



DOJ Focuses on Individuals in Corporate Wrongdoing

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The U.S. Department of Justice (“DOJ”) has a new view in cases involving corporate wrongdoing (including fraud and abuse, qui tam, and similar matters). And its gaze is focused squarely on rooting out and punishing the individuals involved. The policy shift largely was driven by public outcry over the scant number of Wall Street executives prosecuted in the wake of the financial crisis. But the changes apply to DOJ’s involvement in health care matters just the same.

United States Deputy Attorney General Sally Q. Yates issued a memo last fall directing increased focus on individual culpability in matters of corporate wrongdoing. The memo highlights six policy directives – some existing, some new – targeting individuals involved in corporate wrongdoing, in addition to fines and sanctions against the corporation itself. Yates said individual accountability is important to deter future illegality, incentivize good corporate behavioral, ensure proper responsibility, and promote public confidence. Many would say the last is first: DOJ has been criticized roundly for the lack of individual prosecutions in the wake of the financial crisis.

The policy directive – “Individual Accountability for Corporate Wrongdoing” – is addressed to all DOJ attorneys (including the FBI and United States bankruptcy Trustees). It applies equally to civil and criminal investigations and enforcement proceedings. More recently, the Department implemented corresponding revisions to the U.S. Attorneys’ Manual sections on commercial litigation (USAM 4-4.00) and Principles of Federal Prosecution of Business Organizations (USAM 9-28.000).

Six Policy Directives

The Yates Memo sets out six policy directives:

- 1) **Identifying Individuals Now a Threshold for Cooperation Credit.** In the past, DOJ has given *partial* cooperation credit to corporations based on disclosure of wrongdoing, even without complete details about the individuals involved. That’s over. The new policy requires complete disclosure of individuals as a “threshold requirement” for *any* cooperation credit. And it applies to “all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority.” Or as Deputy AG Yates told the NEW YORK TIMES: “We’re not going to be accepting a company’s cooperation when they just offer up the vice-president in charge of going to jail.”

As a corollary, DOJ is instructing its attorneys to investigate and build cases against individuals from the start and to include a “company’s continued cooperation with respect to individuals” as a term of any plea or settlement agreement.

- 2) **Investigations Focus on Individuals from Inception.** DOJ will focus on individual culpability from the start of any investigation. The Yates Memo cites advantages, among them: getting at the “full extent” of the misconduct and increasing the likelihood of individual prosecutions. Mostly importantly, it increases the likelihood of involved individuals giving up targets “higher up the corporate hierarchy.” “Flipping” witnesses to walk-up a conspiracy or organized crime is an established prosecutorial tactic.
- 3) **Criminal / Civil Staff Collusion.** DOJ will increase communication and cooperation between staff in the criminal and civil divisions. The move is expected to lead to better coordination, allocation of consequences to the most appropriate “venue”, and more parallel proceedings.
- 4) **No Protection by Settlement.** “Absent extraordinary circumstances,” corporate resolutions cannot provide protection to individuals – whether dismissal, immunity, or release – without high-level written approval.
- 5) **No Corporate Resolution without Prosecutorial Plan for Individuals.** If individual prosecutions have not been brought or otherwise resolved by the time of entity resolution, any corporate settlement (or similar) memo must include a detailed prosecution plan for the individuals involved in the wrongdoing. While tolling agreements remain an exception, they now must account for individuals as well.
- 6) **Civil Enforcement Beyond Individual’s Ability to Pay.** An individual defendant’s ability to pay fines or restitution no longer will be a principal determinant in civil enforcement charging decisions, having been demoted in the relative hierarchy of considerations.

Take-Aways

Business entities and their counsel can expect at least six consequences, as DOJ implements the Yates Memo.

- 1) **Further Fracturing the Defense.** The policy directives increase the “fracturing” among the defense, sharpen divergent interests and increase the number of independent players. That may pose additional barriers to corporate internal investigations and may require further information barriers in connection with them.
- 2) **Upjohn Warnings More Important than Ever.** *Upjohn* warnings to individuals involved in a corporate investigation now are even more important. The increased prosecutorial emphasis on individual liability magnifies the need to ensure that individual witnesses understand that investigative counsel represents the company and not them individually.
- 3) **Separate Counsel, Earlier.** Similarly, the policy focus makes it more likely that involved individuals will require separate counsel and at an earlier stage in the investigation and proceedings. The window for “carrying” an employee under counsel’s corporate representation is far narrower.
- 4) **Indemnification Provisions & Defense Costs.** Correspondingly, businesses will need to re-evaluate their indemnification provisions. Defense costs will increase.

- 5) **Even More Whistleblowing.** The new focus – with its more explicit objective of flipping witnesses to walk up the corporate chain – incentivizes individuals to “be the first in line” to report wrongdoing and /or cut deals with the prosecution.
- 6) **More Parallel Proceedings.** The Yates Memo expressly lauds the “parallel development of civil and criminal proceedings.” It will result in more parallel proceedings as an investigation plays out with some civil and some criminal dispositions for different players.

Portions of the Yates Memo, especially those conditioning *any* cooperation credit on giving up individuals, are reminiscent of prior DOJ “cooperation conditions” that sparked controversy. The 1999 “Holder Memo” suggested waiver of the attorney-client privilege and work-product immunity as a guideline for evaluating cooperation; the 2003 “Thompson Memo” made it mandatory and ultimately lead to Congressional calls for reform. The Yates Memo is careful not to impinge upon the attorney-client privilege, but also is clear that Justice will view dimly any obstructionist, non-substantial assertion of the privilege.

The Yates Memo is available here: <http://www.justice.gov/dag/file/769036/download>

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