



DOJ Adopts New Requirements for Corporations Seeking Credit for Cooperation

Posted by John F. Savarese, Wachtell, Lipton, Rosen & Katz, on Monday, September 14, 2015

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In an important development for corporations responding to federal investigations, the Department of Justice announced on September 10, 2015 revisions to its [Principles of Federal Prosecution of Business Organization](#) (“Principles”). The new policies, set out in a memorandum authored by Deputy Attorney General Sally Yates and sent to federal prosecutors across the nation, instruct prosecutors to focus their efforts to secure evidence against individuals responsible for corporate wrongdoing. The memorandum (accessible [here](#)) specifically encourages increased attention by DOJ attorneys on considering cases against individual wrongdoers, and also establishes additional guidelines that federal prosecutors and civil enforcement attorneys must follow in conducting and resolving corporate investigations.

Perhaps most important under the new Principles, it is now DOJ policy that in order to qualify for any cooperation credit, a corporation must identify “all relevant facts relating to the individuals responsible for the misconduct.” Only if a company satisfies that threshold requirement will DOJ give the company credit for cooperation and assess the remaining elements of the company’s cooperative efforts (e.g., by weighing the timeliness and proactive nature of the company’s internal investigation, the diligence, thoroughness and speed of the investigation, etc.). In other words, as Ms. Yates explained in a speech following the announcement of the new policies, cooperation credit is now “all or nothing,” and there is “[n]o more partial credit for cooperation that doesn’t include information about individuals.”

In some respects, this announced policy is more of a codification and strengthening of preexisting DOJ practice than a watershed announcement of a new direction in governmental policy. As we have previously observed, DOJ has for some time based cooperation credit on whether a corporation’s investigation assisted the government in identifying and prosecuting culpable employees. See our memorandum dated January 28, 2015 (discussed on the Forum [here](#)).

An important issue—which we hope is not overlooked as part of this heightened attention to potential individual culpability—is that assessing the actions and mental state of individuals is complex and making cases against corporate officers and employees is often difficult. As the Yates memorandum acknowledges, in the corporate setting, knowledge and responsibility are often diffuse, and proving an individual’s culpable intent can be challenging.

The new Principles also require government attorneys on both the civil and criminal sides to coordinate with one another from the earliest stages of an investigation, and they encourage civil enforcement attorneys to levy parallel civil charges against individuals and corporations even when criminal charges are also brought. DOJ has made much greater use of civil enforcement tools, where the burden of proof is only a preponderance of the evidence (not the reasonable doubt standard applicable in criminal cases), in pursuing financial crisis era cases. The focus on civil enforcement tools in the Principles suggests that DOJ may make even greater use of this weapon in its arsenal.

The revised Principles underscore that any corporate internal review or response to a government-initiated probe must be carefully designed to maximize the opportunity for the corporation to receive appropriate credit for its cooperation. Where the evidence establishes that particular employees committed wrongdoing, the Yates memorandum makes it clear that those matters must be addressed forthrightly. But there will still be investigations in which the evidence does not support cases against all the individuals whom the government might wish to pursue. We expect that prosecutors will continue to recognize that there are cases in which individuals should not be charged, but the investigation must be conducted in a credible manner that enables the prosecutor to be comfortable in reaching that conclusion. In other words, we trust that fairness will remain as important as cooperation.