

Client Alert

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DOJ Announces New Policies Prioritizing Efforts to Pursue Individual Accountability for Corporate Wrongdoing

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On September 9, the United States Department of Justice released a new policy memorandum entitled “Individual Accountability for Corporate Wrongdoing,” which is aimed at strengthening and prioritizing the Department’s pursuit of individual misconduct in the course of corporate investigations. The memorandum, issued by Deputy Attorney General Sally Quillian Yates, is the product of a “working group” of senior attorneys from multiple Department components and United States Attorneys’ Offices. The working group was convened to determine how the Department might “fully leverage its resources” to identify and pursue culpable individuals within corporations.¹

Yates announced the following six principles that will govern the Department in all civil and criminal investigations of corporate misconduct:

- 1) To be eligible for **any** cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in the misconduct under investigation.
- 2) The Department’s criminal and civil corporate investigations should focus on individuals from their inception.
- 3) Criminal and civil attorneys handling corporate investigations should routinely communicate with one another.
- 4) Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.
- 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 should be memorialized in writing.
- 6) Civil attorneys should consistently focus on individual liability as well as entity-level liability and should look beyond the question of an individual’s ability to pay in evaluating whether to bring suit against that individual.

Deputy Attorney General Yates’s memorandum marks the Department’s first major policy announcement since Attorney General Loretta Lynch

took office in April 2015. The memorandum advances an approach to individual misconduct articulated by the Department's Criminal Division last year. For instance, Marshall Miller, then-Principal Deputy Assistant Attorney General for the Criminal Division, publicly stated in September 2014 that a corporation under investigation that is seeking cooperation credit should make its "extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door [to make a presentation to the government]. . . [and] the last thing you talk about before you walk out."²

In October 2014, Leslie Caldwell, Assistant Attorney General for the Criminal Division, reinforced Miller's remarks and stated that companies requesting full cooperation credit "must root out . . . misconduct and identify the individuals responsible, even if they are senior executives."³ The Deputy Attorney General's pronouncement this week adopts this philosophical approach and formalizes it as policy applicable to the entire Department of Justice.

Elimination of Partial Cooperation Credit

Although Yates's memorandum reflects a recent focus within the Criminal Division on individual liability, it imposes several new and significant requirements on attorneys in that Division as well as in the Department's other components. In Assistant Attorney General Caldwell's remarks last year, she explained that corporations seeking "full" cooperation credit must identify culpable individuals within the corporation.⁴ In contrast, Yates's memorandum, pointedly states that a corporation will not receive "any" credit unless it provides "all relevant facts about individuals involved in corporate misconduct."⁵ During a public address at NYU Law School on September 10, 2015, Yates stressed this point, announcing:

"Effective immediately, we have revised our policy guidance to require that if a company wants any credit for cooperation, **any credit at all**, it must identify all individuals involved in the wrongdoing, regardless of their position, status or seniority in the company and provide all relevant facts about their misconduct. **It's all or nothing.** . . .

. . . While we have long emphasized the importance of identifying culpable individuals, until now, companies could cooperate with the government by voluntarily disclosing improper corporate practices, but then stop short of identifying who engaged in the wrongdoing and exactly what they did. While the companies weren't entitled to full credit for cooperation, they could still get credit for what they did do and that credit could be enough to avoid indictment.

The rules have just changed. Effective today, if a company wants any consideration for its cooperation, it must give up the individuals, no matter where they sit within the company. And we're not going to let companies 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."⁶

It remains unclear how this principle will be interpreted and applied in practice. Is it simply a strongly worded reminder of the Department's longstanding policy that cooperation generally requires the disclosure of all relevant facts, including those concerning individuals? Or do Yates's statements signal a watershed in criminal enforcement, in which cooperation credit is tied to the actual financial, punitive, or other results the government achieves against individuals with information obtained from the corporation? In other words, what occurs when the company's good faith understanding of the relevant facts differs from or fails to

materially advance the government's theory of individual liability in the case? This unsettled issue emphasizes the critical need for corporate counsel to conduct investigations that are thorough, rigorous, and objective, so that their methodology and conclusions can withstand scrutiny by government prosecutors.

The memorandum also does not indicate how government attorneys should handle a matter when the investigation does not reveal any facts establishing provable wrongdoing by an individual employee. "Because a corporation only acts through individuals," the memorandum notes that "investigating the conduct of individuals is the most effective and efficient way to determine the facts and extent of any corporate wrongdoing."⁷ But it flows from this premise that where an investigation fails to yield facts sufficient to prove wrongdoing by an individual employee, then the government should meaningfully consider whether to charge the larger entity itself. Yates's memorandum does not answer that open question.

Government Attorneys to Develop a "Clear Plan" for Individuals Before Corporate Resolution

In what may become a new catch-phrase in the common parlance of corporate investigations, Yates's memorandum instructs that attorneys attempting to resolve a corporate case must provide a "clear plan" for resolving related individual cases. Indeed, when a prosecuting attorney seeks authorization for a corporate resolution, he or she must first provide a written description of the "potentially liable individuals, . . . the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period."⁸

If the prosecuting attorney later declines to bring civil or criminal charges against the individuals listed in the investigative plan, the attorney must memorialize the reasons for that decision and obtain approval to proceed with the declination from the Assistant Attorney General or United States Attorney overseeing the investigation.⁹ By tying resolution of corporate cases to the creation of a formal plan to resolve individual liability, DOJ policy may now lessen prosecutors' willingness to resolve corporate cases without first assigning individual culpability, and may preclude prosecutors and corporate counsel from achieving closure and finality in circumstances under which they might otherwise have reached agreement.

Continuing Obligations to Investigate Individuals

Yates's memorandum also challenges Department personnel to proactively investigate individuals from the outset of an investigation and to continue to do so throughout the course of any parallel investigatory efforts that may be undertaken by corporations seeking cooperation credit. The memorandum goes further still, directing that scrutiny of individuals should continue even *after* any such corporate cooperation is ostensibly complete.

Corporations under investigation are subject to a continuing responsibility as well. Yates's memorandum provides that a corporation may be subject to an ongoing obligation to cooperate that *survives* the conclusion of the case against the corporate entity.¹⁰ Yates's public remarks at NYU were phrased even more definitively, suggesting that prospective corporate plea agreements and settlement agreements "will include a provision that requires the companies to continue providing relevant information to the government about any individuals implicated in the wrongdoing."¹¹ Yates also stated that any failure to provide continuing cooperation against individuals will be "considered a material breach of the agreement and grounds for revocation or stipulated penalties."¹²

Extends Criminal Division's Focus on Individual Misconduct to Civil Cases

Additionally, Yates's memorandum explicitly extends the Criminal Division's prior approach to individual misconduct to the Department's *civil* enforcement efforts. In addition to calling on civil and criminal attorneys within the Department to communicate early and often about potential individual liability, the memorandum instructs civil attorneys to "consistently focus on individuals as well as corporations."¹³

The memorandum further notes that, in order to adequately hold individuals accountable and deter future wrongdoing, civil attorneys should not decline to pursue civil actions against an individual merely because the individual may be unable to pay a significant monetary judgment. Instead, civil enforcement attorneys should consider the severity of the individual's conduct, the federal interest to be served by a civil action, and whether the admissible evidence is likely to support and sustain a civil judgment. Although these considerations may lead to civil enforcement actions that do not provide a substantial monetary return to the government, the policy urges that individual civil accountability will result in long term deterrence of corporate misconduct.¹⁴

In her remarks at NYU, Yates provided a specific example of how the Department's new policy would apply to civil enforcement efforts, stating that "it will be the [D]epartment's position going forward that in order to qualify for the reduced damages provision under the False Claims Act, the company must identify any individuals and provide all material facts about those individuals."¹⁵

Conclusion

Although the Deputy Attorney General's memorandum reinforces themes previously announced in 2014 by Assistant Attorney General Leslie Caldwell and other members of the Department's leadership, the memo represents perhaps the most significant effort by the Department to date to translate and strengthen those themes through written guidance and policy. It remains to be seen precisely how this written guidance will be applied in individual cases, both pending and future, and whether any other enforcement agencies will implement investigative strategies that similarly attempt to target individual misconduct. For now, though, corporations and their counsel may safely infer that the process by which an internal investigation reveals evidence involving individuals – or reveals the absence of such evidence – will be scrutinized by the Department, with prosecutorial discretion being exercised more frequently in favor of entities that conducted investigations that the Department believes were careful, comprehensive, and credible.

A copy of the Deputy Attorney General's policy memorandum is available here:
<http://www.justice.gov/dag/file/769036/download>

A transcript of the Deputy Attorney General's public remarks about the memorandum, given at NYU Law School, is located here: <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

¹ Memorandum from Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components, U.S. Attorneys, regarding “Individuals Accountability for Corporate Wrongdoing” (September 9, 2015), at p. 2, *available at*: <http://www.justice.gov/dag/file/769036/download> [hereinafter Yates Memorandum].

² Marshall L. Miller, Principal Deputy Asst. Att’y Gen. for the Crim. Div., U.S. Dep’t of Justice, Remarks at the Global Investigation Review Program (September 17, 2014), *available at*: <http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller> [hereinafter Miller Remarks].

³ Leslie R. Caldwell, Asst. Att’y Gen. for the Crim. Div., U.S. Dep’t of Justice, Remarks at the 22nd Annual Ethics and Compliance Conference (October 1, 2014), *available at*: <http://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-22nd-annual-ethics> [hereinafter Caldwell Remarks]. For a thorough analysis of Miller’s and Caldwell’s remarks and their impact on the Department’s approach to cooperation credit, see Gary G. Grindler and Laura K. Bennett, *True Cooperation: DOJ’s “Reshaped Conversation” and its Consequences*, CRIMINAL JUSTICE, Vol. 30, No. 2, Summer 2015.

⁴ *Id.*

⁵ Yates Memorandum, *supra* note 1, at 3.

⁶ Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, Prepared Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (September 10, 2015), *available at*: <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school> [hereinafter Yates, Prepared Remarks] (emphases added).

⁷ Yates Memorandum, *supra* note 1, at 4.

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.* at 4.

¹¹ Yates, Prepared Remarks, *supra* note 6 (emphasis added).

¹² *Id.*

¹³ Yates Memorandum, *supra* note 1, at 3-4.

¹⁴ *Id.* at 6-7.

¹⁵ Yates, Prepared Remarks, *supra* note 6.