

Client Alert

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DOJ Issues “Yates Memo” on Individual Accountability in White Collar Cases Signaling More Prosecutions to Come

On September 9, 2015, the US Department of Justice (DOJ) issued new guidelines for the prosecution of individuals involved in corporate fraud and other misconduct. The “Yates Memo” is the result of a DOJ working group convened to review DOJ’s approach to investigating corporate entities and holding individuals at all levels accountable for large-scale fraud and other corporate misconduct. Although primarily focused on fraud, these guidelines are applicable to all future investigations of corporate wrongdoing, as well as any pending investigations to the extent practicable.

The memo outlines six “key steps” or best practices that prosecutors should follow when reviewing corporate wrongdoing in both the criminal and civil context:

(1) in order to receive any credit for cooperation, a corporation must provide all relevant facts relating to the individuals responsible for the misconduct;

(2) focus should be placed on holding individuals accountable from the inception of the investigation in both criminal and civil cases;

(3) criminal and civil prosecutors should be in routine communication with one another as an investigation progresses;

(4) culpable individuals will not be released from civil or criminal liability absent “extraordinary circumstances or approved departmental policy”;

(5) resolutions should be made with a corporate entity without addressing the liability of related individuals, and any decisions not to prosecute individuals should be memorialized; and

(6) civil attorneys should evaluate the potential for filing suit against individuals in addition to the corporate entity.

The most important aspect of the guidelines for companies is its “threshold requirement” of cooperation against individuals in all criminal and civil investigations of corporate wrongdoing. Companies will now be required to proffer the identities of all individuals involved in the misconduct, “regardless of their position, status or seniority,” and provide all facts relating to the misconduct. If a company learned of this information through an internal investigation, this new requirement means that to obtain credit for cooperating a company must provide the facts that bear upon individual culpability gathered during that investigation.

This requirement is a sharp turn from previous DOJ policy issued in the “Filip Memo” in August 2008 and arguably conflicts with the provision in that document that prohibits the department from requesting the results of an internal investigation. If companies must turn over information gathered during an investigation, they will also likely face a privilege waiver issue. The new requirement of cooperation against individuals is a thumb on the scale of waiver and arguably conflicts with the department’s separate directive not to require privilege waivers as a condition of cooperation.

With respect to releasing individuals from civil or criminal liability, the guidelines state that prosecutors should not agree to a resolution that includes an agreement not to prosecute individuals absent “extraordinary circumstances” or pursuant to a department policy, such as the Antitrust Division’s Corporate Leniency Policy. Any release of criminal or civil liability must now be approved in writing by the relevant assistant attorney general or United States attorney. In addition, declinations must be memorialized in writing, with reasons supporting the decision, and approved by the relevant US attorney or assistant attorney general.

Another significant change in the memo is the potential of civil as well as criminal penalties against individuals. The memo specifically indicates that the requirement of cooperation against individuals applies equally in the civil context. The guidelines make specific reference to the civil False Claims Act, which has the potential to have a significant impact on voluntary disclosures to the government.

The specific guideline directed to civil prosecutors is a significant departure from past policy and practice. The guidelines encourage the pursuit of civil actions against responsible individuals regardless of ability to pay. The twin goals of this provision — to increase the financial recovery and deter future misconduct by individuals — are viewed as “equally important.” In terms of factors for consideration when suing individuals, civil prosecutors are directed to consider whether there is an actionable cause, whether there is sufficient admissible evidence to sustain a judgment and whether such a case would serve an important federal interest.

The practical implications of these guidelines cannot be overstated. The memo places additional burdens on corporations to disclose facts of internal investigations. Global resolutions in which the United States agrees to a corporate resolution and waives its right to pursue individuals will be rare. Companies need to approach internal investigations in a more comprehensive way. In addition, the following best practices are recommended:

- Like the government, in-house counsel should consider the impact on individual employees, in addition to corporate interests, at the start of any internal investigation. Internal investigations need to specifically focus on individual culpability and include the full scope of liability in the risk analysis related to internal misconduct
- Careful thought should be given to maintaining privilege of internal investigations and having policies in place that ensure issues that may result in disclosure are identified early and protected.
- Companies should make early decisions about the need for separate counsel for employees at all levels, but particularly high-level executives, when misconduct is identified.
- Companies should review Director & Officer coverage and other policies to understand the scope of coverage for senior management in the context of government investigations.

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