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White Collar Crime Investigation & the Biden Administration

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In 2015, then-Deputy Attorney General Sally Yates issued a memorandum to the attorneys of the Justice Department articulating departmental policy on corporate misconduct. This memo became popularly known as the Yates Memo. It was not the first of these memos—deputy attorney generals at least as far back as Larry Johnson in 2003 issued similar pronouncements—and it will likely not be the last.

One particular aspect of the Yates Memo has gone under-scrutinized, and aligns with what may be a broader trend across the Department in the coming year: the memo's mandate that criminal and civil attorneys handling corporate investigations be in routine communication with one another. A renewed focus on this seemingly innocuous requirement is warranted as President Joe Biden continues to staff the Department with Obama-era prosecutors.

The Justice Department has long recognized the importance of parallel development of civil and criminal proceedings. The Justice Manual—formerly known as the U.S. Attorneys' Manual—contains an entire subsection on coordination between proceedings. Over the course of the Trump Administration, parallel proceedings receded from the spotlight. With both new tools to pursue wrongdoing and the fodder of large government stimulus programs to investigate, a renewed focus on coordination between criminal and civil proceedings appears likely during the Biden administration.

The Yates Memo noted that "early and regular" communication between the civil and criminal division lawyers at the Justice Department "can be crucial" to the department's goals and "promotes the most thorough and appropriate resolution in every case." The memo, therefore, required that "[c]riminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought." A return to this type of information sharing and concurrent, coordinating investigations could generally lead to a rise in enforcement measures taken, particularly where new investigations involve murky mens rea situations.

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