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DOJ Issues Policy On **Holding Individuals Accountable** For Corporate Malfeasance

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BIGSTOCK

Following widespread criticism of its failure to prosecute corporate insiders in the aftermath of the 2008 financial crisis and other recent corporate malfeasance while collecting hundreds of millions of dollars in corporate civil penalties and criminal fines, the Department of Justice (Justice Department or DOJ), on Sept. 9, 2015, announced new policies intended to enhance the Justice Department's ability to identify and prosecute culpable individuals at all levels in corporate cases.1 Authored by Deputy Attorney General Sally Q. Yates, the memorandum titled "Individual Accountability for Corporate Wrongdoing" (the Yates Memorandum) revises the Justice Department's "Principles of Federal Prosecution of Business Organizations," (the Filip Memorandum) principally by directing DOJ lawyers, both civil and criminal, to focus on collecting evidence that will lead to the prosecution of individuals in large corporate malfeasance cases.

The Yates Memorandum adopts a position that had been publicly espoused by several high ranking Justice Department officials over the last year and that has been largely followed by prosecutors around the country. For example, during his Sept. 17, 2014 speech, Principal Deputy Assistant Attorney General for the Criminal Division Marshall Miller

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announced that "if a company wants full cooperation credit, make your extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door to make your presentation." Similarly, on Jan. 20, 2015, Sung-Hee Suh, Deputy Attorney General for the Criminal Division, announced that "corporations do not act criminally, but for the actions of individuals … the Criminal Division intends to prosecute those individuals, whether they are sitting on a sales desk or in a corporate suite." Likewise, on April 17, 2015, at a speech delivered at New York University Law School, Assistant Attorney General for the Criminal Division Leslie R. Caldwell noted that the "mere voluntary disclosure of corporate misconduct—by itself—is not enough … . True cooperation, however, requires identifying the individuals actually responsible for the misconduct—be they executives or others—and the provision of all available facts relating to that misconduct." The Yates Memorandum, together with the accompanying public statements by Deputy Attorney General Yates[2] and Assistant Attorney General Caldwell,[3] on Sept. 10, 2015 and Sept. 22, 2015 respectively, represent efforts to standardize what is essentially current practice in several parts of the Justice Department and various U.S. Attorneys' Offices, notwithstanding the Yates Memorandum's protestations that it represents a "substantial shift from [the Justice Department's] prior practice."

The Yates Memorandum

Recognizing the challenges it faces in prosecuting employees of large corporations, including that "responsibility can be diffuse and decisions made at various levels" of a corporation and that it can often be "difficult to determine if someone possessed the knowledge and criminal intent necessary to establish [] guilt beyond a reasonable doubt … particularly when determining the culpability of high-level executives who may be insulated from the day-to-day activity in which the misconduct occurs," the Justice Department has resolved to leverage its resources to identify culpable individuals at all levels in corporate cases. Thus, the Yates Memorandum identified six principles to strengthen its ability to investigate and prosecute corporate malfeasance. These principles apply equally to both civil and criminal investigations.

Absent approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, we **rarely see settlements** where the Justice Department agrees to settle with a company while **immunizing culpable individuals.**

First, to be eligible for *any* cooperation credit, corporations must provide to the Justice Department all relevant facts about the individuals involved in corporate misconduct. This principle departs from the Justice Department's prior practice of awarding full or partial credit for cooperation that stops just short of identifying the individuals who may be criminally liable. Setting aside for the moment the philosophical question of whether it is appropriate to task a corporation (and its counsel) with engaging in this level of finger pointing at its employees, the Yates Memorandum now makes clear that a corporation "must completely disclose to the [Justice] Department all relevant facts about individual misconduct" and "must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct." Notably, the requirement to disclose all relevant facts applies equally in civil and criminal cases.

Second, both criminal and civil attorneys "should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct." Apparently, by focusing on individuals from the beginning of an investigation, the Justice Department can "maximize [its] ability to ferret out the full extent of corporate misconduct." Moreover, this early focus will supposedly "increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy" and "maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well." In practice, in our experience, Justice Department lawyers typically focus on individuals from the beginning of an investigation so it remains to be seen how this guidance will change how criminal and civil attorneys collect and use information in corporate investigations.

Third, criminal and civil attorneys handling corporate investigations should be in routine communication with one another because early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to the

Justice Department's ability to effectively pursue individuals. The Yates Memorandum asserts that this early consultation would allow criminal and civil attorneys to be alert to circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Such coordination should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

Fourth, absent extraordinary circumstances, "no corporate resolution will provide protection from criminal or civil liability for any individuals." Typically, the Justice Department tends to resolve allegations of corporate wrongdoing against the corporate entity first and, where it deems it appropriate, institute follow-on actions against purportedly culpable individuals. In those corporate settlements, absent approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, we rarely see settlements where the Justice Department agrees to settle with a company while immunizing culpable individuals. In any case, in the unlikely and extraordinary event that a corporate resolution proposes to immunize an individual, the guidelines compels that such a resolution must be approved in writing by the relevant Assistant Attorney General or U.S. Attorney.

Fifth, the guidance notes that "corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized." Here, the implication appears to be that Justice Department lawyers focus on the high-profile monetary settlements with corporations at the expense of individual prosecutions. Moreover, if a decision is made at the conclusion of an investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the U.S. Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Sixth, civil attorneys should consistently "focus on individuals as well as the [corporations] and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay." The Justice Department's civil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing. These twin aims of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other are equally important. As such, an individual's demonstrated inability to pay should not determine whether or not a case is brought.

Implications of the Yates Memorandum

While it is too early to tell how the U.S. Attorney's Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000), will be revised to reflect the changes proposed in the Yates Memorandum, a number of early observations bear noting.

First, it appears that the Justice Department is of the view that one of the key barriers to its prosecution of corporate insiders is the difficulty it encounters in securing admissible evidence that will lead to the successful prosecution of wrongdoers. However, the available evidence does not seem to support this proposition. One only need look at several of the corporate settlements that the Justice Department has negotiated over the last several years to notice that the vast majority of these settled cases included language suggesting that the settling entity had in fact cooperated with the government's investigation, produced all relevant evidence, made domestic and foreign employees available for witness interviews, and (in some cases) waived attorney-client privilege in an effort to provide the government with the results of its internal investigation. As such, the proposition that companies are somehow withholding critical information that prevents the prosecution of culpable individuals seems dubious at best.

Second, relatedly, the Yates Memorandum makes clear that cooperation credit will now only be given where a corporation has provided *all* relevant facts about the individuals involved in the corporate misconduct. Accordingly, a corporation looking to secure cooperation credit ought to consider devising a system by which, in a multiyear investigation, it documents all of its efforts to provide the Justice Department with facts evidencing individual misconduct. Such a record will be critical in showing that the corporation has fulfilled its obligation to secure cooperation credit. To the extent that a corporation can secure periodic written confirmation that it is meeting the government's expectation of providing timely and complete information about employee wrongdoing, such a confirmation will likely remove any ambiguity years down the road when the corporation is seeking to negotiate a settlement.

Third, one of the unintended consequences of the requirement to provide all relevant facts about employee misconduct is the pressure it puts on corporations to waive privilege even though Deputy Attorney General Yates noted, on Sept. 10, 2015, that if a corporation wants cooperation credit, it "will need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals." Moreover, while it is true that Assistant Attorney General Caldwell, on Sept. 22, 2015, indicated that the new guidance does not change existing Justice Department policy of not requesting waiver of a corporation's attorney-client privilege or work product protection, it nevertheless remains a significant concern that the information the government is seeking (particularly as it relates to intent, credibility, and culpability) is so tightly interwoven with a corporation's attorney-client privilege or work product protection that a corporation must approach this issue with extreme care so as not to waive its attorney-client privilege or work product protection.

Fourth, it is likely that employees are going to be less likely to cooperate with corporate internal investigations if they feel that their employer is going to throw them under the proverbial bus to save itself. To be fair, this is not a new problem, but the Yates Memorandum does ratchet up the level of distrust that permeates corporate internal investigations. Relatedly, while a U.S.-based employee may be forced to submit to an interview under threat of termination, the same is not necessarily true for employees in other countries where strong labor laws may prevent the corporation from terminating employees for failure to submit to an interview. Similarly, the decision to have counsel present during the critical initial interviews in the early stages of the internal investigation now takes on added significance. Again, while the general practice is that US-based employees are often not afforded counsel at the internal investigation stage, corporations ought to consider whether that practice should change in light of the Yates Memorandum, particularly because certain foreign-based employees may have a right to counsel or a works council representative present at their interviews. Moreover, there is a question as to whether counsel for the corporation ought to consider revising the Upjohn Warning to inform witnesses that one of its tasks is to gather and report evidence of individual wrongdoing to the Justice Department so that the employee can determine whether it wants to cooperate with the internal investigation.

Fifth, one of the likely consequences of the Yates Memorandum is that there will be an increase in civil charges where the Justice Department determines that it may not have enough to institute criminal charges. Counsel representing individuals should be aware of the potential overlap in cases implicating, among other statutes, alleged violations of the books and records provisions of the Foreign Corrupt Practices Act where there is concurrent jurisdiction between the U.S. Securities and Exchange Commission (SEC) and the Justice Department. Individuals and their counsel should also be aware of the potential collateral consequences that may stem from civil enforcement, including debarment and loss of professional licenses.

Conclusion

In announcing the new principles, Deputy Attorney General Yates stated that to codify and supplement the changes, the Justice Department will be revising several guidance documents. How far the Yates Memorandum goes to "revise" the Filip Memorandum will be of interest in the coming months. Also worthy of following is how much additional resources the Justice Department will devote to the implementation of the guidance. Additionally, how well the Civil Division and the Criminal Division coordinate their work internally and with other government agencies such as the SEC will play a significant role in how successful the new guidance works. As the Justice Department implements the guidance outlined in the Yates Memorandum, corporations and their employees will likely continue to assess how to adapt to the new terrain.

1. See "Individual Accountability for Corporate Wrongdoing," dated Sept. 9, 2015, http://www.justice.gov/dag/file/769036/download.

2. Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing, Sept. 10, 2015, http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

3. Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the Second Annual Global Investigations Review Conference, Sept. 22, 2015, http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-second-annual-global-0.