

ALERT

DOJ Doubles Down on Individual Accountability for Corporate Wrongdoers

November 30, 2016

WHAT: Deputy Attorney General Sally Q. Yates made public remarks reiterating DOJ's policy of holding individuals accountable for corporate wrongdoing. DOJ also unveiled a new website with guidance about the policy.

WHEN: Both the remarks and the availability of the website occurred on November 30, 2016.

WHAT DOES IT MEAN FOR INDUSTRY: The thrust of the Yates Memo is not going away, as one year later DOJ sees it as a success. As a result, DOJ will continue to focus on individuals in its criminal and civil prosecutions and demand companies turn over *all* non-privileged information about culpable individuals in order to receive *any* cooperation credit.

OUR ANALYSIS:

On November 30, 2016, Deputy Attorney General (DAG) Sally Q. Yates delivered remarks attempting to respond to concerns raised after the release of the Department of Justice (DOJ) policy on enforcement actions against individuals in cases of corporate wrongdoing, the so-called "Yates Memo." DOJ also unveiled a new website with additional guidance about how DOJ intends to approach corporate investigations, <https://www.justice.gov/dag/individual-accountability>. Together, the information indicates that DOJ believes its policy is working and will continue to pursue vigorously criminal and civil liability for individuals involved in corporate crime.

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The 2015 Yates Memo announced new rules concerning the ways in which DOJ will approach corporations and their employees in investigations and prosecutions of corporate crime, placing a new emphasis on enforcement against individuals. The memorandum strongly encouraged companies to disclose information about culpable individuals, making it the key consideration when determining whether a corporate defendant has cooperated with DOJ. However, it has been debated whether this marked a true DOJ policy change or was merely a public relations move to recast the *status quo* in light of public criticism of the perceived lack of prosecution of corporate executives.

Today, DOJ addressed some of the concerns raised by companies and practitioners alike regarding the 2015 memorandum through statements made by DAG Yates at the 33rd Annual International Conference on Foreign Corrupt Practices Act. DAG Yates strongly endorsed the policy behind the memorandum and reaffirmed the view that “the best way to deter individual conduct is the threat of going to jail.” DAG Yates said that the 2015 memorandum was not intended to change prosecutions of individuals by a particular number or percentage but rather to ensure that DOJ is consistently investigating and prosecuting corporate cases as effectively as possible.

Judged by that standard, DAG Yates said the shift has been a success. She said that individuals are now a DOJ focus from the beginning of every corporate investigation, and DOJ attorneys are “reviewing evidence against individuals up and down the corporate ladder” as a part of every case. Cooperation credit for companies hinges upon providing information about individual wrongdoers. As to self-disclosure, she said that DOJ has increased the differential between cooperation credit in situations where a company has self-reported as opposed to when it waits until the Government is inquiring. All of this, DAG Yates said, has resulted in increased cooperation and company assistance in building cases against individuals from the get-go.

Nonetheless, DAG Yates acknowledged that the policies have generated questions. In an attempt to increase transparency, DOJ created a new website (<https://www.justice.gov/dag/individual-accountability>) that compiles prior DOJ statements about the issue and includes a “Frequently Asked Questions” (FAQ) document that attempts to provide new guidance into DOJ’s policy. The FAQ reiterates that “a company must turn over all non-privileged relevant information about the individuals involved in the misconduct in order to receive any consideration for cooperation,” calling that disclosure a “threshold requirement.” On one of the issues that has concerned the defense bar, the new FAQ document states that a joint defense agreement with individuals’ counsel does not make a corporation ineligible for cooperation credit, but it may restrict a company’s ability to cooperate meaningfully. Therefore, the FAQ instructs companies to consider carefully the drafting of cooperation agreements to avoid limiting the ability to disclose facts about individuals which would then prevent the receipt of cooperation credit. The FAQ also notes that prompt early disclosure is now an independent factor separate from cooperation in the Principles of Federal Prosecution of Business Organizations, a change made in an effort to reward companies that voluntarily disclose potential wrongdoing even if an investigation is not yet complete.

Overall, DAG Yates's remarks and DOJ's new FAQ document indicate DOJ is pleased with the results of the new policy and intends to continue it, despite questions and concerns from the defense bar and corporations. Those undergoing federal investigation or prosecution need to be keenly aware of this fact and approach internal investigation, disclosures, and litigation with DAG Yates's policy in mind. Given the change in administration it is possible this commitment to individual accountability will be short-lived, but DAG Yates was confident that these changes will endure and affect DOJ prosecution going forward. In her view, "holding individuals accountable for corporate wrongdoing isn't ideological; it's good law enforcement."