

DOJ Issues New Guidance on Pursuing Individual Accountability for Corporate Wrongdoing

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Background

In a memorandum and accompanying speech this week by U.S. Deputy Attorney General Sally Quillian Yates, the Department of Justice (“DOJ”) announced a major new initiative designed to target and pursue “accountability from the individuals” who “perpetrate corporate wrongdoing.” The DOJ memorandum provides six specific policy instructions to DOJ attorneys, both in Washington D.C. and the U.S. Attorneys’ Offices, on the investigation and resolution of criminal and civil enforcement matters involving corporations and their employees. Media reports describe the memorandum as the first major policy announcement by the new Attorney General, Loretta E. Lynch.

DOJ Memorandum

The DOJ memorandum initially acknowledges the substantial challenges to pursuing individuals who “perpetrate corporate wrongdoing.”¹ As the Deputy Attorney General stated, “[t]hese cases can present unique challenges for DOJ’s agents and attorneys: there are complex corporate hierarchies, enormous volumes of electronic documents and a variety of legal and practical challenges that can limit access to the evidence we need.”² She further explained that “[i]n modern corporations, where responsibility is often diffuse, it can be extremely difficult to identify the single person or group of people who possessed the knowledge or criminal intent necessary to establish proof beyond a reasonable doubt. This is particularly true of high-level executives, who are often insulated from the day-to-day activity in which the misconduct occurs.”

The DOJ memorandum cites the following six steps in pursuit of individual corporate wrongdoing:

1. In order to qualify for any cooperation credit, corporations must provide to DOJ all relevant facts relating to individuals responsible for the misconduct.

The memorandum states that in order to be eligible for any so-called “cooperation credit,” companies “must identify all individuals involved in or responsible for the misconduct at

¹ See “Individual Accountability for Corporate Wrongdoing,” dated September 9, 2015: <http://www.justice.gov/dag/file/769036/download>

² See prepared text of speech given by Deputy Attorney General Yates on September 10, 2015: <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>

issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct.” The memorandum recognizes explicitly that the provision of information as to individuals must respect the “bounds of the law and legal privileges.”

If a company seeking cooperation credit declines to learn or provide all facts related to the individuals involved in or responsible for the misconduct at issue, then its cooperation will not be considered a mitigating factor and DOJ will not support a cooperation-related reduction at sentencing. Where a corporation’s continued cooperation is necessary post-resolution, the “plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.”

2. Criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

The memorandum directs criminal and civil DOJ attorneys to “focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct.” Doing so, the memorandum says, will increase the likelihood that individuals with knowledge of corporate misconduct will cooperate against those higher up the corporate hierarchy, and will “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.”

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

The memorandum emphasizes that criminal and civil DOJ attorneys should be in “[e]arly and regular communication” with one another, as such communication “can be crucial to [DOJ’s] ability to effectively pursue individuals” in both kinds of cases.

4. Absent extraordinary circumstances or approved departmental policy, the DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation.

DOJ attorneys are instructed not to “agree to a corporate resolution that includes an agreement to dismiss criminal charges against, or provide immunity for, individual officers or employees,” nor one that releases civil claims relating to liability for such individuals. Any such release of criminal or civil liability must be due to “extraordinary circumstances” and must be “personally approved in writing by the relevant Assistant Attorney General or United States Attorney.” There may also be exceptions for approved Departmental policies such as the Antitrust Division’s Corporate Leniency Policy.

5. 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.

The memorandum provides that if the investigation of individual misconduct is not over by the time a corporate resolution is ready to be authorized, DOJ attorneys will need to memorialize the “potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and

an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period.” If, at the conclusion of the investigation, a decision is made not to bring civil claims or criminal charges against individuals, the reasons for that decision must also be memorialized and approved by the U.S. Attorney or relevant Assistant Attorney General.

6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.

The memorandum reminds Department attorneys that a decision regarding whether to file a civil action against an individual should consider not only whether the individual has sufficient resources to satisfy a judgment, but also whether the “misconduct was serious, whether it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest.” The memo also states that “the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit.”

Implications

While the DOJ memorandum is not binding law, it is a source of practical guidance for DOJ attorneys and law enforcement agents and will involve several changes to the U.S. Attorneys’ Manual and other Departmental guidance. It remains to be seen how significant a change these policy directives will have on individual prosecutions and corporate civil and criminal resolutions. But one thing is clear: DOJ is trying to send a message to the public and to agents and prosecutors across the country that the twin goals of punishment and deterrence will not be served unless individuals, as well as companies, are held accountable for corporate wrongdoing.

We view the implications of the memorandum as distinct for criminal and for civil cases. In criminal matters, the effect of DOJ’s policy announcement is hard to predict and may not represent a significant change. For example, the guidance on cooperation credit does not appear to represent a departure from current practice. To be sure, the Deputy Attorney General stated yesterday that the memorandum represents a “substantial shift from our prior practice,” and added that “we’re not going to let corporations plead ignorance.” Yet the memorandum reflects practices that are already employed by numerous DOJ components and U.S. Attorneys’ offices, and reflects prior DOJ guidance, such as a September 2014 speech by Criminal Division leadership declaring that “[v]oluntary disclosure of corporate misconduct does not constitute true cooperation, if the company avoids identifying the individuals who are criminally responsible. Even the identification of culpable individuals is not true cooperation, if the company fails to locate and provide facts and evidence at their disposal that implicate those individuals.”³

In civil cases, the memorandum may have more pronounced effect. Its apparent prohibition (with some exceptions) on the release of individual liability within corporate settlement

³ See text of speech given by Principal Deputy Assistant Attorney General for the Criminal Division Marshall L. Miller on September 17, 2014: <http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller>

agreements may complicate the negotiation and execution of corporate resolutions. In certain civil settlement agreements, for example, DOJ has agreed to release employees from at least civil liability. Yet the new guidance would appear to mark a shift in this practice, providing that “absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases,” and that any such releases must be personally approved in writing by the relevant Assistant Attorney General or U.S. Attorney.

The memorandum may also produce increased civil enforcement action against present and former company employees, even if the individual has few resources to satisfy any demand, judgment, or claim for payment. For example, in civil False Claims Act settlements, which often result in corporate but not individual dispositions, DOJ may more often insist on enforcement actions against individuals. This may alter the way in which companies investigate potential wrongdoing, not to mention the possible impact on the careers of the affected individuals, who may now more frequently confront civil enforcement and possible related suspension or debarment penalties. In this regard, the Deputy Attorney General declared that “[t]hese individual civil judgments will also become part of corporate wrongdoers’ resumes that will follow them throughout their careers.”⁴

It appears that “purely civil” corporate investigations may become less likely, and that clients ought to consider whether and how criminal prosecutors may become involved in such investigations. As noted above, the guidance requires civil and criminal attorneys to be in “routine” communication with one another throughout an investigation.⁵ The major lasting impact of these policy changes may in fact be increased civil enforcement, as opposed to additional individual criminal guilty pleas. As the Deputy Attorney General acknowledged in her speech yesterday, “[l]ess corporate cooperation could mean fewer settlements and potentially smaller overall recoveries by the government. In addition, individuals facing long prison terms or large civil penalties may be more inclined to roll the dice before a jury and consequently, we could see fewer guilty pleas. Only time will tell. But if that’s what happens, so be it.”

It bears note, however, that DOJ has not announced any additional resources -- agents, attorneys, etc. -- to implement the new guidance. So only time will tell if practice can keep up with policy here.

The Deputy Attorney General stated yesterday that in order to “codify and supplement” the changes announced in the memorandum, DOJ will be revising several guidance documents, including the Principles of Federal Prosecution of Business Organizations contained in the U.S. Attorneys’ Manual. We will be watching closely to see if the changes made to the “Principles”

⁴ *Id.*

⁵ This requirement builds on prior directives, which, for example, already require parallel coordination and investigations in *qui tam* cases. See prepared remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell on September 17, 2014, including that “[w]e in the Criminal Division have recently implemented a procedure so that all new *qui tam* complaints are shared by the Civil Division with the Criminal Division as soon as the cases are filed”: <http://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-taxpayers-against>. Of course, in criminal investigations, Rule 6(e) of the Federal Rules of Criminal Procedure limits prosecutors’ ability to share grand jury information with their civil counterparts, which means that prosecutors may be structurally limited in what they can share with civil DOJ attorneys.

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go beyond what is contained in the memorandum, marking an even greater policy shift than what DOJ announced this week.

Contacts at Covington & Burling LLP

If you have any questions concerning the material discussed in this client alert, please contact the following members of our White Collar practice group:

California

Tammy Albarrán	+1 415 591 7066	talbarran@cov.com
David Bayless	+1 415 591 7005	dbayless@cov.com
Aaron Lewis	+1 424 332 4754	alewis@cov.com
Sara O'Connell	+1 858 678 1811	soconnell@cov.com
Dan Shallman	+1 424 332 4752	dshallman@cov.com
Douglas Sprague	+1 415 591 7097	dsprague@cov.com
Anita Stork	+1 415 591 7050	astork@cov.com
Phillip Warren	+1 415 591 7012	pwarren@cov.com

New York

Nancy Kestenbaum	+1 212 841 1125	nkastenbaum@cov.com
David Kornblau	+1 212 841 1084	dkornblau@cov.com
Lynn Neils	+1 212 841 1011	lneils@cov.com
Alan Vinegrad	+1 212 841 1022	avinegrad@cov.com

Washington

Stephen Anthony	+1 202 662 5105	santhony@cov.com
Bruce Baird	+1 202 662 5122	bbaird@cov.com
Lanny Breuer	+1 202 662 5674	lbreuer@cov.com
Michael Chertoff	+1 202 662 5060	mchertoff@cov.com
Chris Denig	+1 202 662 5325	cdenig@cov.com
Steven Fagell	+1 202 662 5293	sfagell@cov.com
James Garland	+1 202 662 5337	igarland@cov.com
Ben Haley	+1 202 662 5194	bhaley@cov.com
Geoffrey Hobart	+1 202 662 5281	ghobart@cov.com
Eric Holder	+1 202 662 6000	eholder@cov.com
Robert Kelner	+1 202 662 5503	rkelner@cov.com
Fred Levy	+1 202 662 5154	flevy@cov.com
Matt O'Connor	+1 202 662 5469	moconnor@cov.com
Robert Nichols	+1 202 662 5328	rnichols@cov.com
Mona Patel	+1 202 662 5797	mpatel@cov.com
Ethan Posner	+1 202 662 5317	eposner@cov.com
Mythili Raman	+1 202 662 5929	mraman@cov.com
Benjamin Razi	+1 202 662 5463	brazi@cov.com
Margaret Richardson	+1 202 662 5075	mrichardson@cov.com
Don Ridings	+1 202 662 5357	dridings@cov.com
Simone Ross	+1 202 662 5566	sross@cov.com
Michael Scheininger	+1 202 662 5350	mscheininger@cov.com
Elaine Stone	+1 202 662 5596	estone@cov.com
Daniel Suleiman	+1 202 662 5811	dsuleiman@cov.com
D. Jean Veta	+1 202 662 5294	jveta@cov.com
Sarah Wilson	+1 202 662 5397	swilson@cov.com

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