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CLIENT ALERT

DOJ Resets Bar for Corporate-Cooperation Credit and Shifts Emphasis in False Claims Act Cases from Individual Accountability to Monetary Recovery

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After a year of review, Deputy Attorney General Rod Rosenstein has announced reforms to Yates-era policy governing corporate investigations in both criminal and civil cases. Those reforms affect the conditions for cooperation credit, the availability of corporate resolutions that shield individuals from civil liability, and the likelihood of individual prosecutions in civil cases. The reforms address several concerns that have been raised by prosecutors and defendants alike. But significant questions remain unanswered, particularly about cooperation credit in civil cases.

In September 2015, then-Deputy Attorney General Sally Yates issued a memorandum on "Individual Accountability for Corporate Wrongdoing." The Yates Memo directed all Department of Justice prosecutors to pursue "the individuals who perpetrated the wrongdoing" in corporate-misconduct investigations. And it specified six measures that "should be taken in *any* investigation of corporate misconduct"—whether civil or criminal. (Emphasis added). The measure that has caused perhaps the most confusion and frustration among prosecutors and defendants was the requirement that, "[i]n order for a company to receive any consideration for cooperation . . . , the company must completely disclose to the Department all relevant facts about individual misconduct." (Emphasis in original). We had previously discussed those issues here.

There has been much speculation about the fate of the Yates Memo. Over a year ago, Mr. Rosenstein announced that the Memo was "under review" and that he anticipated changes in "the near future." Yesterday, Mr. Rosenstein unveiled those changes in a speech at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act. Those changes are reflected in the Justice Manual (formerly the U.S. Attorney's Manual), which is essentially the rulebook for all DOJ attorneys.

What Changed?

First, the Yates Memo required a company to "completely disclose . . . all relevant facts about individual misconduct" to be "eligible for any cooperation credit." (Emphasis in original). That requirement has now loosened.

For criminal cases, the DOJ still adopts an "all or nothing approach." But instead of requiring complete disclosure of "all relevant facts" for "every person involved," companies can obtain cooperation credit when they seek in "good faith" to identify those who were "substantially involved in or responsible for wrongdoing."

The amended § 9-28.700 of the Justice Manual provides some examples of such good-faith (albeit unsuccessful) efforts:

> For example, there may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is legally prohibited from disclosing it to the government. Under such circumstances, the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor.

For civil cases, the change is starker. Companies no longer must identify all individuals substantially involved in or responsible for wrongdoing to be eligible for any cooperation credit. According to Mr. Rosenstein's remarks, such a requirement is inefficient and impractical in civil cases, where the primary goal is to recover money. Instead, under § 4-3.100, "To be eligible for cooperation credit in a civil corporate case, a corporation must provide meaningful assistance to the government's investigation."

A corporation that "conceals" misconduct by "senior management or the board of directors, or otherwise demonstrates a lack of good faith in its representations regarding the nature or scope of the misconduct" is ineligible for cooperation credit. While the Justice Manual does not seem to require *affirmative* disclosure, according to Mr. Rosenstein's remarks, to be eligible to receive *any* credit, a company "must identify all wrongdoing by senior officials, including members of senior management or the board of directors." Interestingly, there appears to be some tension between that statement and the amended Justice Manual.

So is affirmative disclosure required to be eligible for credit? Or is it only necessary that a company not conceal such misconduct? Insofar as any inconsistency exists, we believe that the Justice Manual controls. But the distinction is perhaps without a meaningful difference. Prosecutors are likely to view a company that does not affirmatively disclose senior management or board involvement in wrongdoing as lacking "good faith in its representations regarding the . . . scope of the misconduct" or failing to provide the "meaningful assistance" that is necessary to be eligible for any cooperation credit in the first instance.

No matter which view applies, the DOJ will apply a sliding-scale approach under which it appears that a company can achieve "maximum credit" for naming "every individual person who was substantially involved in or responsible for the misconduct." And a company can receive some degree of credit for identifying "all wrongdoing by senior officials."

Second, the Yates Memo provided that "absent extraordinary circumstances, no corporate resolution [would] provide protection from criminal or civil liability for individuals."

For criminal cases, that extraordinary-circumstances requirement remains. But for civil cases, prosecutors may once again provide releases for individuals as part of a corporate settlement even without "extraordinary circumstances." Prosecutors must simply document why individual action is "not necessary or warranted."

Third, the Yates Memo required civil prosecutors to "evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay." That prior directive was based on the view that monetary recovery and deterrence are "*equally* important" aims for civil prosecutions. (Emphasis added).

The DOJ's revised policy recognizes monetary recovery as more important than deterrence in civil prosecutions. Mr. Rosenstein explained, "Civil cases are different" from criminal cases. "The *primary* goal of affirmative civil enforcement cases is to recover money, and we have a responsibility to use the resources entrusted to us efficiently." (Emphasis added).

Given that increased emphasis on monetary recovery over deterrence, civil prosecutors may once again give greater weight to "an individual's ability to pay in deciding whether to pursue a civil judgment." That amendment restores much of the discretion that civil prosecutors had before the Yates Memo.

How Substantial Are Those Changes?

When compared to the Yates Memo itself, the changes that Mr. Rosenstein announced appear substantial, particularly on the civil side. But it is unclear how substantial the changes actually are when compared to DOJ *practice* under the Yates Memo. Mr. Rosenstein acknowledged that what the Yates Memo said and what DOJ prosecutors did were not always the same: "As with the 'all or nothing' criminal policy, we understand that the civil policy was not strictly enforced in many cases."

The newly announced good-faith standard appears similar to guidance that Ms. Yates provided after releasing the Memo. In her speech "Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing," Ms. Yates assured defense attorneys, "We are not asking companies to 'boil the ocean.' . . . We expect thorough investigations tailored to the scope of the wrongdoing."

"Thorough" and "tailored" do not set forth an absolute standard. They are more akin to a good-faith standard. Ms. Yates also advised, when "there's a question about the scope of what's required, . . . pick up the phone and discuss it with the prosecutor." Mr. Rosenstein said the same: "Companies that want to cooperate in exchange for credit are encouraged to have full and frank discussions with prosecutors about how to gather the relevant facts."

Under the Yates Memo, we are unaware of a case where DOJ prosecutors have refused cooperation credit simply because the company did not disclose *a* relevant fact about *an* individual who had *some* involvement—no matter how insignificant that involvement was. Such refusals almost always (if not always) involved disputes over whether the company failed to disclose what—in the prosecutor's view—was a material fact about someone who was substantially involved in the alleged wrongdoing. Again, that practice appears consistent with the amended requirement to disclose facts relating to "substantial involvement" or criminal "responsibility."

On the civil side, especially in False Claims Act cases, it is difficult to assess the significance of the change without knowing how DOJ civil prosecutors previously calculated cooperation credit. In contrast to their criminal counterparts in the Fraud Section, DOJ Civil Frauds has yet to explain exactly what defendants can expect in exchange for various levels of cooperation.

As we had previously covered here, in June 2018, then-Acting Associate Attorney General Jesse Panuccio explained that the DOJ has "tremendous enforcement discretion" with respect to "structuring settlements" that provide a "material discount" based on cooperation. Similar to Mr. Rosenstein, Mr. Panuccio also explained that "the extent of the discount will depend on the nature of the cooperation and how helpful it is to the Department's investigation, including our pursuit of individual wrongdoers." But Mr. Rosenstein and Mr. Panuccio did not explain—and the Justice Manual still does not explain—how to calculate "minimum credit," "maximum credit," "material discount," or "the extent of the discount" in any meaningful way.

The remaining two amendments are substantial changes from Yates-era practices for civil enforcement. Regarding releases, companies often have indemnification agreements with their management. So Yates-era settlements without releases for individuals sometimes offered little financial relief for companies and their shareholders. Allowing releases for individuals will now increase the incentive for companies to settle. Regarding the increased focus on ability to pay, civil prosecutors will likely determine that the juice from pursuing lower-level employees without indemnification agreements is not worth the squeeze. Taken together, these changes will likely result in quicker and simpler resolutions.

So What Now?

The amendments leave open two important issues.

First, the amendment on criminal cooperation-credit eligibility seems to have created inconsistencies within DOJ guidance. Consistent with Mr. Rosenstein's remarks, section 9-28.700 in the Justice Manual states, "In order for a company to receive any consideration for cooperation under this section, the company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct."

But at least two other DOJ guidance documents seemingly conflict with that relaxed eligibility requirement. For example, the Justice Manual FCPA Corporate Enforcement Policy, section 9-47.120, still requires, "disclos[ing] . . . all relevant facts about all individuals involved in the violation of law" in order "to receive credit for voluntary self-disclosure of wrongdoing." And the October 2, 2016 National Security Division "Guidance Regarding Voluntary Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations" requires disclosing "all relevant facts . . . , including all relevant facts about the individuals involved in any export control or sanctions violation."

It seems odd that the cooperation-credit amendment to the Yates Memo would somehow carve out FCPA cases and cases involving sanctions or export controls. We expect that the DOJ will bring all of its guidance in line with the newly announced amendment.

Second, cooperation credit for civil actions is still missing a critical piece. In deciding whether to cooperate and how much to cooperate, companies have no way to *quantify* how much they can expect in return. In the criminal context, companies have more clarity, with the U.S. Sentencing Guidelines and the Fraud Section guidance setting forth the fines and specific discount percentages for various levels of cooperation. As Mr. Rosenstein acknowledged, civil enforcement is "primarily" money driven. So more transparency on how much cooperation is worth to the DOJ could incentivize more cooperation. Such transparency could also provide more uniform resolutions across cases, DOJ components, and U.S. Attorney's Offices.

As part of the DOJ's FCA reform efforts, which we previously covered here, we expect that the DOJ will provide that guidance in the near future.

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