“Individual Accountability for Corporate Wrongdoing”: A Sea Change Or Not?

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On Thursday, September 10, 2015, Deputy Attorney General Sally Quillian Yates delivered remarks announcing a memorandum delivered to all federal prosecutors, including the Antitrust Division: “Individual Accountability for Corporate Wrongdoing”. She said the purpose of this memorandum was “to ensure that individual accountability lies at the heart of corporate enforcement strategy.” She outlined “six specific steps” to accomplish that goal. She emphasized the first step: “In order for a company to receive any credit for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct...[and] Department Attorneys should vigorously review any information provided by companies and compare it to their own investigation in order to best ensure that the information is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.” (emphasis in original)

But is this anything really new? Many experienced practitioners would argue definitely not. For decades, federal prosecutors have focused on bringing charges against the highest level company executives. Almost universally, they hold the opinion that the only way to truly deter corporate crime is to jail executives, the more senior the better. And we all know that corporations can act only through individuals. Anyone who has ever held the post of Assistant United States Attorney—as this author did in the mid-1980’s—or has defended federal criminal investigations knows that among the very first questions in a discussion of cooperation will be: “You understand that full cooperation against individuals will be required, will you be providing information against Mr./Ms. X, Y and Z?” In the Foreign Corrupt Practices Act area, Assistant Attorney General Leslie Caldwell has made this point every single time she has spoken in public.

So why the memorandum and the highly publicized speech? Several reasons come to mind: (1) the American public has felt that DOJ has been soft on Wall Street executives; (2) this memorandum gives corporate defense counsel a very clear statement to show clients who are considering cooperation; and (3) the formal internal procedures ensure that federal white collar prosecutors account for their investigations and dispositions of individuals within a corporate crime setting. Maybe it also gives prosecutors an additional talking point with defense counsel for individuals: “Sorry, DOJ policies tie my hands. I have to go after your client.”

Might this policy result in significantly more prosecutions of individuals? Doubtful. Senior executives and other individuals have always been in DOJ’s crosshairs.

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