

U.S. Justice Department Issues New Guidelines Prioritizing Individual Liability For Corporate Wrongdoing

Following numerous speeches over the past several months by senior Department of Justice officials on their focus on the prosecution of individuals in investigations involving corporate misconduct and the importance of corporations disclosing evidence against individuals to receive cooperation credit in criminal investigations, on September 9, 2015, the U.S. Justice Department issued new guidelines aimed at prioritizing the Department's focus on individual responsibility in both civil and criminal corporate wrongdoing cases. The guidelines appear to reflect a push by the Department to strengthen efforts at obtaining penalties – including criminal penalties – against responsible individuals in addition to those that may be sought against the firms and companies involved in misconduct. The guidelines supplement those set out in the 2007 memorandum from Deputy Attorney General Paul McNulty on “Principles of Federal Prosecution of Business Organizations.” These new guidelines are a response to criticism that the Department has not been aggressive enough in prosecuting individuals post-financial crisis and are a must know for companies and individuals engaged in ongoing Department investigations others who could be the subject of investigation in the future, including companies and individuals in heavily-regulated industries.

Six Steps To Strengthen The Pursuit of Individuals

The Department's new guidelines are set out in a September 9, 2015 memorandum from Deputy Attorney General Sally Quillian Yates (the “Yates Memorandum”). The Yates Memorandum describes six steps that the Department will take to “strengthen” its “pursuit of individual corporate wrongdoing,” acknowledging that some of these “reflect policy shifts.” Specifically:

- (1) In order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for 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 departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation.

- (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases.
- (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.

The measures directed “are steps that should be taken in any investigation of corporate misconduct.” These steps may have significant implications for companies and individuals subject to Department investigations in both the civil and criminal context.

Corporate Resolutions Require That The Department Consider Action Against Individuals

Among the most striking policy shifts announced in the guidelines is the requirement that part of the process of resolving claims against corporations entail formal consideration of potential charges against individuals. As part of any request for authorization to resolve a case against a corporation prior to commencing action against responsible individuals, Department attorneys are required to detail in writing the status of their investigation against the relevant individuals and their plan for bringing such matters to conclusion prior to the end of any statutory limitations period.

The guidelines make it more difficult and time-consuming to reach corporate resolutions by requiring approval at a senior level – from either a United States Attorney or an Assistant Attorney General – to resolve any civil or criminal case against a corporation without asserting civil claims or criminal charges “against the individuals who committed the misconduct.” The reasons for not doing so must also be memorialized in writing. As a practical matter, those guidelines could be read to forestall corporate resolutions until the Department is well along in its investigation of the relevant individuals.

It will now be very difficult to resolve any potential investigation or prosecution of individuals through a corporate settlement. Under the guidelines, “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.” Exceptions to this policy may only be occasioned by “extraordinary circumstances ... personally approved in writing by the relevant Assistant Attorney General or United States Attorney.”¹

The Guidelines Highlight The Need To Assess And Manage Conflicts of Interest In Corporate Investigations

Taken together, the Department's first two guidelines precipitate a need, whenever a Department investigation is commenced or thought to be likely, to carefully consider potential conflicts of interest between a company and its responsible employees.

¹ Approved departmental policies, such as the Antitrust Division's Corporate Leniency Program (which affords leniency to corporate directors, officers and employees who participate in a corporate confession), are unaffected by this policy shift.

The Yates Memorandum requires companies to provide “all relevant facts about individual misconduct” to the Department in order to be considered for any potential cooperation credit under the Principles of Federal Prosecution of Business Organizations. This creates a very substantial incentive for a company that identifies any actual or potential misconduct to disclose any potentially incriminating information to the Department. Indeed, by failing to do so a company would appear to forfeit any potential for cooperation credit.

The requirement to disclose information relevant to individual conduct goes beyond existing requirements and guidelines. The U.S. Sentencing Guidelines have historically equated cooperation with disclosure of information regarding the individuals responsible for criminal conduct.² Likewise, the Manual for U.S. Attorneys specifies that “[i]n gauging the extent of [a] corporation’s cooperation, the prosecutor may consider ... the corporation’s willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives.”³ The new guidelines, however, require the disclosure of “all” information relevant to the conduct of individuals “regardless of their position, status or seniority,” and describes this as a “threshold requirement” to obtaining cooperation credit, as opposed to one of several factors to be considered.

The focus on obtaining information from companies to facilitate actions against individuals heightens the importance of carefully evaluating and managing the conflict of interests between a company under investigation and individual corporate employees. The company’s interest will be in timely retrieving all relevant facts to be able to present to the Department to preserve the possibility of cooperation credit. At the same time, an individual employee may have an interest in preserving confidentiality for communications between such employee and counsel for the company. The Department’s mandate to focus on individual liability from the “inception of the investigation” means that the need to evaluate potential conflicts between the company and its employees will arise at an early stage of any investigation – at a time when the facts, and the existence (or not) or misconduct are unlikely to be well understood by the firm or its lawyers. The guidelines make clear that the early focus on individual conduct is intended both to “maximize the chances that the final resolution of an investigation uncovering ... misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well,” and that it is intended to facilitate obtaining “information against individuals higher up the corporate hierarchy.” This latter consideration appears to confirm that executives and senior managers are the primary targets of the Department’s new approach.

As a practical matter, we expect that these changes may lead an increasing number of individual corporate officers and employees to request individual representation at an early stage in at least any internal investigation in which the DOJ has expressed interest in order to obtain confidential advice regarding their conduct.

² See U.S.S.G. § 8C2.5(g), Application Note 13 (“A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient ... to identify ... the individual(s) responsible for the criminal conduct.”).

³ USAM 9-28.700.

The Guidelines Encourage Concurrent Civil and Criminal Investigations

Consistent with the expressed intention to facilitate resolutions against individuals, the guidelines encourage civil and criminal attorneys in the Department to work together and share information, noting that such attorneys “should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued.” In particular, the guidelines suggest that where a decision is taken not to pursue criminal action against an individual “due to questions of intent or burden of proof, for example,” the Department will consider the availability of civil remedies that may be subject to less onerous legal requirements – including, for example, the remedy of civil forfeiture.⁴

The guidelines make clear the Department’s focus on individual civil liability and that the decision on whether to bring civil claims against individuals should not be the product of a strict cost/benefit analysis. Even in cases where the possibility to recovery of civil penalties or damages is viewed as remote, the guidelines emphasize that civil claims should be considered “to hold the wrongdoers accountable and to deter future wrongdoing.” Department policy now establishes that the “twin aims” of “recovering as much money as possible, on the one hand, and of accounting for and deterrence of individuals, on the other ... are equally important.” Accordingly, “[p]ursuit of civil actions against culpable individuals should not be governed solely by those individuals’ ability to pay.” The guidelines signal that the trend will continue of the Department pursuing civil actions against individuals where the proof is not present to support criminal charges.

Similar Steps Are Being Taken By Authorities Outside The United States

The Department’s guidelines reflect an increased focus on individual liability not only in the U.S. but also internationally. Since the financial crisis, regulators and criminal authorities have increasingly viewed enforcement action against individuals as a means for deterring corporate misconduct that is often more effective than enforcement action against companies.

For example, in the U.K., draft rules published at the end of 2014 by the Financial Conduct Authority and Prudential Regulatory Authority, and set to take effect by March 2016, will substantially increase potential individual liability for individuals employed at banks and other financial services firms.⁵ A proposed amendment to the Financial Conduct Authority’s Enforcement Guide explains that the agency “believes that deterrence will most effectively be achieved by bringing home to such individuals the consequences of their actions.” The U.K. authorities have increasingly dedicated resources to the criminal prosecution of individuals involved in financial crimes in the U.K., such as the recent prosecution and conviction of former derivatives trader Tom Hayes for his role in manipulating the London Interbank Offered Rate – a conviction that led to an unprecedented 14-year prison sentence.

⁴ See 18 U.S.C. § 981.

⁵ PRA CP28/14, FCA CP14/31.

In the coming months and years, we anticipate regulators and criminal authorities in other jurisdictions to adopt a stance similar to the Department's with respect to the investigation and prosecution of corporate misconduct, particularly in the financial services sector.

Practical Considerations Of The Guidelines

In light of the Yates Memo, companies and their employees engaged in Department investigations or matters that may lead to such investigations, should consider the following:

- Companies seeking credit for cooperation with the Department should ensure absolute transparency regarding the roles of corporate employees actually or potentially involved in corporate wrongdoing. In particular, the guidelines suggest that the Department will not tolerate efforts by companies to shield senior employees from personal liability as part of any investigation.
- Early consideration should be given to potential conflicts of interest between companies and their employees – both in the context of Department investigations, as well as in internal investigations that may potentially lead to a subsequent Department investigation.
- Senior corporate employees should take steps to ensure that both their own conduct, and that of the employees that they supervise, is lawful and in accordance with Company policies and expectations and – when their conduct is called into question – should consider the need to request individual counsel. While the Department's increased focus on individual liability extends to any employee, regardless of seniority, it is clear that the Department's intention is to facilitate charges or claims at the highest possible level of seniority in order to deter corporate misconduct.

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If you have any questions, please feel free to contact any of your regular contacts at the firm. You may also contact our partners and counsel listed under "[White-Collar Defense, Securities and Enforcement and Internal Investigations](#)" located in the "Practices" section of our website at <http://www.clearygottlieb.com>.

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