
DOJ Outlines New Policy Regarding White Collar Cases Against Individuals

SEPTEMBER 10, 2015

The Department of Justice has released a new policy intended to further the Department's effort to hold individuals accountable for corporate wrongdoing. The policy was laid out in a September 9, 2015 memorandum authored by Deputy Attorney General Sally Quillian Yates. The new policy is more than a clarification of existing practices; it constitutes the most significant new measures taken since the Department intensified its focus on pursuing white collar cases against individuals last year. The policy, and in particular the requirement that corporations provide the Department with "all relevant facts relating to the individuals responsible for the misconduct" in order to receive *any* cooperation credit, could have significant implications for how corporations investigate potential misconduct and share factual findings with the Department.

The Policy

The new policy has six components:

1. **To be eligible for *any* cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.** This is the most significant aspect of the new policy for corporations and their attorneys. The new policy requires a corporation to investigate all facts relevant to individual misconduct, and then provide all such facts about individuals who engaged in misconduct to the Department, as a "threshold requirement" in order to obtain cooperation credit. This "condition of cooperation" thus appears designed to impact the scope of both the corporation's investigation and its ensuing disclosures to the Department.
2. **Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.** Prosecutors are instructed to prioritize cases against individuals early on in an investigation. Given that all corporate conduct is carried out through the corporation's individual agents, the practical impact of this mandate is somewhat unclear, but it may cause prosecutors to look for evidence of intent—an essential element of a case against an individual that is often the last piece of the puzzle in a corporate case—early on.
3. **Criminal and civil attorneys handling corporate investigations should be in routine**

communication with one another. Civil and criminal attorneys are to communicate early on in an investigation. Civil attorneys and prosecutors are also supposed to discuss civil referrals when a prosecutor decides not to pursue a criminal case due to challenges in showing intent or meeting burdens of proof, and civil attorneys should involve prosecutors when they believe that an individual identified in a corporate investigation should be criminally prosecuted.

4. **Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.** Under the new policy Department attorneys may not agree to a corporate resolution that includes an agreement to dismiss charges against, or immunity for, individual officers or employees. The policy, which also applies to the release of civil claims against individuals, allows for exceptions based on “extraordinary circumstances or approved departmental policy such as the Antitrust Division’s Corporate Leniency Policy.”
5. **Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.** In cases where the investigation of individuals will continue after a resolution, government attorneys’ internal memoranda are to include a discussion of the potentially liable individuals and a plan to bring the matter to resolution before the statute of limitations expires. Notably, if government attorneys ultimately decide not to prosecute such individuals or charge them civilly, they must memorialize that determination and have it approved by the United States Attorney or Assistant Attorney General or their designees.
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 new policy states that pursuit of civil actions against individuals “should not be governed solely by those individuals’ ability to pay,” but instead Department attorneys should consider the seriousness of the offense, whether it is actionable, whether the admissible evidence will probably be sufficient to sustain a judgment, and whether pursuing the action represents an important federal interest.

Issues Going Forward

Importance of Thorough, Independent Investigations. As a result of prior Department policies, corporations have long had incentives to provide the government with information about individuals who engaged in misconduct. The new policy makes those incentives even stronger and reinforces that corporations and their boards must carry out thorough investigations when they become aware of misconduct and, particularly where the misconduct rises into the ranks of management, take measures to ensure those investigations are robust and complete. The Department will likely examine the nature and scope of the corporation’s investigation—as well as the persons responsible for conducting and supervising it—in considering whether the corporation has met this new threshold requirement for cooperation credit.

Policy Compliance and Conditional Agreements. When a corporate resolution takes place before the Department’s investigation of individuals is complete—as it often does—the Department will in

many cases have to rely on a company's assurance that all relevant information has been provided. The policy leaves open the question of what remedies the Department might seek if it later doubts a company's assertion that all relevant information was handed over. In practice, the Department could attempt to implement protections in the resolutions themselves—for example, stipulated penalties or revocation if a company's promise of completeness is later proved wrong, similar to provisions currently contained in non-prosecution and deferred-prosecution agreements.

The Attorney-Client Privilege. The new policy does not explicitly address the attorney-client privilege. However, Section 9-28.710 of the U.S. Attorneys' Manual has for years provided that prosecutors "should not ask" for waivers of "core" attorney-client communications or work product. The new policy appears to suggest that this provision is undisturbed, and indicates that the requirement of full cooperation exists "within the bounds of the law and legal privileges, see USAM 9-28.700 to 9-28.760." Notwithstanding this general principle, one can easily imagine situations in which legal advice provided to an executive may be *highly* relevant to establishing either good faith or bad faith. Clarification of whether such core attorney-client communications are carved out of the requirement of providing all relevant facts will likely be necessary. If such clarification does not come from the Department's leadership in a global way, it will effectively be given out by individual prosecutors on a case-by-case basis.

Resolving Cases With Limited Evidence of Intent. Demonstrating *mens rea* is one of the most difficult aspects of a white collar case. In practice, corporations have been willing to resolve cases with the Department despite limited evidence of bad intent by their own personnel because the reputational and financial costs of litigating such cases are often simply too high. The new policy may complicate that analysis. Where the individuals who appear to have engaged in misconduct have failed to record their fraudulent intent in writing (as is often the case) and have refused to speak to company counsel, the company may have little relevant evidence concerning the Department's putative targets. The new policy appears to limit a corporation's obligations to information reasonably within its control, but whether a company in such a position can still obtain the full benefits of cooperation will need to be explored.

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