DOJ Announces Revisions to Yates Memorandum Policy

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On November 29, 2018, in a speech at the 35th International Conference on the Foreign Corrupt Practices Act, U.S. Deputy Attorney General Rod Rosenstein announced the Department of Justice's (DOJ or the Department) revised policy concerning individual accountability. The revised policy maintains much of the guidance in its predecessor policy — the DOJ Memorandum on Individual Accountability for Corporate Wrongdoing, referred to as the Yates Memorandum — but departs from the prior policy by no longer requiring companies to provide "all" evidence to obtain cooperation credit in criminal matters and by similarly reducing companies' self-disclosure burdens in civil matters.

The revised policy, consistent with the prior policy, continues to prioritize individual accountability for wrongdoing. As Rosenstein explained in the speech — and on a number of other occasions — "the most effective deterrent to corporate criminal misconduct is identifying and punishing the people who committed the crimes." Accordingly, the revised policy requires that, absent extraordinary circumstances, corporate resolutions not seek to protect individuals from criminal liability. Relatedly, the revised policy continues to require that corporations identify individuals who are responsible for the subject conduct to receive credit for cooperation.

But the new approach departs from the Yates Memorandum by reducing the burden companies bear when seeking credit for cooperation in criminal cases. Specifically, the Yates Memorandum required corporations to "provide to the Department *all* relevant facts about the individuals involved in corporate misconduct" if they wished to receive *any* cooperation credit. The revised policy no longer requires identification of "all" individuals involved to receive cooperation credit, and instead allows companies and the DOJ to focus resources on identifying those who were "substantially involved in or responsible for" the potential criminal misconduct. Rosenstein explained that as a practical matter, to require a corporation to locate and report every person involved in alleged misconduct, particularly in cases where the alleged violations took place throughout the company over a long period of time, would be a waste of resources and unnecessarily delay resolutions. Indeed, he noted that the prior policy was not strictly enforced in this respect, for this and other reasons. It thus would appear that the revised policy formalizes existing practice.

Furthermore, the revised policy allows for cooperation credit in criminal cases even where a company "is unable to identify all relevant individuals or provide complete factual information despite its good faith efforts to cooperate fully" if it can explain the restrictions it is facing to the prosecutor. On the other hand, where a company "declines to learn such facts or to provide the Department with complete factual information" it will receive no credit and, as Rosenstein's speech emphasized, concealment of misconduct or a lack of good faith representations to the Department also will preclude any credit.

The revised policy also differs from the Yates Memorandum in its approach to civil investigations. The Yates Memorandum essentially required the same level of cooperation from companies in civil investigations as in criminal investigations. The revised policy, by contrast, provides credit for at least some cooperation in a civil case where a company "identif[ies] all wrongdoing by senior officials, including members of senior management or the board of directors." If a company wants maximum credit in a civil case, it must "identify every individual person who was substantially involved in or responsible for the misconduct," but the policy restores the Department's ability to grant at least some credit in circumstances where it would previously have been unavailable.

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As in criminal matters, when a company conceals misconduct by senior officials, cooperation credit is precluded. As Rosenstein explained in his speech, the revised policy allows flexibility that does not exist on the criminal side. He noted that the goal of affirmative civil enforcement cases is to recover money, and therefore the government must use its resources efficiently in pursuing them. According to Rosenstein, prior "all or nothing" policy was not productive in civil cases, and was not strictly enforced.

The revised policy, in contrast to the Yates Memorandum, also returns discretion to civil Department of Justice lawyers to negotiate civil releases for individuals who do not warrant additional investigation as part of corporate civil settlement agreements, with appropriate supervisory approval, and to consider an individual's ability to pay in deciding whether to seek a civil judgment. These measures similarly recognize the practical need for the responsible government agencies to have discretion to cease pursuit of litigation unlikely to yield a benefit, or to resolve litigation efficiently without requiring further investigation of individual wrongdoing.

Taken together, these policy revisions signal that the DOJ intends to use its resources to focus its attention on senior corporate personnel and/or individuals who were substantially involved in misconduct, and to continue to require companies to disclose the facts regarding their complicity. The Department does not appear to be backing away from its prior focus on individual prosecutions; indeed, Rosenstein made clear in his November speech that the pursuit of responsible individuals will be a "top priority," and that individual cases may be more effective than corporate prosecutions, where the deterrent impact is "attenuated" and where innocent employees and shareholders may be unfairly penalized. It remains to be seen whether that shift — described largely as making the policy consistent with practice — will truly impact the size or burden of investigations that companies must undertake to cooperate effectively in civil and criminal cases. But the revisions are consistent with a number of this Department's recent policies — such as the "Piling On" policy and last year's November 29, 2017, FCPA Policy release — that are intended to facilitate cooperation and remediation, and to ensure that cooperation, even if somewhat more limited, is rewarded.

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