

Professional Perspective

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# White Collar Crime Investigation & the Biden Administration

*Contributed by William C. Komaroff, Seetha Ramachandran, and Joseph S. Hartunian, Proskauer*

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.

## Bank Secrecy Act Violations

With the enactment of the Anti-Money Laundering Act of 2020 (AMLA), both civil and criminal investigators have additional tools at their disposal to bring cases. On the criminal side, the law added new Bank Secrecy Act (BSA) violations to the U.S. Code for intentionally deceiving or withholding information from financial institutions. On the civil side, the Act increased penalties for repeat and egregious violations.

While civil enforcement in this space has been recently pushed by the Financial Crimes Enforcement Network (FinCEN), the Justice Department also has an active Money Laundering and Asset Recovery Section, which, in addition to criminal cases, has the power to file civil cases (and does so with some frequency). Civil enforcement of BSA violations may prove particularly popular due to the lower evidentiary standards. Unlike criminal cases under the BSA, which require the government to prove intentional, willful violations of the statute, the mens rea requirement that governs FinCEN's enforcement actions is the lower reckless disregard standard. We might also begin to see the Justice Department file cases under the rarely used civil money laundering statute, where the government similarly benefits from a lower evidentiary burden.

While the Yates Memo was focused on inter-department coordination, it would not be unusual for federal prosecutors to also coordinate with other government agencies such as FinCEN, the Securities and Exchange Commission (SEC), or the Federal Trade Commission (FTC).

FinCEN recently showed its enhanced enforcement chops when it assessed a \$390 million penalty against Capital One for violations of the BSA. These violations were related to a business unit under Capital One's commercial bank that had failed to guard against money laundering, and failed to file suspicious activity and currency transaction reports. Though the agency in that case charged Capital One with willful violations of the BSA, a closer look at the factual allegations suggest mere reckless or negligent actions were sufficient to support the enforcement action.

## Covid-19 Related Fraud

These new tools also go hand in hand with the massive new government spending programs that were enacted in 2020 and 2021. The Justice Department [indicated](#) it is extremely interested in pursuing both civil and criminal fraud cases that involve the Paycheck Protection Program (PPP), Economic Injury Disaster Loan (EIDL) program, and Unemployment Insurance (UI) programs.

While implementation of massive government programs nearly always leads to speculation of increased enforcement, it is a return to the Obama administration's criminal-civil coordination that may be most relevant for those that eventually find themselves in the government's crosshairs.

In January 2021, the department [resolved](#) claims against an internet retail company and, notably, individual officers for violations of the False Claims Act (FCA) and the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). The FCA is the government's primary civil tool to redress the misuse of federal funds, while the FIRREA allows the government to pursue civil penalties for violations of federal criminal statutes.

It would not be surprising to see inter-department or inter-governmental tasks forces designed to coordinate enforcement efforts. Indeed, the Justice Department has already signaled that it is working in concert with FinCEN and other government agencies to pursue Covid-related investigations. For example, the Justice Department and the FTC [announced](#) a joint action against two defendants for violations of the Consumer Protection Act, alleging that the defendants had deceptively marketed Covid-19 treatments to consumers through advertisements claiming their products were equally or more effective therapies than current vaccines.

## Health-Care Investigations

The Justice Department's Civil Division remains heavily invested in policing health-care fraud more broadly. The Department has a longstanding relationship with the Department of Health and Human Services, and just this year has announced a series of civil settlements with defendants facing allegations of [Medicare fraud](#), [Anti-Kickback Statute violations](#), and [concealing and destroying records](#). These cases all come with inter-agency coordination which would only increase with requirements like those laid out in the Yates Memo.

## Conclusion

As the Biden Justice Department continues to fill its leadership positions with those familiar with the department's policy under the Obama Administration, an uptick in coordination between criminal and civil enforcement efforts is expected. A Monaco Memo, after new Deputy Attorney General Lisa Monaco, also an Obama-era lawyer, is possible. This would likely outline particular agency priorities when it comes to corporate criminality, including increased communication during the investigatory stages of a case to fully leverage the broad investigative resources of the Justice Department.