

Clients & Friends Memo

New DOJ Policy Regarding Individual Accountability for Corporate Wrongdoing

September 10, 2015

On September 9, 2015, the U.S. Department of Justice announced a new policy regarding individual accountability for corporate misconduct. The policy, described in a memo authored by Deputy Attorney General Sally Yates¹, posits that “one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.” The focus on individuals represents the first formal announcement of a policy shift that Department of Justice (DOJ) officials have hinted at during the past year.

Going forward, the Justice Department will require that companies investigate and disclose individual wrongdoing before a company will be eligible to receive *any* credit for cooperation. Further, companies should expect that the Justice Department will pursue individuals civilly, regardless of ability to pay, in an effort to promote deterrence of future violations. The policy also makes clear that civil and criminal division prosecutors are required to consult from the outset, and that civil division attorneys pursue civil penalties against individuals involved in corporate crimes.

This new policy, which is effective immediately, is applicable to every litigating component of the Department of Justice including the Antitrust, Civil, Criminal and Tax Divisions, as well as to the United States Attorneys’ Offices, and is billed as necessary to deter future misconduct, incentivize change in corporate behavior, punish culpable wrongdoers and promote public confidence in the justice system.

Corporate Cooperation 2008-2014

Few companies are willing to risk the extensive monetary and reputational costs associated with going to trial. As a result, most corporate investigations result in negotiated settlements. In recent years, such settlements have taken the form of corporate deferred or non-prosecution agreements—DPAs and NPAs, respectively—that almost always result from a corporation’s decision to cooperate with the government. Although the contours of cooperation sufficient to result in a DPA or NPA for the company are necessarily case-specific, the DOJ has issued

¹ <http://www.justice.gov/dag/file/769036/download>

guidelines to prosecutors defining adequate cooperation. Most recently, this issue was addressed in the revised Principles of Federal Prosecution of Business Organizations, last updated and codified in the United States Attorneys Manual in 2008, and commonly referred to as the “Filip Memo” for its author, then Deputy Attorney General Mark Filip.²

The Filip memo counseled that a company’s cooperation with an investigation was a mitigating factor that prosecutors could consider in deciding whether to charge a corporate entity. In assessing whether a company’s cooperation was sufficiently extensive to result in a NDA or DPA, the Filip memo alluded to the importance of the corporation providing information about culpable individuals who participated in or were responsible for the wrongdoing. In fact, the memo suggests that “a corporation’s cooperation may be critical in identifying potentially relevant actors . . . among other things, and in doing so expeditiously.” Nonetheless, prosecution of individuals has lagged even as corporate settlements continue to grow in number and monetary value. At least according to the Department of Justice, this trend can be partially explained by the difficulty of proving individual intent—crucial to successfully prosecuting individuals involved in corporate crime.

2014 - Shift towards Yates’ Policy Announcement

Since the 2008 Financial Crisis, many have questioned the lack of individual accountability in corporate settlements with the Justice Department or the Securities and Exchange Commission. For instance, in 2014, Judge Jed S. Rakoff of the Southern District of New York argued that the failure to prosecute any individuals responsible for the Financial Crisis represents one of the “more egregious failures of the criminal justice system in many years.” Under pressure from judges, politicians and other commentators, the Justice Department seemingly took notice and has recently moved towards a demand for individual accountability, culminating in the policy announced in Deputy Attorney General Yates’ memo. However, it is often difficult to prosecute individuals, and these difficulties appear to be the impetus for requiring the active participation of cooperating companies in prosecutors’ efforts to hold individuals accountable.

Indeed, in a September 2014 speech, former Attorney General Eric Holder highlighted just how difficult it is to prosecute individuals, noting that “corporations are structured to blur lines of authority and prevent responsibility for individual business decisions from residing with a single person.” He discussed several possible but ultimately deficient tools to pursue individual prosecutions and openly questioned whether current law provided an adequate means to hold corporate decision-makers accountable.

Even though individual criminal prosecution has proven difficult, the Justice Department’s shift towards demanding greater individual accountability has progressed. In late 2014, then-Principal Deputy Assistant Attorney General for the Criminal Division Marshal Miller and Assistant Attorney

² <http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>

General Leslie Caldwell made speeches highlighting the need for corporations to provide information about culpable individuals when seeking cooperation credit. Miller went a step further, saying that “[i]f you want 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 [to the Justice Department].”³

Thus, the change in policy announced yesterday should come as no surprise. Yet, despite the fact that it could be anticipated that the Department of Justice would focus more on individual accountability, the reach of the policy shift cannot be overstated. While before, companies were certainly expected to be fully forthcoming about the extent of corporate misconduct, and to provide whatever information prosecutors sought, to a large extent, the Department awarded full cooperation credit when companies terminated the wrongdoers. Now however, the Department will require that companies that want cooperation credit not only identify but essentially become witnesses against the corporate wrongdoer, regardless of the level of that individual actor. Moreover, the requirement of identifying and providing evidence against corporate wrongdoers is not limited to the cases in which a company is seeking “full” cooperation credit sufficient to result in a NPA or DPA, but in all cases in which a company seeks *any* cooperation credit at all, whether that credit be in the form of a reduced financial penalty, waivers of debarment, or settlement agreements with subsidiaries rather than parent companies. Moreover, according to a speech given by Deputy Attorney General Yates on September 10, 2015, at New York University Law School, the DOJ will now mandate that a company that enters into a cooperation agreement with the government will be required to continue cooperating with prosecutors against culpable individuals, even after the terms of the cooperation agreement have been satisfied.

Implications

What does this mean for companies under investigation by a Justice Department component? Corporations seeking cooperation credit should heed Deputy Attorney General Yates’ comments to the New York Times in an interview on September 9, 2015: “[w]e mean it when we say, you have to cough up individuals.”⁴ As of today, full cooperation means that corporations should thoroughly investigate individuals potentially responsible for wrongful conduct and be prepared to “name names.” Only after a company provides all relevant facts with respect to individuals will it be eligible for any consideration of cooperation. While corporate liability and lucrative settlements will still be important to the government, companies should not expect to be able to resolve cases on favorable terms without prosecutors focusing on individuals. Companies should also no longer expect to be able to negotiate any sort of release of liability for its employees as part of a corporate resolution, no matter how financially significant, absent extraordinary circumstances. Rather the

³ <http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller>

⁴ <http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html>

company should expect to be a de facto force multiplier to government prosecutors in their quest for proof of individual liability.

The collateral effects of the policy shift remain to be seen. The Justice Department's focus on individuals invites speculation into a host of other issues. For example, it is unclear whether the U.S. Securities and Exchange Commission, which has also had its share of high dollar civil settlements with corporations, will follow the Justice Department's lead in defining adequate cooperation. If it does not do so, then the discrepancy in requirements could lead to "forum shopping" by corporations under investigations by civil authorities who are considering self-reporting. Further, corporations will have to make decisions regarding their role in an individual's personal legal defense. If a corporation identifies an employee as a wrongdoer to the DOJ, is a joint defense with that person's counsel still permissible? Will voluntary indemnification of that individual's legal expenses still be possible?

Given the focus on corporate employees of all levels, corporations will have to both double down on its training and enforcement of corporate policies to prevent misconduct, and conduct more thorough and sufficiently independent internal investigations when wrongdoing is suspected, especially where misconduct might have occurred at high levels within the company. In doing so, the corporation will be in a better position to achieve the fullest cooperation credit available.

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