DOJ Issues Memo Directing Prosecutors to Focus on Individual Accountability

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The U.S. Department of Justice (DOJ) issued a memorandum on Wednesday from Deputy Attorney General Sally Quillian Yates that reaffirms the Government's commitment to prosecuting individuals and formally instructs prosecutors to focus on individual accountability when dealing with corporate misconduct. Yates delivered additional remarks yesterday on the memorandum and its expected impact on criminal and civil investigations of corporations. Having been publicly criticized for permitting corporations to take the fall and allowing individual wrongdoers off the hook, the DOJ has regularly tried to focus on individuals with only limited success. Some may view the memo as restating existing Government policy but it in fact represents a significant formal policy shift that almost requires prosecution of individuals in exchange for corporate cooperation credit.

The DOJ memorandum outlines six steps to achieve this goal:

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

Corporations will be required to disclose evidence regarding misconduct of all individuals, regardless of their position, status, or seniority, in exchange for cooperation, which will put companies in a difficult position. This is a significant formal policy change and will likely impact decisions regarding whether to charge a parent or subsidiary and whether a company qualifies for reduced damages in a False Claims Act case. Public companies will have little choice but to comply completely, but smaller companies that previously could get agreements to spare individuals now may have more incentive to fight, rather than cooperate, if this policy is strictly followed. Yates also noted yesterday that the “threshold requirement of complete cooperation as to individuals not only governs criminal investigations, but applies to civil investigations as well.”

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

In addition to shifting DOJ’s expectations from corporations, the memorandum also notes a shift in what DOJ expects from its own prosecutors. Prosecutors are now required to actively pursue their own investigations of corporations and compare them with information handed over by corporations. Prosecutors will no longer sit back and simply accept the results of corporate investigations.

Yates’ remarks indicate that DOJ is trying to handle corporate investigations similarly to other investigations because DOJ cannot prove intent without focusing on individuals from the outset. Additionally, following its routine “flipping up the chain” modus operandi, the Government will continue to put pressure on lower level employees in order to gain their cooperation so that they will provide information about those higher up the corporate hierarchy. During her comments, Yates mentioned the desirability of an insider wearing a wire as part of her cooperation. Following its devastating use of electronic surveillance in the Rajaratnam and other cases, the government has a
very strong appetite for this type of evidence gathering.

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

From the very beginning of the matter, criminal and civil prosecutors must communicate with each other. Yates indicated that DOJ will be formalizing lines of communication between the criminal and civil divisions. Assistant Attorney General Leslie Caldwell articulated this approach in a speech last fall, but now this will become formal policy.

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

Cases against individuals must be resolved before corporate settlements. Yates indicated that if the corporate settlement must occur before resolving cases against individuals, prosecutors should retain the ability to pursue individuals after the corporate settlement.

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.**

Related to step 4, prosecutors must now provide written justification to the highest level at the DOJ in order to proceed without resolving cases against individuals. Similarly, without written justification to the highest level at the DOJ, prosecutors cannot release individuals from liability where there is corporate wrongdoing.

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 final step directs prosecutors to bring civil or criminal charges against individuals, even if the individuals cannot satisfy a civil judgment. Yates maintained that the DOJ’s mission is individual accountability, not financial recoveries, and its goal is to hold wrongdoers responsible for their actions and to deter misconduct in the future.

These steps suggest the Government’s intention to achieve more consistent practices across offices. The changes will be incorporated in the U.S. Attorneys’ Manual, and will specifically modify the 2008 Filip factors for prosecuting business organizations. The DOJ seems to be trying to correct the impression that corporate wrongdoers are treated differently than other wrongdoers. In fact, Yates appears to assume that corporations are actually treated differently than others.

The focus on individual accountability in the memorandum and Yates’ speech is noteworthy. Other high-level DOJ officials, like Leslie Caldwell and former Principal Deputy Assistant Attorney General Marshall Miller, have previously articulated a focus on individual accountability, and many federal criminal prosecutors would say it has always been their focus. However, it is now a matter of formal policy that corporations “must give up the individuals.” That is, corporations must “investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals” in order to receive any cooperation credit at all. While the Filip factors were developed in reaction to public sentiment that attorney-client privilege and joint defense agreements were under attack, it remains to be seen how the tension will be resolved regarding privileged versus non-privileged evidence and whether joint defense privilege will be at all feasible.


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