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The US Department of Justice's new policy initiative targeting corporate officers and employees

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The United States Department of Justice ("DOJ") recently adopted new policies and procedures relating to its investigation and prosecution of corporate wrongdoing. It is critical that companies and their counsel become familiar with these policies and procedures before deciding on the scope of any internal investigations they undertake and whether they should cooperate with DOJ.

The Yates Memorandum

On September 9, 2015, DOJ issued a policy memorandum regarding individual accountability for corporate wrongdoing. The memo, signed by Deputy Attorney General Sally Q. Yates (thus referred to as the "Yates Memorandum"), provides guidance to federal prosecutors in the United States regarding "steps that should be taken in any investigation of corporate misconduct." Yates Memorandum at 2. As Deputy Attorney General Yates explained in a speech about the memo at New York University School of Law on September 10, 2015 ("NYU Speech"), its purpose is to ensure that all federal prosecutors consistently employ their "best efforts to hold individual wrongdoers accountable." DOJ recently incorporated the policy initiatives of the Yates Memorandum into the U.S. Attorneys' Manual, including the section of the Manual known as the Principles of Federal Prosecution of Business Organizations (the so-called "Filip Factors"). Deputy Attorney General Yates discussed these revisions to the United States Attorneys' Manual at a speech before the American Banking Association and American Bar Association Money Laundering Enforcement Conference on November 16, 2015 ("ABA Speech"). She explained that, although DOJ does not change the United States Attorneys' Manual often, it does so – for among other reasons -- "to make sure that certain principles are embedded in the culture of our institution . . . , and as a way of telling the world about our priorities and our values, so that others know what to expect when the Justice Department comes knocking."

Six Principles That Will Guide DOJ Investigations And Prosecutions

The Yates Memorandum describes six "key steps to strengthen [DOJ's] pursuit of individual corporate wrongdoing."

1. To be eligible for any cooperation credit, corporations must provide to DOJ all relevant facts about the individuals involved in corporate misconduct.

This principle applies to corporations seeking to receive credit for cooperation in



criminal or civil investigations. In her ABA Speech, Deputy Attorney General Yates explained that there is nothing new about the concept of companies providing information to DOJ about the conduct of individuals as a part of corporate cooperation. What is new, however, according to Deputy Attorney General Yates, is the consequence of not doing it: "In the past, cooperation credit was a sliding scale of sorts and companies could still receive at least some credit for cooperation, even if they failed to disclose all facts about individuals. That has changed now. As the policy makes clear, providing complete information about individuals' involvement in wrongdoing is a threshold hurdle that must be crossed before we'll consider any cooperation credit."

Moreover, in her NYU Speech, Deputy Attorney General Yates emphasized that "we're not going to let corporations plead ignorance. If they don't know who is responsible, they will need to find out. If they want any cooperation credit, they will need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals."

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

The Yates Memorandum explains that by focusing on building cases against individuals from the outset of an investigation, DOJ ac-

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completes multiple goals, including maximizing the chances that “the final resolution of an investigation uncovering misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.” Yates Memorandum at 4. Deputy Attorney General Yates elaborated in her NYU Speech that “once a case is underway, the inquiry into individual misconduct can and should proceed in tandem with the broader corporate investigation. Delays in the corporate case will no longer suffice as a reason to delay pursuit of the individuals involved.”

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

The Yates Memorandum explains that “[c]onsultation between the Department’s civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government’s potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case.” Yates Memorandum at 5.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

The Yates Memorandum states that “absent extraordinary circumstances or approved departmental policy such as the Antitrust Division’s Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees.” *Id.* The same holds true for civil corporate matters.

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 Yates Memorandum provides that “[i]f a decision is made at the conclusion of the 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 United States Attorney or Assistant Attorney General who office handled the investigation, or their designees.” Yates Memorandum at 6.

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

The Yates Memorandum explains that “the fact that an individual may not have sufficient resources to satisfy a judgment should not control the decision on whether to bring suit. Rather, in deciding

whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person’s 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.” Yates Memorandum at 6-7.

Potential Implications of DOJ’s New Policies and Procedures

Over the years, DOJ officials have repeatedly noted DOJ’s interest in investigating and prosecuting individuals responsible for corporate wrongdoing as well as DOJ’s expectation that companies would disclose information about any improper conduct by their officers and employees as part of their cooperation obligations. And, in fact, DOJ has brought numerous criminal and civil cases against officers and employees in connection with its investigations of corporate fraud. Although the goals of the Yates Memorandum are not new, some of the policies and procedures adopted by DOJ to achieve its goals are new. It remains to be seen, however, whether these policies and procedures will actually advance the interests of DOJ or whether they will have unintended consequences.

First, DOJ’s renewed emphasis on prosecuting individuals for corporate wrongdoing might deter some employees from cooperating in internal investigations, notwithstanding the repercussions such a decision might have on their employment. Second, DOJ’s all or nothing approach to credit for cooperation could dissuade some companies from cooperating with DOJ. Third, the requirement that federal prosecutors focus at the outset of an investigation on whether there is sufficient evidence to prosecute corporate officers and employees might place DOJ in a weaker position to demand that companies enter into deferred prosecution agreements (or plead guilty) and pay enormous fines in circumstances where DOJ itself determines that the evidence would not support criminal charges against individuals.

On the other hand, DOJ’s new policies and procedures could be very successful -- resulting in more criminal and civil cases being brought against individual wrongdoers who otherwise might not have been held accountable for their misdeeds. Moreover, there may well be increased, high-level supervision of DOJ investigations and charging decisions, which could redound to the benefit of both DOJ and the companies it investigates.

Time will tell how DOJ goes about implementing its new policies and procedures and what the ultimate impact of these changes will be. In the meantime, it is more important than ever that companies obtain the guidance of counsel when deciding whether to cooperate with DOJ.