

PUBLICATION

Department of Justice Mandate: Prosecute Individuals for Corporate Wrongdoing

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On September 9, 2015, Sally Quillian Yates, the Deputy Attorney General of the U.S. Department of Justice (DOJ), issued a directive to the leaders of the divisions of the DOJ and to U.S. Attorneys to combat corporate fraud by seeking individual accountability for corporate wrongdoing. According to Yates, the DOJ intends to fully leverage its resources to identify culpable individuals at all levels in corporate cases.

The directive identifies six key steps to strengthen the government's pursuit of individual corporate wrongdoing. Some of these steps reflect current practices and others represent policy shifts. They are as follows:

1. in order to qualify for any cooperation credit, companies must provide to the DOJ all relevant facts relating to the individuals responsible for the misconduct;
2. criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
3. criminal and civil attorneys handling corporate investigations should be in routine communication with one another;
4. absent extraordinary circumstances or approved DOJ policy, the DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a company;
5. DOJ attorneys should not resolve matters with a company without a clear plan to resolve related individual cases and should memorialize any declinations as to individuals in such cases; and
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.

To be eligible for any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, a company must completely disclose to the DOJ all relevant facts about the individuals involved in corporate misconduct. This will place pressure on the company being investigated by the DOJ to conduct a thorough internal investigation of the alleged corporate misconduct. The company's legal counsel will face new challenges in conducting these investigations.

First, legal counsel must explain to the individuals being interviewed that the company will disclose its findings to the DOJ and that the DOJ may prosecute potentially culpable individuals. This will require company counsel to update their Upjohn warnings with more robust disclosures relating to potential individual liability. We expect that directors, officers, employees and agents of the company will be cautious in responding to these internal investigations, may require their own legal representation and may decide not to cooperate in the company's investigation.

Second, we expect to see a "culpability creep" up the corporate ladder, with the DOJ expanding its interest to the persons responsible for supervising the individuals identified as having been involved in the misconduct. Questions of "who knew what and when" will be common and must be asked by the company seeking credit for cooperation. The DOJ may consider the number of and placement within the organization of individuals involved in the misconduct as evidence that the organization itself was corrupt. The DOJ will scrutinize corporate culture which could incentivize individual wrongdoing, such as sales quotas and bonus programs.

The DOJ directive applies to all future investigations of corporate wrongdoing as well as pending matters to the extent practical. Legal counsel representing companies currently responding to DOJ subpoenas or which are aware of a DOJ investigation should inform their clients of the new DOJ directive and how it will affect and apply to the company's response to the investigation. General counsel and outside legal counsel will need to have conversations with the executives to whom they report explaining this directive and how it will affect both the company and its employees. Company indemnification agreements and issues of attorney-client privilege and individuals' separate legal representation will need to be reviewed and considered.

Going forward, "complete" disclosure of individual wrongdoing will be the standard to receive "any consideration" for cooperation credit. This standard places immense pressure on companies to conduct internal investigations and will increase the costs of these investigations because of the "no stone unturned" scope required of the investigation. In addition, companies should expect more of their employees to seek individual counsel during the investigation process.

The DOJ's directive is designed to align the corporate defendant with the government prosecutor with the goal of identifying company executives and employees engaged in fraud. This will over time change corporate cultures resulting in placing more value on company-wide compliance. The government expects to see the end of the age of treating liability associated with corporate wrongdoing as a cost of doing business.

We will continue to provide updates on this new DOJ initiative.

If you have any questions regarding the Department of Justice mandate, please contact the author of this alert or a member of the Government Enforcement and Investigations team.