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Justice Department Targets Individuals in Corporate Wrongdoing

A recent memorandum issued by Deputy U.S. Attorney General Sally Quillian Yates described a shift in policy that makes it clear the Department of Justice intends to hold individuals responsible for corporate wrongdoing. Although all the implications are unclear, the Department's enforcement emphasis is sure to heighten companies' obligation to conduct thorough investigations in response to allegations of wrongdoing.

Six 'Key Steps' and Their Implications

The memorandum from the Justice Department's No. 2 official, dubbed the Yates Memo, was sent to all attorneys at the Department of Justice, including every U.S. Attorney's Office. It set forth policies, effective immediately, for investigating, charging and resolving cases involving corporate wrongdoing.

The memo outlined six "key steps" for department agents and prosecutors to follow when pursuing "individuals [allegedly] responsible for corporate wrongs." Those steps are outlined below, along with possible implications for companies and executives facing Justice Department scrutiny.

1. Cooperation means full disclosure of individuals' involvement.

The Yates Memo states that to receive any cooperation credit from the Department of Justice in a criminal or civil investigation, companies under investigation "must completely disclose ... all relevant facts about individual misconduct," including "all non-privileged evidence implicating those individuals." Some legal experts immediately questioned what constituted "all relevant facts," prompting the head of the Department's Criminal Division, Assistant Attorney General Leslie Caldwell, to clarify that companies must "work affirmatively" to uncover information regarding individuals involved in the misconduct and should identify such individuals and evidence of their

misconduct in any disclosures. Caldwell went on to explain that as long as companies conduct a thorough investigation into alleged corporate misconduct, identifying individuals as part of any disclosure is not necessarily a prerequisite to garnering cooperation credit. In some cases, Caldwell conceded, there simply may not be evidence regarding individual misconduct to disclose.

Regardless, the Yates Memo makes clear there is increased pressure on companies to identify individual bad actors and to turn over all evidence the company has against those individuals as part of any disclosure in order to receive cooperation credit. To obtain such information of individual misconduct, companies may benefit from conducting prolonged internal investigations to ascertain who is responsible for corporate wrongdoing before making disclosures. Given the Department's focus on individual wrongdoing, the interests of executives may differ dramatically from those of the company facing scrutiny and could chill the willingness of executives to self-report wrongdoing. It is further foreseeable that executives and other employees may be less forthcoming during investigations and/or that corporate decision-makers may be less inclined to make voluntary disclosures if there is an increased likelihood that the information may be used against them individually, potentially complicating internal investigations.

2. Investigations should focus on individuals from the start.

Federal agents and prosecutors are encouraged to target individuals early on in criminal and civil investigations to "ferret out the full extent of corporate misconduct," to increase cooperation and whistleblowing by lower-level employees, and to increase the likelihood of "civil or criminal charges against ...culpable individuals..." This directive implicitly endorses a bottom-up approach for corporate investigations, with the goal of securing criminal charges and/or civil penalties against high-ranking executives and other employees responsible for corporate wrongdoing.

The policy places a heightened duty on in-house and outside counsel conducting internal investigations to provide clear *Upjohn* warnings during witness interviews. Future prosecutions will likely lead to attorney-client privilege challenges by executives and employees who provide information to outside counsel during the internal investigation believing (or claiming) the information was privileged. Moreover, the policy may lead to more executives and/or employees demanding their own counsel during investigations, inhibiting the fact-gathering process and potentially resulting in the company having to cover the associated attorney fees (depending on the circumstances).

3. Increased civil/criminal coordination is necessary.

The policy places a renewed emphasis on early and frequent communication between the civil and criminal arms of the Justice Department while conducting corporate investigations, with the goal of maximizing criminal and civil penalties against the individuals responsible for corporate wrongdoing.

While the Department has always favored parallel criminal/civil investigations, the Yates directive enthusiastically encourages the use of civil investigations to help build criminal cases against individuals and vice versa. Going forward, companies under civil investigation by the Justice Department should be mindful of the potential for a case to turn criminal if incriminating evidence against the company and/or its employees/executives is discovered.

4. Corporate resolutions will not provide immunity for individuals.

The policy prohibits the practice of providing immunity to individuals as part of a criminal or civil corporate resolution “absent extraordinary circumstances.” The release of civil liability or grant of immunity from criminal prosecution with respect to any individual must now be approved in writing by the relevant Assistant Attorney General or U.S. Attorney. The unintended consequence of this may be reluctance on the part of corporate decision-makers to enter into any sort of settlement agreement with the Justice Department on behalf of the company, and could lead to more protracted investigations and litigation.

The policy makes clear that individuals may no longer be able to rely on corporate settlements to protect them against individual liability, either criminal or civil. As a result, corporate executives may demand greater protection under their company’s directors and officers (D&O) insurance policy, particularly excess Side A policies to provide catastrophic protection for corporate executives, which typically has fewer exclusions and no retention or deductible. Such policies may be triggered when a company decides to withhold indemnification from executives suspected of wrongdoing or when a company is unable to fulfill its obligations due to financial difficulties.

5. Corporate resolutions must provide a clear plan for resolving potential cases against individuals.

At the time of corporate resolution, Justice Department agents and/or prosecutors must memorialize their analysis of other “potentially liable individuals” and provide an action plan for resolving the investigation(s) against those individuals prior to the close of any statute of limitations. This means prosecutors may no longer rely solely on corporate resolutions, and it imposes on them the extra step of explaining why no individuals are being criminally prosecuted and/or pursued for civil sanctions before closing their case against the company. Whether this will result in a major shift from current practice is unclear.

6. Pursuit of civil penalties should not be dictated by an individual’s ability to pay.

The government’s pursuit of “civil actions against culpable individuals should not be governed solely by those individuals’ ability [or inability] to pay.” This means that practical considerations of collectability will not necessarily determine whether the government seeks civil monetary sanctions

against individuals, and could give rise to an increase in civil actions against individuals, including executives, for corporate wrongdoing.

What This Means to You

It is hard to say whether this policy shift will actually result in criminal prosecutions of and/or civil penalties against individuals responsible for corporate wrongdoing. The policy certainly heightens a company's obligation to conduct thorough investigations in response to allegations of wrongdoing and, if making voluntary disclosures to government entities, to provide detailed information regarding culpable individuals (if found) to garner cooperation credit. As discussed above, this may lead to more prolonged internal investigations, companies may adopt an all-or-nothing approach to cooperation, and it may reduce enthusiasm for self-reporting.

Another key takeaway from the Yates Memo is that the Justice Department will no longer enter into settlement agreements with corporate bad actors without closely examining whether individuals were ultimately responsible for the conduct and should be pursued both criminally and civilly. Corporate executives who in the past could insulate themselves from criminal and civil liability by entering into large monetary settlements with guarantees of individual immunity will have trouble doing so in the future.

Husch Blackwell's Securities & Corporate Governance team provides more detail in a companion alert titled "Managing Risk Through D&O Insurance in Light of the Yates Memo."

Contact Us

Husch Blackwell's White Collar, Internal Investigations & Compliance team closely follows government policy changes. For more information on the Yates Memo or the impact of Justice Department investigations, contact team members Matt Schelp or Mark Milton.