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INSIGHT: Individuals Remain Focus After DOJ Revisions to Yates Memo on Individual Accountability



By JOHN C. RICHTER, BRANDT LEIBE, AND WILLIAM S. McCLINTOCK

Deputy Attorney General Rod J. Rosenstein [announced](#) Nov. 29, 2018, that the Department of Justice had completed its review and revision of its policies governing efforts to hold individuals accountable for corporate misconduct.

The revisions modify policies announced in Sept. 9, 2015, by then-Deputy Attorney General Sally Yates in a [policy memorandum](#) entitled “Individual Accountability for Corporate Wrongdoing.” (See redlined and annotated version of the Justice Manual revisions [here](#).)

Although the revisions clarify the steps companies must take to obtain cooperation credit and grant Department attorneys additional discretion when resolving civil matters, they reveal more continuity than rupture with prior policy and underscore the Department’s focus on individual accountability.

Even after the policy revisions, companies seeking cooperation credit will continue to be well advised to document and describe their efforts to identify relevant facts about responsible individuals and to explain clearly the burdens or obstacles involved in obtaining additional information about more individuals—particularly employees whose involvement might be less significant.

Beyond the cooperation context, the policy revisions reinforce how critical it is for companies to engage with government lawyers actively and to maintain clear lines of communication throughout an investigation.

September 2015: Yates Memorandum The “Yates Memo” expressed the view that pursuing culpable individuals is one of the most effective ways to deter corpo-

rate misconduct and announced several policies to heighten the Department’s focus on individual accountability.

The Yates Memo’s most significant component was its all-or-nothing approach to cooperation credit. Per the Yates Memo, corporations would not receive any cooperation credit unless they provided the Department with “all relevant facts about the individuals involved in corporate misconduct.”

The Yates Memo also extended the focus on individual accountability to civil enforcement. The policy applied the same “all or nothing” analysis for cooperation credit to civil cases, required that Department lawyers consider factors beyond an individual’s ability to satisfy a monetary judgment in determining whether to sue, and directed that corporate resolutions should not release individuals from liability, absent extraordinary circumstances.

November 2018: Revisions to Policies Governing Corporate Cooperation Credit A close examination of the revised policies reveals that little has changed with respect to the Department’s focus on individuals in criminal investigations. The revised cooperation credit policy remains “all or nothing,” and any company seeking credit must “identify every individual who was *substantially* involved in or responsible for the criminal conduct, regardless of their position, status or seniority, and provide all relevant facts relating to that misconduct.”

While the prior policy required that corporations provide “all relevant facts about the individuals involved in the corporate misconduct,” Deputy Attorney General Rosenstein clarified that the Department is now focused

on individuals who played “significant role[s] in the setting a company on a course of criminal conduct.”

In the civil context, the “all or nothing” rule for cooperation credit remains in effect for information regarding senior employees and board members, but the Department’s civil attorneys now will have discretion to award partial cooperation credit to companies that have not identified or provided facts about lower level employees.

The [Justice Manual](#) now states that if a company wishes “to obtain maximum cooperation credit, [it] must do a timely self-analysis and be proactive in voluntarily disclosing wrongdoing and identifying all individuals substantially involved in or responsible for the misconduct, without making the government compel such disclosures with subpoenas or other investigative demands.”

In his remarks, Rosenstein indicated that partial cooperation credit may be possible by making a voluntary disclosure or providing other meaningful assistance without identifying and providing all facts about non-managerial employees involved in wrongdoing.

November 2018: Granting Additional Flexibility to Civil Attorneys The Yates Memo provided that “pursuit of civil actions against culpable individuals should not be governed solely by those individuals’ ability to pay” and that Department attorneys should consider additional “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 a judgment, and whether pursuing the action reflects an important federal interest.”

In contrast, Rosenstein announced that the Department “generally do[es] not want attorneys to spend time pursuing civil litigation that is unlikely to yield any benefit,” and stated that civil attorneys should put greater emphasis on an individual’s ability to pay in deciding whether to sue.

The revised Justice Manual also permits greater flexibility to release individuals civilly. Although the Yates Memo stated that absent extraordinary circumstances, corporate resolutions should not release individuals from criminal or civil liability, the Justice Manual now states that corporate settlements may release civil claims against individuals if the Department attorney overseeing the matter documents a basis for concluding that further action against individuals is unwarranted and obtains supervisory approval. Releases of individuals in connection with a criminal resolution remain prohibited absent “extraordinary circumstances.”

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