

September 11, 2015

DOJ Issues Guidance on Individual Accountability for Corporate Misconduct

Overview

On September 9, 2015, U.S. Deputy Attorney General Sally Quillian Yates issued a memorandum outlining to U.S. Department of Justice (“DOJ”) personnel the importance of individual accountability for corporate wrongdoing (the “Yates Memorandum”).¹ Under this new guidance, corporations have an enhanced responsibility to provide information to DOJ about individual misconduct in order to be eligible to receive credit for cooperating with a DOJ investigation. In a speech the following day, Deputy Attorney General Yates explained that her memorandum underscores the principle that “Americans should never believe, even incorrectly, that one’s criminal activity will go unpunished simply because it was committed on behalf of a corporation.”²

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The Yates Memorandum’s Directives

The Yates Memorandum outlines six requirements for all DOJ investigations into corporate wrongdoing, whether conducted by criminal prosecutors or civil enforcement attorneys: (1) in order to qualify for **any** cooperation credit, corporations must provide to DOJ **all** relevant facts relating to individuals responsible for the misconduct; (2) DOJ investigations into corporate wrongdoing, whether criminal or civil, should focus on individuals from the outset; (3) DOJ criminal and civil attorneys handling parallel corporate investigations should be in regular communication with one another; (4) absent extraordinary circumstances or approved departmental policy, DOJ will not release culpable individuals from civil or criminal liability as part of a corporation’s resolution of liability; (5) DOJ attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases and should memorialize any declinations as to individuals in such cases; and (6) DOJ civil attorneys should consistently focus on individuals and should evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.

Key Takeaways for Companies

The directives set forth by the Yates Memorandum provide several key implications for corporations that are under investigation and that adopt a cooperative posture with DOJ:

- In order to receive any cooperation credit under DOJ’s Principles on Federal Prosecution of Business Organizations or to receive DOJ’s support for a cooperation-related Sentencing Guidelines reduction in the event the corporation is prosecuted, a corporation must fully disclose to DOJ **all** relevant facts about the individuals involved in corporate misconduct. Thus, a company under investigation is expected to fully investigate misconduct by specific individuals, including misconduct implicating its own personnel. If a company is less than forthcoming as to individual misconduct, its cooperation will not be considered a mitigating factor under the United States Attorneys’ Manual. Similarly, the Yates Memorandum specifies that

¹ Sally Quillian Yates, U.S. Dep’t of Justice, Individual Accountability for Corporate Wrongdoing (2015).

² Sally Quillian Yates, Deputy Attorney General, Remarks at the New York University Program on Corporate Compliance and Enforcement (September 10, 2015).

“full cooperation” under the False Claims Act’s “reduced damages” provision, 31 U.S.C. § 3729(a)(2), will entail disclosing all relevant facts about responsible individuals. In her speech at New York University announcing this policy change, Ms. Yates stated that DOJ will not accept as an excuse, for a less-than-complete disclosure, the fact that the corporation has not undertaken a robust internal investigation. In other words, DOJ will expect a corporation to conduct the investigation to determine the relevant facts regarding the responsibility and culpability of individuals.

- The Yates Memorandum, however, does not clarify what the provision of “all relevant facts” will involve. Moreover, it is not clear what effect the Yates Memorandum will have on requests for privilege waivers by DOJ. According to DOJ’s Principles of Federal Prosecution of Business Organizations, corporations do not need to disclose, and prosecutors may not request, disclosure of attorney work product as a condition for eligibility to receive cooperation credit. Nevertheless, under the Yates Memorandum, it is unclear whether DOJ will require companies to turn over contents of interviews with potentially culpable employees, including interviews conducted by counsel, or other materials. Ultimately, the contours of this requirement will likely be handled on a case-by-case basis.
- This increased emphasis on individual accountability may very well mean some difficult decisions to “turn in” individual actors, some of whom may well be high-level executives. The DOJ has stated that individual accountability extends to all levels of the corporation, including individuals who are “higher up the corporate hierarchy” and even those who may not have the necessary financial resources to pay a significant civil judgment or criminal fine.
- Given DOJ’s focus on understanding the role senior management played in corporate misconduct, a corporation’s Board of Directors may need to play a more active role both in determining whether to initiate and in overseeing an internal investigation in order to avoid or minimize potential conflict of interest concerns.
- Corporate settlements will continue to have a focus on individual accountability. For instance, plea or settlement agreements will include a provision requiring the company to provide information about all culpable individuals to facilitate subsequent individual prosecution and outlining consequences for failure to provide such information (*e.g.*, stipulated penalties and/or a finding of “material breach”). Similarly, absent extraordinary circumstances, corporate resolutions will not protect individuals from subsequent criminal or civil liability.
- Agreements tolling the statute of limitations will now be the “rare exception.” As such, corporations are expected to conduct thorough, but expeditious, investigations.
- DOJ’s focus on individual accountability extends not only to criminal prosecutions, but also to civil proceedings, such as *qui tam* actions and civil consumer product safety investigations, as well as many other civil enforcement proceedings. The focus on individual accountability, as well as coordination between DOJ’s Criminal *and* Civil Divisions, may mean that civil investigations into corporate misconduct may now be more likely to result in both civil and criminal actions against responsible individuals.

Context

The policy changes outlined in the Yates Memorandum formalize principles that DOJ leaders have already expounded upon publicly in recent months.³ In a speech on September 10, 2015, Ms. Yates tied DOJ’s statements in the Yates Memorandum to remarks given a year prior by former Attorney General Eric Holder, in which he emphasized the importance of pursuing corporate crime by prosecuting the individuals carrying it out. And the United States Attorney’s Manual (“USAM”) has long provided that when assessing a corporation’s cooperation, a prosecutor may consider “the corporation’s willingness to provide relevant information and evidence and identify relevant actors

³ See Ropes & Gray LLP, *The DOJ Sends Strong Messages Regarding Corporate Cooperation in Criminal Matters* (April 28, 2015), available [here](#).

within and outside the corporation, including senior executives.”⁴ In A Resource Guide to the U.S. Foreign Corrupt Practices Act, DOJ and the U.S. Securities and Exchange Commission, citing the USAM, similarly state that prosecutors should consider a company’s provision of information and identification of relevant actors in assessing the company’s cooperation.⁵

In a presentation at the Annual Ethics and Compliance Conference on October 1, 2014, Assistant Attorney General Leslie Caldwell emphasized that, “[f]or a company to receive full cooperation credit following a self-report, it must root out the misconduct and identify the individuals responsible, even if they are senior executives.”⁶ A month earlier, Principal Deputy Assistant Attorney General Marshall Miller had publicly stated that “the heart of effective corporate cooperation” is “whether that cooperation exposed, and provided evidence against, the culpable individuals who engaged in criminal activity.”⁷

Consistent with the focus in the Yates Memorandum on timely disclosure, on April 17, 2015, Ms. Caldwell reiterated the importance of timely cooperation, stating that DOJ expects a company to “turn over evidence of wrongdoing to our prosecutors in a timely and complete way” in order to earn cooperation credit.⁸ In the same speech, she further stated that internal investigations should not “aimlessly boil the ocean,” noting that, in some instances, companies have “conducted overly broad and needlessly costly investigations, in some cases delaying our ability to resolve matters in a timely fashion.”

The Yates Memorandum also comes in the wake of public criticism that DOJ’s prosecutions have not focused on senior executives. In particular, there has been extensive criticism of DOJ for its perceived leniency of Wall Street executives in recent years, especially after the 2008 financial crisis.⁹ Moreover, there has been recent public criticism that investigations by the agency are excessively lengthy.¹⁰ This may further reflect pressure on the DOJ to make case decisions more expeditiously, including bringing individual prosecutions prior to the running of statutes of limitation. Additionally, on September 10, 2015, Deputy Attorney General Yates stated that DOJ’s new approach may lead to fewer settlements and more jury trials if companies under investigation decide not to cooperate and individuals choose to “roll the dice before a jury.”¹¹

Whether the implementation of the Yates Memorandum will ultimately cause a sea change in enforcement is yet to be seen. Nevertheless, the new guidance from DOJ certainly formalizes the sentiments expressed by DOJ personnel in recent months regarding the agency’s intent to focus on individual prosecutions as part of broader investigations into corporate misconduct.

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If you have any questions, please contact your usual Ropes & Gray advisor.

⁴ U.S. Attorneys’ Manual § 9-28.700.

⁵ U.S. Dep’t of Justice & U.S. Sec. Exch. Comm’n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 54 (2012).

⁶ Leslie R. Caldwell, Assistant Attorney General, Department of Justice – Criminal Division, Remarks at the 22nd Annual Ethics and Compliance Conference (October 1, 2014).

⁷ Marshall L. Miller, Principal Deputy Assistant Attorney General, Department of Justice – Criminal Division, Remarks at the Global Investigation Review Program (September 17, 2014).

⁸ Leslie R. Caldwell, Assistant Attorney General, Department of Justice – Criminal Division, Remarks at New York University Law School’s Program on Corporate Compliance and Enforcement (April 17, 2015).

⁹ See, e.g., Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. Rev. Books, Jan. 9, 2014.

¹⁰ See, e.g., Paul Pelletier, *Lengthy and Costly FCPA Investigations Disserve Both Business and Justice*, Westlaw Journal White-Collar Crime (June 2015).

¹¹ Leslie R. Caldwell, Assistant Attorney General, Department of Justice – Criminal Division, Remarks at New York University Law School’s Program on Corporate Compliance and Enforcement (April 17, 2015).