US Department Of Justice Targets Corporate Individuals

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DOJ announces tough new approach to the investigation and prosecution of corporate officers and employees.

On September 9, in a major change to its approach to the investigation of alleged corporate crime, the US Department of Justice (DOJ) announced a series of new policy directives that prioritize the investigation and prosecution of individual corporate officers and employees in addition to the companies themselves. US Deputy Attorney General Sally Quillian Yates issued a memorandum detailing a six-step plan to strengthen the DOJ’s pursuit of individual corporate wrongdoers in both criminal and civil contexts (the Yates Memo). The Yates Memo reflects a very aggressive new stance by the DOJ in regards to white-collar crime in corporate America.

The six steps outlined in the Yates Memo are as follows:

“All or nothing” cooperation requirement—The DOJ’s corporate charging guidelines—the Principles of Federal Prosecution of Business Organizations—will be revised to require companies to completely disclose all relevant facts about individual misconduct in order to be eligible for any cooperation credit. Such credit can be the key factor in negotiating a non-prosecution or deferred prosecution agreement, as well as in gaining favorable consideration at sentencing. DOJ attorneys are directed to “vigorously review” information provided by companies to ensure that it is complete and does not seek to minimize the involvement of any individual, regardless of position, status, or seniority. As Yates told the New York Times, it will no longer be sufficient for companies to offer up the low-level officers—what she called “the vice president in charge of going to jail”—as a token of cooperation. Nor can companies simply plead ignorance; as Yates stated in a speech at New York University (NYU) School of Law the following day, “[i]f they don’t know who is responsible, they will need to find out” through an internal investigation in order to receive cooperation credit. This “all or nothing” cooperation requirement applies equally in criminal and civil investigations, including when companies seek reduced damages under the False Claims Act. Moreover, full disclosure can be made a continuing obligation in any plea or settlement agreement, such that the company’s failure to provide information about culpable individuals even after resolution of the company’s case may be considered a material breach and result in revocation of the agreement or stipulated penalties.

Build cases against individuals from the beginning—In both the criminal and civil contexts, DOJ attorneys investigating corporate misconduct will focus from the inception of an investigation on building a case against culpable individuals as well as the company itself.

Increased civil/criminal communication and parallel investigations—Civil and criminal attorneys handling corporate investigations will communicate and consult with each other regarding potential individual liability, declinations, and the early pursuit of parallel criminal and civil investigations of individual misconduct.

High hurdles to resolve corporate case without action against individuals—Absent extraordinary
circumstances, which must be approved by the relevant Assistant Attorney General or United States Attorney, no civil or criminal case resolution between the DOJ and a company may include an agreement to dismiss charges, release claims, or provide immunity for individual officers and employees.

Corporate settlements must address investigations against individuals—When seeking authorization to resolve a criminal or civil case against a company before the investigation of individual misconduct has been completed, DOJ attorneys must present in their authorization memorandum a description of the current status of that investigation and a plan to bring the matter to a resolution before the expiration of the statute of limitations. Where a decision is made not to bring civil or criminal claims against culpable individuals, the reasons for that declination must be presented to and approved by the relevant Assistant Attorney General or United States Attorney, or their designees.

Corporate individuals’ inability to pay fines and penalties no longer will result in automatic declinations—Finally, in a change to the DOJ’s civil enforcement strategy, civil attorneys will no longer focus solely on an individual’s ability to pay a significant monetary judgment when deciding whether to pursue actions against individual corporate wrongdoers. The Yates Memo recognizes that the government objectives of deterring individual misconduct and holding individual wrongdoers accountable are equally as important as the objective of recovering money.

Conclusion

The very aggressive stance announced in the Yates Memo can be read as an attempt by the DOJ to outsource the criminal and civil investigation of white-collar crime to the corporations themselves. By setting forth an “all or nothing,” black-and-white standard for corporate cooperation that focuses on potentially culpable individuals, the DOJ believes that it will achieve a shortcut around the “painstaking review” it otherwise would have to conduct. No longer will corporations be able to receive some level of credit (e.g., a non-prosecution agreement, a deferred prosecution agreement, or reduced fines and penalties) for voluntarily disclosing improper corporate practices. Now, unless the corporation also identifies every culpable individual at every level of the company, it will receive no credit at all for the voluntary disclosure.

As Ms. Yates has stated: “It’s all or nothing.” She even went so far in her NYU speech as to analogize corporate criminal investigations to drug trafficking investigations (in which cooperators are required to provide information about the cartel boss as well as the street-level dealers), stating that “[a] corporation should get no special treatment as a cooperator simply because the crimes took place behind a desk.”

New Factors for Corporations to Consider

Going forward, corporations contemplating voluntary disclosures will have to weigh the following new factors in addition to those traditionally considered:

- The time and expense of an internal investigation that will be required to determine all culpable people involved in the alleged wrongdoing
- The possibility that the corporation will receive no credit for its efforts if the DOJ finds any culpable individuals who have not been fully disclosed or, even more concerning, refuses credit where they disagree with a company’s good faith assessment of culpability
- The fact that corporate cooperation only ends when the DOJ says it ends, not with the resolution of the corporation’s case
- The increased likelihood of parallel civil and criminal proceedings
- The increased likelihood of civil suits against individuals

A Change That Will Affect Federal Law Enforcement Across the Board

The Yates Memo was sent not only to the 93 United States Attorney Offices nationwide, but also to the Criminal, Civil, Antitrust, Environment and Natural Resources, National Security, and Tax Divisions of the DOJ. Thus, there will be no aspect of federal law enforcement that will remain unaffected by the Yates Memo.

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