The U.S. Department of Justice’s New Policy Emphasizing Individual Civil and Criminal Accountability for Corporate Wrongdoing


In the past five years, the U.S. Department of Justice (DOJ) has negotiated ever more eye-popping settlements with companies in cases involving violations of the U.S. Foreign Corrupt Practices Act, health-care fraud and financial fraud. With each new corporate resolution, the DOJ announces larger and larger penalties.

Despite the influx of billions of dollars into the government’s coffers, the DOJ’s prosecution of flesh and blood individuals has lagged. Critics of these cash-based settlements, including judges, politicians and the media, abound. In response, the DOJ recently made significant changes to its internal policies surrounding corporate investigations and charging decisions, mandating that prosecutors focus on individual civil and criminal accountability, and warning companies that, if a company wants any credit for cooperating with the government, it must assist the government in its quest to focus on individual accountability.

This new policy was announced in a memorandum entitled ‘Individual Accountability for Corporate Wrongdoing’ on Sept. 9, 2015, authored by Deputy Attorney General Sally Yates (see WSLR, October 2015, page 20).

The Yates Memo

The title says it all. The ‘Yates Memo’ posits that ‘one of the most effective ways to combat corporate misconduct is by working accountable from the individuals who perpetrate the wrongdoing.’ Individual accountability is important in that it ‘deters future illegal activity, incentivizes changes in corporate behavior,... ensures that the proper parties are held responsible for their actions, and... promotes the public’s confidence in our justice system.’

The Yates Memo is the first formal announcement of a policy shift that DOJ officials have hinted at during the past year. It represents a shift from the DOJ’s post-Enron tendency to structure corporate settlements in a manner that does not credit companies that cooperate with the government, but instead credit companies for cooperating with the government.

In contrast, the DOJ’s new policy mandates that companies must assist the government in its quest to focus on individual accountability. The new policy was announced in a memorandum entitled ‘Individual Accountability for Corporate Wrongdoing’ on Sept. 9, 2015, authored by Deputy Attorney General Sally Yates (see WSLR, October 2015, page 20).

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The new policy is likely to have a significant impact on corporate employees at all levels, company managers and those who advise them. Because it represents more than just an incremental shift in prosecutorial priorities, it will necessitate a reassessment of how a company under investigation deals with the government, and has the potential to change the dynamic between employees, officers and directors and their employers in internal investigations and perhaps in day-to-day business dealings.

Policy Changes

In truth, the Yates Memo’s new policies enforcing greater cooperation from employees on individual wrongdoing and requiring civil and criminal prosecutors to work together to achieve both civil and criminal charges and resolutions are not new. Nor, as of late, has the DOJ’s requirement that companies actively investigate and disclose individual wrongdoing at all levels before a company will be eligible to receive any credit for cooperation in civil and potentially transformative investigations.

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In a Sept. 10, 2015, speech at New York University School of Law, at which she publicly announced the new policy, Yates stated that, "if a company wants any consideration in bringing civil or criminal cases against its officers and directors and their employers in internal investigations and perhaps in day-to-day business dealings.

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The new policy also requires that, before a prosecutor can release individuals from liability in connection with a corporate settlement, the prosecutor must show "consistent prosecution intent." It prescribes that the decision to relieve the individual of liability must be made by the U.S. attorney or assistant attorney general supervising the case. For the DOJ to revoke its approval to permit an individual to settle a civil matter, it would require the intervention of a U.S. attorney or assistant attorney general, generally supervising the case. For the DOJ to revoke its approval to permit an individual to settle a civil matter, it would require the intervention of a U.S. attorney or assistant attorney general, generally supervising the case. In addition, this action would be taken in consultation with the civil attorneys responsible for the civil investigation.

The policy also makes clear that, in cases involving individuals from families or organizations with a history of avoiding prosecution, the DOJ will be able to demand that a corporation relieve the individual of liability in exchange for acceptance of the corporation’s criminal plea agreement. The DOJ has stated that a corporation may not "bargain away" a prosecutor’s right to bring a civil suit against an individual.

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Memo, companies might have responded to a subpoena ining of initiating cooperation. Whereas, prior to the Yates Companies will also have to carefully consider the tim-

eals and requiring employees to testify demands a differ-

wrongdoers. Providing actual evidence against individu-

corporate misconduct by instituting new policies and firing culpable to get cooperation credit and remediate corporate mis-

companies that cooper-

correctness, they may be less inclined to cooperate, making it more difficult for companies to conduct a complete and thorough investigation.

Corporate culture will be tested during an internal in-

vestigation. With its "all or nothing" standard, the Yates Memo arguably pits the company against its employees, especially mid- and lower-level employees. Potentially culpable high-level employees have always understood that they could be charged, and, most times, they have proven separate counsel. All employees now know that corporate cooperation credit is conditioned on identifying and turning over names and information on indi-

criminal, as opposed to the threat of protec-

collaterally. No matter where they sit in the organization. As such, there may be a chilling effect on open and honest communications between company leadership and em-

ployees when the investigations are being conducted.

May time will tell the extent of the DOJ willingness to reach deep into an organization to conduct corporate 

in its deferred prosecution agreements and non-prosecution agreements, the DOJ now mandates that a cooperating company continue cooperating for the duration of the government's investigation of its employees both civil and criminal cases. In some cases, it may be preferable 

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As noted above, Yates has underscored that the DOJ now expects that cooperating companies will continue cooperating for the duration of the government's investigation of its employees both civil and criminal cases. In some cases, it may be preferable 

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Collateral Consequences/Wide Spread Impact

The DOJ might not care the Yates Memo as anything but a platform or a warning to corporate entities to be more active in helping the DOJ achieve that goal. Where and in corporate investigations more frequently applied in corporate investigations, the focus on individuals means that the DOJ might not view the Yates Memo as ground-

breaking or having significant impact, because it has al-
since most recent deferred prosecution agreements and non-prosecution agreements last for only three years, a corporation must consider its willing-


the 1987 movie "Wall Street," Yates noted the desirabil-

simply because the crimes took place behind a desk." Under scoring her seriousness, Yates analogized the DOJ approach to corporate defendants to a corporate defendant: "A drug traffi-

rackets should get "special treatment as a cooperator 

because the come with prior behind a desk."
It is unclear whether the Securities and Exchange Commission, which has also had its share of high-dollar civil settlements with corporations, will follow the DOJ’s lead in defining adequate cooperation. If the SEC does not do so, then the discrepancy in requirements could lead to “forum shopping” by corporations under investigation by civil authorities that are considering self-reporting.

Another unclear area is the impact of the Yates Memo on ongoing cases. Yates stated that the policy changes are “effective immediately.” She also noted that the new policies will affect cases just getting underway, the impact of which may not be felt for years.

Internal investigations that are not close to resolution may need to be re-examined to determine compliance with the stricter scrutiny required for cooperation credit. Yates stated in an interview that the changes would impact ongoing cases only to the extent that it was “practicable.” However, the $900 million General Motors criminal settlement announced just after the Yates Memo was published includes no individual criminal charges.

Yates said that the DOJ would not “renege on verbal agreements,” indicating that individual charging decisions were determined prior to the policy change. Corporate officers should discuss the implications of this policy with counsel and take steps to ensure that their company is positioned to prevent misconduct from occurring, to ensure full cooperation credit, and to intelligently assess whether the DOJ’s all-or-nothing requirement for cooperation might be a less desirable path to follow than a “triangle play and line.”


Conclusion

Yates’s memo and speech formally announced a policy shift towards individual accountability. Even though the new focus is on individuals, corporations will be affected by the policy change as much as, if not more so than, their employees, officers and directors.

Corporate officers should discuss the ramifications of the policy with counsel and take steps to ensure that their company is positioned to prevent misconduct from occurring, to ensure full cooperation credit, and to intelligently assess whether the DOJ’s all-or-nothing requirement for cooperation might be a less desirable path to follow than a “triangle play and line.”


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