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New DOJ Guidance Sharpens the Focus on Prosecuting and Suing Individuals in Corporate Criminal Investigations

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On September 9, 2015, the U.S. Department of Justice (“DOJ” or the “Department”) issued a memorandum to its staff revising the principles guiding criminal and, indeed, civil enforcement in corporate criminal investigations and emphasizing its focus on targeting individuals. Many of the concepts in the memo are familiar, but one new theme is the message that DOJ should use both criminal and civil tools — not just criminal indictments, but lawsuits against individuals DOJ believes are responsible for corporate misdeeds, even if the individual has an inability to pay — to drive the deterrence message home.

Thus, the message is clear: DOJ’s focus is now laser-like on individuals in corporate criminal cases.

The Memo

The September 9, 2015 memorandum (the “Memo”) was issued by Sally Quillian Yates, the Deputy Attorney General, and arose from an internal working group of DOJ lawyers who reviewed DOJ’s efforts to target corporate fraud and misconduct. The Memo recognizes that “[o]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.” The Memo lays out measures — some familiar, some new — that are to be taken “in any investigation of corporate misconduct,” even ongoing investigations where it is “practicable” to apply these principles.

The six measures recommended by the Memo are:

1. That to obtain credit for cooperating in a criminal case, a corporation must provide to the Department all relevant facts relating to the individuals responsible for the misconduct;
2. That DOJ’s criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
3. That DOJ’s criminal and civil attorneys handling corporate investigations should be in routine communication with one another;
4. That absent extraordinary circumstances or approved departmental policy, DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;
5. That DOJ attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases and should memorialize any declinations as to individuals in such cases; and

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6. That DOJ civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

What is New in the Memo

DOJ's focus on targeting individuals in criminal cases is not new. For years, and certainly since the financial meltdown of 2008, DOJ has emphasized prosecuting individuals in corporate criminal cases.

As K&L Gates has noted in prior client communications, the call for DOJ to pursue individuals in white-collar cases has grown amidst strong criticism of its failure to bring individuals to account for the 2008 financial crisis. In September of 2014, then Principal Deputy Assistant Attorney General for the Criminal Division, Marshall L. Miller, emphasized prosecuting individuals: "If [companies] want full cooperation credit, make your extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door to make your presentation." In fact, DOJ signaled last fall it would take a more aggressive posture against individuals in white-collar cases. In September, then Attorney General Eric Holder suggested that Congress should expand the Park "responsible corporate officer" doctrine to financial services cases. Under the Park "responsible corporate officer" doctrine, named for the Supreme Court case United States v. Park,¹ strict criminal liability can be imposed under the Food, Drug and Cosmetic Act on senior corporate executives if, by reason of corporate position, the executive had the authority and responsibility to prevent or correct violations and did not, unless he or she was powerless to do so. Thus, even where the corporate officer had no knowledge of any wrongdoing, he or she could still be charged with a crime. The U.S. Food and Drug Administration ("FDA") has sought to reinvigorate this little-used doctrine in FDA cases, where it was developed. Holder's call for Congress to expand Park liability to the financial services industry was an aggressive call to enhance the likelihood of imposing criminal responsibility in white-collar cases.

What is new in the Memo is the harmonization between criminal and civil investigators: it expressly directs civil and criminal attorneys at DOJ to coordinate their efforts. This is often tricky legally, since the law governing the secrecy of materials gathered by criminal prosecutors through the grand jury process cannot be routinely shared with civil lawyers within DOJ. Nevertheless, the Memo calls for DOJ to put at the top of its agenda bringing both criminal actions against individuals allegedly responsible for corporate crime — which often carries with them significant financial penalties — and civil lawsuits as well. And the decision whether DOJ should bring a civil lawsuit is not to be governed solely by the individuals' ability to pay. As the Memo puts it, "the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit." Thus, civil actions should be considered by DOJ where the alleged misconduct is serious, actionable, provable, and the pursuit of the action "reflects an important federal interest" — deterrence.

¹ 421 U.S. 658 (1975).

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Conclusion

DOJ has made targeting individuals in corporate criminal cases a priority. Those employees now must worry not only about indictments, but civil actions against them as well — which means their employers have a new worry, too. Corporations would be well-advised to review their policies on employee indemnification and decide whether they will pay for the defense of civil actions against employees stemming from corporate criminal probes.

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