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New Justice Department Guidance on Individual Accountability

Analysis of the Justice Department's New Guidance on Individual Liability in Matters of Corporate Wrongdoing

SUMMARY

On September 9, 2015, the Department of Justice released new guidance addressing the accountability of individual employees in civil and criminal investigations of corporate wrongdoing. Most notably, in order to qualify for any cooperation credit, new Department policy requires companies to provide investigators with “all relevant facts relating to the individuals responsible for the misconduct.” The new guidance also instructs Department attorneys to focus on the potential liability of individuals at the outset of corporate investigations and not settle matters with a corporation without a clear plan to resolve related individual cases.

BACKGROUND AND DISCUSSION

Beginning in 1999, successive Deputy Attorneys General have issued memoranda outlining general principles for making corporate charging decisions. These memoranda ultimately resulted in the Department's “Principles of Federal Prosecution of Business Organizations,” which outlines considerations for prosecutors in making charging decisions and determining when corporations should be given credit for cooperation with Department investigators. The Department's new guidance supplements these principles.

The September 9 memorandum maintains that “[o]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing,” because “it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper

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parties are held responsible for their actions, and it promotes the public's confidence in our justice system.”

The memorandum provides that in large corporations, “it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt,” which is “particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs.” The new guidance outlines “steps that should be taken in any investigation of corporate misconduct,” which are designed to “ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.” The guidance applies to all future investigations of corporate conduct and to any pending investigations, to the extent practicable.

The memorandum outlines six steps that Department investigators are expected to take when investigating corporate conduct:

- (1) First, companies will not be eligible for **any** cooperation credit in settlements or plea agreements unless they provide the Department with “all relevant facts about the individuals involved in corporate misconduct.” This new policy requires companies to “identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct.” Deputy Attorney General Sally Yates, the author of the memorandum, characterized the new requirement in a speech given the day after the memorandum was released as “all or nothing,” with “[n]o more partial credit for cooperation that doesn't include information about individuals.” This requirement applies to both criminal and civil investigations.

The policy puts the onus on the company to identify any individuals involved; if a corporation “declines to learn of such facts,” it will not be eligible for cooperation credit. Deputy Attorney General Yates stated that “we're not going to let corporations plead ignorance. If they don't know who is responsible, they will need to find out. If they want any cooperation credit, they will need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals.” She explained that the Department is “not asking companies to ‘boil the ocean’ . . . and embark upon a multimillion-dollar investigation every time they learn about misconduct,” but rather that investigations be “thorough” and “tailored to the scope of the wrongdoing.” She advised corporate counsel to consult with prosecutors about the scope of what is required in each case.

Department attorneys will compare information provided by the company with information obtained during the course of the Department's own investigation, “in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.”

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The obligation to provide facts about responsible individuals will be ongoing. As a condition of settlement, corporations will be expected to continue to provide relevant information post-resolution, although there is no real detail on what that post-resolution review might entail. Failure to meet this continuing obligation may be considered a material breach of any agreement and grounds for revocation or stipulated penalties.

- (2) Second, the guidance instructs both criminal and civil attorneys in the Department to focus on individual liability from the inception of an investigation.
- (3) Third, the guidance calls on criminal and civil attorneys in the Department handling corporate investigations to be in routine communication with one another. Criminal attorneys are instructed to advise civil attorneys as early as permissible of potential individual civil liability, even if criminal liability continues to be sought. If criminal charges are not pursued against an individual, civil attorneys should consider bringing civil charges. Likewise, civil attorneys are expected to advise their criminal counterparts if an investigation reveals that individuals may be subject to criminal liability.
- (4) Fourth, “absent extraordinary circumstances,” settlements with corporations will not provide protection from criminal or civil liability for any individuals, such as agreements to dismiss charges, provide immunity for individuals, or release claims in civil cases. The guidance instructs Department attorneys to preserve the ability to pursue culpable individuals as part of corporate settlements.
- (5) Fifth, and relatedly, Department attorneys should not resolve corporate cases without a clear plan to resolve related individual cases. If Department investigators decide not to bring charges against individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the relevant United States Attorney or Assistant Attorney General.
- (6) Sixth, when considering whether to bring suit against an individual, civil attorneys in the Department are directed to consider factors beyond an individual’s financial resources to pay a judgment. These factors include whether the person’s misconduct was serious, whether there is sufficient evidence to obtain a judgment, and whether pursuing the action reflects an important federal interest. The memorandum recognizes that although “certain cases against individuals may not provide as robust a monetary return on the Department’s investment,” “pursuing individual actions in civil corporate matters will result in significant long-term deterrence.”

IMPLICATIONS AND PRACTICAL RECOMMENDATIONS

Although a number of commentators have questioned whether the guidance will result in any meaningful change, the guidance reflects a singular focus by the Department on individual liability that may result in

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the charging of individuals in certain borderline cases where the Department may have declined to bring charges previously.

The guidance and Deputy Attorney General Yates' related speech recognize that because corporations cannot commit crimes except through individuals, individuals should ordinarily be charged if charges are brought against the company.

In light of the new guidance, companies under investigation by the Department of Justice may want to consider the following:

- **Bring in Counsel for Individuals Early in the Process.** In light of the renewed focus on individual liability, companies under investigation should assess early whether to recommend separate counsel for any individuals whom the government may view as potentially subject to individual liability. The joint representation of such persons by company counsel may be viewed by the Department as reflecting an insufficient commitment to cooperating with the Department's investigation. Likewise, it may be advisable to carefully review whether an individual employee should rely on "pool" counsel, who represents several employees at once, as the risk that conflicts will develop may be increased.
- **Involve Decision Makers Without Connections to the Implicated Conduct.** As any internal investigation progresses, decision makers without any connection to the implicated conduct should be brought in to make decisions about the level of cooperation with Department investigators and what information must be turned over. If necessary, decisions can be made by disinterested board members, such as those on an audit committee. This will help avoid claims by Department attorneys that individuals with potential liability were involved in decisions related to the company's cooperation with the Department.
- **Discuss the Scope of Relevant Issues and the Investigative Plan with Investigators.** Counsel conducting an internal investigation at the request of the Department should seek to understand the expectations of Department attorneys in each case. Because the new policy requires that companies turn over "all relevant facts about the individuals involved in corporate misconduct," counsel must understand the scope of the issues about which the Department expects to receive relevant facts. Ensuring open lines of communication with Department attorneys will allow counsel to better understand the Department's expectations and avoid claims that the company withheld relevant facts or did not probe relevant areas.
- **Companies Should Consider How to Provide Information About Relevant Individuals Without Admitting Liability.** The new policy requires companies to "identify all individuals involved in or responsible for the misconduct at issue." Companies need to be cognizant that specifically attributing "responsibility" or even "involvement" to individuals for certain conduct may be seen as an acknowledgment that those individuals (and thus the company) are liable for that conduct. In situations where the company wishes to preserve the argument that the conduct at issue does not give rise to criminal liability, companies will need to express clearly to Department attorneys that although the company is "providing all relevant facts with respect to individuals" under investigation, the company is not admitting that their conduct was criminal.

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