On September 22, 2015, the U.S. Department of Justice’s Assistant Attorney General in charge of the Criminal Division, Leslie R. Caldwell, spoke at the Global Investigations Review Conference in New York, addressing the recent memo by Deputy Attorney Sally Yates on individual accountability. Her comments provided a straightforward approach to how the Yates memo could play out in practice.

As recently reported in our Health Law & Policy Matters blog, a central tenet of the Yates memo is that in order to qualify for cooperation credit, a corporation must identify all individuals involved in the wrongdoing and provide all relevant evidence implicating those individuals to the government. AAG Caldwell explained “This means that companies seeking cooperation credit must affirmatively work to identify and discover relevant information about culpable individuals through independent, thorough investigations. Companies cannot just disclose facts relating to general corporate misconduct and withhold facts about the responsible individuals. And internal investigations cannot end with a conclusion of corporate liability, while stopping short of identifying those who committed the criminal conduct.”

Expanding upon DAG Yates’ remarks last week at NYU Law School, AAG Caldwell stated “We recognize, however, that a company cannot provide what it does not have. And we understand that some investigations – despite their thoroughness – will not bear fruit. Where a company truly is unable to identify the culpable individuals following an appropriately tailored and thorough investigation, but provides the government with the relevant facts and otherwise assists us in obtaining evidence, the company will be eligible for cooperation credit. We will make efforts to credit, not penalize, diligent investigations. On the flip side, we will carefully scrutinize and test a company’s claims that it could not identify or uncover evidence regarding the culpable individuals, particularly if we are able to do so ourselves.” AAG Caldwell also explicitly recognized that DOJ can sometimes obtain evidence that a corporation cannot.

To the extent that practitioners read the Yates memo as erecting an impossible hurdle to cooperation credit, AAG Caldwell’s remarks indicate that each case will be evaluated on its facts. AAG Caldwell made at least one other point worth noting: the Yates memo does not change existing DOJ policy regarding the attorney client privilege and work product protection. Prosecutors will not be seeking corporate waiver of these protections.