

September 10, 2015

## DOJ Memo to Prosecutors Calls for More Aggressive Pursuit of Corporate Executives



The U.S. Department of Justice—widely criticized for the perceived lack of cases brought against corporate executives—[issued a new directive](#) yesterday to all U.S. Attorneys designed to hold more individuals accountable for illegal corporate conduct.

The memorandum, written by Deputy Attorney General Sally Quillian Yates, first acknowledges the challenges involved in pursuing individuals for corporate crimes, noting the difficulties in determining the culpability of high-level corporate executives who tend to be "insulated from the day-to-day activity in which the misconduct occurs." Yates then goes on to outline guidance designed to help prosecutors better address these challenges. In developing the guidance, the DOJ convened a working group of senior attorneys from the Justice Department as well as the U.S. Attorney community, and worked to identify areas in which it can amend its policies and practices to more effectively pursue individuals responsible for corporate misconduct. The guidance is explicit in its application to both criminal and civil corporate conduct cases, and outlines six key steps:

- 1. To qualify for cooperation credit, corporations must provide to DOJ all relevant facts relating to the individuals responsible for the misconduct.**
  - Companies will not receive *any* consideration for cooperation credit unless they identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. Only if and when a company meets that threshold requirement will it be eligible for consideration of cooperation credit, and the extent of that credit will depend on traditional factors such as the timeliness of cooperation, the diligence, thoroughness and speed of the internal investigation, the proactive nature of the cooperation, *etc.*
- 2. Both criminal and civil corporate investigations should focus on individuals from the inception.**

- Focusing on individuals at the outset accomplishes multiple goals. First, a corporation only acts through individuals so investigating individual conduct is the most efficient and effective way to determine the facts. Second, it increases the likelihood that individuals with knowledge will cooperate and "provide information against individuals higher up the corporate hierarchy." Third, it maximizes the chances that the final resolution will include civil or criminal charges against culpable individuals and not just the corporation.
- 3. Criminal and civil prosecutors handling corporate investigations should routinely communicate with one another.**
    - Criminal attorneys at DOJ handling corporate investigations should notify civil DOJ attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. If there is a decision to *not* pursue criminal action against an individual, criminal attorneys should confer with their civil counterparts to make an assessment under applicable civil statutes. Likewise, civil attorneys should promptly refer cases to criminal prosecutors if they believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry.
  - 4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.**
    - Absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. Any release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or U.S. Attorney.
  - 5. Corporate cases should not be resolved without a clear plan to resolve related individual cases. Declinations as to individuals in such cases must be memorialized.**
    - If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution memo should include a discussion of the potentially liable individuals, a description of 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.
    - If a decision is made at the conclusion of an investigation to not bring civil claims or criminal charges against the individuals who committed the misconduct, the reason for that determination must be memorialized and approved by the U.S. Attorney or Assistant Attorney General whose office handled the investigation.
  - 6. Civil DOJ attorneys should evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.**
    - Pursuit of civil actions against culpable individuals should not be governed solely by those individuals' ability to pay. Department attorneys should also consider factors such as whether the person's misconduct was serious, whether it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain judgement, and whether pursuing the action reflects an important federal interest.

The Yates Memo applies to all future investigations of corporate wrongdoing, and also applies to those matters pending as of September 9, 2015, to the extent practicable. While the Memo builds in sufficient safeguards for DOJ to fully exercise its discretion, the new requirements appear designed to better document and memorialize

the decisions that are made with regard to individual officers or employees who are involved in corporate misconduct cases.

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