GIBSON DUNN

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DOJ'S NEWEST POLICY PRONOUNCEMENT: THE HUNT FOR CORPORATE EXECUTIVES

To Our Clients and Friends:

On September 9, 2015, the Department of Justice ("DOJ") issued a new policy memorandum, signed by Deputy Attorney General Sally Yates, regarding the prosecution of individuals in corporate fraud cases--"Individual Accountability for Corporate Wrongdoing" ("the Yates Memorandum").

The Yates Memorandum has been heralded as a sign of a new resolve at DOJ, and follows a series of public statements made by DOJ officials indicating that they intend to adopt a more severe posture towards "flesh-and-blood" corporate criminals, not just corporate entities. Furthermore, the Yates Memorandum formalizes six guidelines that are intended "to strengthen [DOJ's] pursuit of corporate wrongdoing."

Though much of the Yates Memorandum is not entirely novel, corporations and their executives should take close note of DOJ's increasing and public focus on individual prosecutions. Additionally, both corporations and DOJ should take note of how the Yates Memorandum may carry a number of consequences – intended and unintended – with respect to cooperation with DOJ investigations.

The Genealogy of the Yates Memo

The high-profile roll-out of the Yates Memorandum--above-the-fold coverage in major newspapers, a speech by Yates at New York University--obscures the fact that DOJ leaders, at increasingly higher levels of seniority, have been making similar statements for months, even years (and ones that echo similar statements made during Eric Holder's tenure as Attorney General).

- For instance, in a speech on September 17, 2014, Principal Deputy Assistant Attorney General for the Criminal Division Marshall Miller explained that "when [corporations] come in to discuss the results of an internal investigation to the Criminal Division . . . expect that a primary focus will be on what evidence you uncovered as to culpable individuals, what steps you took to see if individual culpability crept up the corporate ladder, how tireless your efforts were to find the people responsible."

- Similarly, in a speech on January 20, 2015, Deputy Assistant Attorney General for the Criminal Division Sung-Hee Suh stated 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."

- More recently, in a speech on April 17, 2015, Assistant Attorney General for the Criminal Division Leslie Caldwell stated that, for her Division, "[t]rue cooperation . . . 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."

These public remarks set the stage for the Yates Memorandum, which serves as the apotheosis of these statements; together, the speeches and the Yates Memorandum reflect how goals and positions long articulated (and, in fact, daily pursued) by federal prosecutors have now been formalized in DOJ policy.

The Memo's Guidance

The Yates Memorandum--which acknowledges that many of its policies already are being followed by federal prosecutors--establishes "six key steps" intended to enhance DOJ's effort to "fully leverage its resources to identify culpable individuals at all levels in corporate cases." In brief, they are as follows:

1. To qualify for any cooperation credit whatsoever, in both criminal and civil cases, corporations under investigation must provide DOJ with all relevant facts about the individuals involved in corporate misconduct.

This is the most important guideline articulated in the Yates Memorandum, and is designed to incentivize corporations not only to cooperate with the DOJ, but also from the outset focus their investigation on individuals and share findings and conclusions regarding those individuals. It is far from clear, however, how this guideline will affect the conduct of internal investigations, or the question of whether corporations should voluntarily disclose potential issues to the DOJ, as they may have to assess whether conduct is criminal or not at a very early stage, and may be severely punished if they are perceived as not having provided "all facts related to [individual] misconduct."

In her speech accompanying the Memorandum's release, Yates called this policy a "substantial shift from prior practice" and a reflection of the "rules [having] just changed." In particular, it serves as an important revision to the fourth factor articulated in the April 2008 "Principles of Federal Prosecution of Business Organizations" issued by then-Deputy Attorney General Mark Filip (the "Filip Memorandum") --"a corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."

Significantly, this guideline does not stop at criminal matters. It also applies to civil matters, which often run on parallel tracks to criminal ones, and may profoundly alter how those matters are resolved. According to the Memorandum, "a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation." This includes, but is not limited to, False Claims Act matters, which are specifically highlighted in the Yates Memorandum.

Overall, this policy reflects a more draconian tone towards cooperation--instead of potentially receiving partial cooperation credit if the investigation into, or disclosures regarding, individual misconduct are incomplete, a corporation would now receive *no cooperation credit at all*. Of course,

this leaves open the question of who at DOJ will decide if "all [relevant] facts" have been disclosed, and when such cooperation might cease. Further, consistent generally with the existing approach, any settlement document must now include a provision mandating continued cooperation with respect to any individuals engaged in wrongdoing.

In reality, corporations, through internal investigations, already and regularly identify corporate individual misconduct and, despite the implication of the Memorandum, regularly terminate or discipline employees as a result of such investigations.

2. DOJ investigations--both criminal and civil--should focus on potentially culpable individuals from the very beginning.

This policy is directed at DOJ itself. Acknowledging that it is difficult to build criminal cases against individuals months or years after a civil inquiry into a corporation has begun, DOJ investigations must now focus on individual wrongdoing from the outset.

This could change the approach and temperament of federal prosecutors and civil investigators who might now require much more detail, at a much earlier stage, about specific individuals.

3. Similarly, DOJ criminal and civil attorneys are now encouraged to be in routine communication with one another.

Accordingly, DOJ attorneys will now be required to notify the "other side of the house" about any investigation, once it is initiated. The Memorandum does not address whether or how such "routine communication" falls within the ambit of Rule 6(e) of the Federal Rules of Criminal Procedure, which constricts access to grand jury materials.

4. Only in extraordinary circumstances will a corporate resolution immunize individuals from any sort of liability.

This policy also affects corporate resolution documents, which now cannot contain provisions immunizing individuals, or dismissing charges against them, unless there are (undefined) "extraordinary circumstances" (or if approved DOJ policy, such as the Antitrust Division's Corporate Leniency Policy, applies). Frankly, however, it is rare that current resolution agreements provide individuals with such protections.

This guideline also increases the amount of oversight, and related bureaucracy, at DOJ. Significantly, in every matter, any release of individual liability must be vetted and approved by the relevant Assistant Attorney General or a United States Attorney.

5. Corporate cases should not be resolved unless there is a clear path to resolve related individual cases before statutes of limitations expire; further, any declinations must now be memorialized.

This guideline seemingly implies that DOJ attorneys are prioritizing high-dollar cases against corporations while placing cases against individuals on the back burner. In our experience, federal prosecutors regularly examine the conduct of employees during corporate investigations and do not pull punches in their pursuit of individuals. As counsel for a number of individuals subject to exhaustive investigations, we disagree with the Memorandum's implied premise. The Memorandum requires DOJ attorneys to submit to their supervisors plans to investigate and bring cases against individuals to resolution if those cases have not concluded by the time of the corporate resolution. Similarly, any declinations also must be memorialized, and approved by the relevant Assistant Attorney General or a United States Attorney.

6. In civil investigations, attorneys should consistently focus on individuals, and whether to bring suit against them based on considerations beyond ability to pay.

This guideline, equally aggressive as its criminal counterparts, is intended to provide a long-term deterrent effect, by showing individual wrongdoers that lack of resources will not render one judgment-proof. In her speech, Yates called this a "broadening [of] the focus of our civil enforcement strategy."

Our Initial Views and Guidance to Clients

The Yates Memorandum, like other major policy guidelines addressing cooperation (such as the Filip Memorandum), has the real potential to affect how companies and their executives will assess cooperation and whether to provide it.

Additionally, and especially in the short-term, the Yates Memorandum is designed to place a higher premium on the prosecution (and conviction) of corporate leaders. Within DOJ, there will be increased oversight and supervision of corporate criminal matters, and line attorneys will either have to develop robust cases or investigation plans against individuals, or defend their choices to senior leaders. A more searching senior-level review of immunity applications or declinations, and newly mandated cross-DOJ cooperation seem to confirm this fact. Finally, investigations have the potential to become either more resource intensive, or much longer, as federal prosecutors and civil enforcers build multiple cases--against both corporations and individuals--simultaneously.

That said, the Yates Memorandum acknowledges, but does not address, how difficult individual prosecutions in corporate cases are--not only because of the difficulty in obtaining evidence, but also because it is profoundly difficult to determine whether any identified conduct does, in fact, violate federal laws. More unpredictable will be the effect on corporate behavior. The scale of internal investigations may increase as more intense scrutiny is focused on individuals at the outset. Vigorous investigations of this sort can negatively affect morale within companies, and employees who refuse to cooperate may cause investigations to falter or stall. Moreover, internal investigations often must deal with historical conduct – frequently in the very distant past and with former employees – and overseas activities that present a host of legal and practical challenges. The Yates Memorandum may well affect a corporation's analysis as to how vigorously, or widely, potential misconduct should be investigated where the consequences of not being able to identify culpable individuals could be dire.

As a result, it may result in an all-or-nothing approach to cooperation, with many corporations electing to take the latter path. All of this may temper a corporation's enthusiasm to self-report potential misconduct.

Thus, corporations that decline to engage in such investigations, or--more problematically--those that are unable to find suitable evidence of individual wrongdoing despite the existence of some systemic problem (which is often the case given how action, intent, and conduct can be diffused throughout a corporation), may decline to cooperate entirely. The Yates Memorandum, consequently, may have an unintended chilling effect on corporate cooperation.

Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding the above developments. Please contact the Gibson Dunn lawyer with whom you usually work, or the following authors in the firm's White Collar Defense and Investigations Group.

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