know that companies need to identify individuals in order to get credit for cooperating with an investigation. While individuals may be reluctant to provide information to internal investigators, a company still needs to ensure that it receives all possible information for its proffers to DOJ. These competing issues may lead to increased tensions between the company and its executives during an internal investigation.

F. Foreign Executives Are Increasingly Likely to Face Charges in the United States

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The Yates Memorandum's increased emphasis on both corporate cooperation and the prosecution of individuals, especially culpable executives of multi-national companies who are located abroad, means that they are at a greater risk of prosecution in the United States. And when coupled with the Division's recent success on the extradition front, as well as the increasing criminalization of cartel offenses around the world, the Yates Memorandum may mean that more foreign executives will be prosecuted in the United States.

G. The Yates Memorandum May Change Some Carve-Out Decisions

More broadly, the combination of the Division's increased cartel enforcement efforts and the Yates Memorandum would seem to mean that it will be increasingly difficult for corporate and individual counsel to argue, and for prosecutors to justify, that a particular executive should be "carved-in" to a corporate plea agreement without substantial corporate disclosure about his or her conduct. But how broadly will this extend? Will it impact an employee's willingness to cooperate with his employer thereby jeopardizing the employee's continued employment? Does cooperation mean disclosing knowledge about other employees? Does it undermine the employee's attorney-client privilege? Does it require a company to terminate an executive at some point? Does cooperation mean a company has to somehow support or agree not to interfere with the possible extradition of an employee by say, agreeing to disclose his location and travel plans? Will the demand for cooperation by DOJ's different offices and staff attorneys be applied consistently? The answers to these questions are not known yet but raise significant issues concerning striking an appropriate balance between aggressive investigations and prosecutions and protecting the due process rights of those being investigated and prosecuted. Broadly speaking, however, the Yates Memorandum could prompt prosecutors to "carve-out" a larger number of individual executives.

H. Executives May Face Civil Liability

Following the spirit of the Yates Memorandum, the Division recently announced that it will consider bringing civil enforcement actions against individuals alleged to have participated in price-fixing. The Division has not provided any guidance on when or whether it will pursue civil actions against executives. This leaves many unanswered questions. How would the Division evaluate an individual's culpability when determining whether to bring a civil action, especially when it prosecutes that individual? Would knowing but passive acquiescence in a subordinate's conduct be enough for the Division to pursue a civil case? What would an appropriate remedy be—a fine, disgorgement, or injunctive relief? Will civil prosecution be limited to conduct in certain industries like the banking, financial, and securities sectors, which are already regulated by other agencies? Until the Division provides further guidance, companies will need to update their corporate compliance programs to inform employees about their possible exposure to civil antitrust prosecution.

IV. CONCLUSION

The Yates Memorandum did not change the fundamentals of U.S. cartel enforcement. Prior to the Yates Memorandum, the Division had significant enforcement tools at its disposal, including the ability to indict individuals under seal, Interpol Red Notices, and an increasingly

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aggressive and successful track record in criminal antitrust cases. While it is too soon and still unclear how the Yates Memorandum will be implemented, the Memorandum will likely provide the Division with additional leverage in its criminal cartel investigations. Companies will need to make difficult decisions regarding how robust an Upjohn warning they should provide, when to provide legal counsel to their employees, and how much information they should provide to the government regarding its employees. Likewise, individuals will need to determine the extent to which they will cooperate with a corporate internal investigation, given the Division's increased focus on criminal and civil liability for individual wrongdoing. Stay tuned; there is more to come.

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