

DOJ REVISES CORPORATE COOPERATION POLICY BUT LEAVES INDIVIDUAL EMPLOYEES IN THE CROSSHAIRS

On November 29, 2018, Deputy Attorney General ("DAG") Rod J. Rosenstein announced updates to the Department of Justice's ("DOJ") policy for criminal and civil enforcement, making important adjustments to the policy announced in September 2015 by then-DAG Sally Yates, as well as prior DOJ guidance.¹ The revised guidance continues to place pressure on corporations to cooperate fully with investigations while at the same time creating incentives to identify culpable executives and other employees. Under the revised policy, the DOJ will now award cooperation credit where a corporation identifies every individual "substantially involved" in, or responsible for, the misconduct. Identification of all involved employees, regardless of level of seniority or culpability is no longer a precondition for cooperation credit.

What qualifies as "substantially involved," however, remains unclear. Moreover, the revised policy is meant to expedite resolution of investigations and does not create a right to refuse to identify employees whose involvement the company deems insignificant. In his remarks, DAG Rosenstein emphasized that an increased focus on prosecuting individuals may be more effective than imposing record-setting financial penalties on corporations. The emphasis on individual prosecutions was not matched, however, by any suggestion of reduced penalties for the corporations that employ these individuals.

¹ Rod J. Rosenstein, Deputy Attorney Gen., U.S. Dep't of Justice, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.

Background

DAG Rosenstein explained that the policy changes are intended to affirm the principle of individual accountability articulated by his predecessors, noting "[u]nder our revised policy, pursuing individuals responsible for wrongdoing will be a top priority in every corporate investigation."²

Since at least September 2015, when then-DAG Yates issued a memorandum on "Individual Accountability for Corporate Wrongdoing" (commonly known as the Yates Memo and now referred to as the "Prior Policy"),³ the DOJ has focused on individuals' misconduct when resolving corporate enforcement matters. The Prior Policy conditioned corporate cooperation credit on companies' willingness and ability to "provide to the Department all relevant facts about the individuals involved in corporate misconduct."⁴ This condition became a significant factor considered by companies when making voluntary disclosure decisions and responding to government investigations, and it has continued to shape every phase of internal investigations. The policy's requirement that all individuals – no matter their level of involvement – be identified has generated debate, however, about efficiency and delay, and has not been consistently followed.

The DOJ Sets an Ambiguous Standard

In response to these concerns "about the inefficiency of requiring companies to identify every employee involved regardless of relative culpability," DAG Rosenstein announced that, going forward, "any company seeking cooperation credit in criminal cases must identify every individual who was substantially involved in or responsible for the criminal conduct."⁵ DAG Rosenstein thus made "clear that investigations should not be delayed merely to collect information about individuals whose involvement was not substantial[] and who are not likely to be prosecuted."⁶

The change applies in both criminal and civil matters. In his remarks, DAG Rosenstein acknowledged that civil prosecutors felt constrained by the "all or nothing" approach mandated by the Prior Policy and that "when criminal liability is not at issue, our attorneys need flexibility to accept settlements that remedy the harm and deter future violations[] so they can move on to other important cases."⁷ Instead of demanding the disclosure of every person at every level involved in the wrongdoing, the revised policy now requires companies to "identify all wrongdoing by senior officials" to earn any cooperation credit in a civil case, with maximum credit available after the company "identif[ies] every individual person who was substantially involved in or responsible for the misconduct."⁸

What remains unclear, however, is what qualifies as "substantial involvement." While decision makers and those directing misconduct would qualify, it is unclear

² *Id.*

³ SALLY QUILLIAN YATES, U.S. DEPT' OF JUSTICE, INDIVIDUAL ACCOUNTABILITY FOR CORPORATE WRONGDOING (2015), <https://www.justice.gov/archives/dag/file/769036/download>.

⁴ *Id.* at 3.

⁵ Rosenstein, *supra* note 1. The Justice Manual has been updated to reflect these priorities at §§ 9-28.210, 9-28.300, 9-28.700. U.S. Dep't of Justice, Justice Manual §§ 9-28.210, 9-28.300, 9-28.70 (2018), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations?utm_medium=email&utm_source=govdelivery#9-28.700.

⁶ Rosenstein, *supra* note 1.

⁷ *Id.*

⁸ *Id.*

whether managers whose failure to supervise arguably allows misconduct to continue would be deemed to be substantially involved. Even more unsettling was the suggestion by Sandra Moser, Acting Chief of the Fraud Section, (speaking in her personal capacity) that the DOJ would expect a company to identify employees whose involvement was unwitting or nondiscretionary, such as a secretary used by senior managers to carry out fraudulent activity.

The enhanced policy may bolster the DOJ's ability to bring successful cases by identifying witnesses who could provide valuable testimony in a prosecution of the company or its officers. Paradoxically, however, if the DOJ defines "substantial involvement" to require reporting on more junior employees who were "involved" in, but not culpable for, potential misconduct, it could impede internal whistleblowers and reduce the volume of voluntary disclosures. This is particularly true in complex regulatory contexts, such as export controls and sanctions, where compliance depends on employees across the company spotting potential breaches and flagging them for assessment by the compliance function. No matter how good the compliance culture, line-level operational employees are less likely to flag an issue to the compliance function if they know their names will be given to the DOJ.

Companies that cooperate will nonetheless have powerful incentives to identify those employees with "substantial involvement," however that nebulous concept is defined. The day before DAG Rosenstein's announcement, on Wednesday, November 28, 2018, Principal Deputy Assistant Attorney General John P. Cronan emphasized the importance of individual accountability by highlighting two declinations against companies in 2018 under the FCPA Corporate Enforcement Policy that involved prosecutions of individuals.⁹ He pointed out: "While the involvement of senior management is an aggravating factor that can weigh against a declination, it did not preclude declinations in these cases in light of the companies' overall efforts to do the right thing. And that included cooperation with law enforcement that enabled the Department to bring charges against culpable individuals in both of these cases."¹⁰

Key Takeaways

The announced change embodies a more pragmatic approach to enforcement and updates U.S. criminal and civil enforcement policy to reflect the real-world approach already being deployed by prosecutors around the country. By acknowledging the importance of prosecutorial discretion and clarifying the DOJ's position on individual liability, the revised policy has the potential to improve not only the DOJ's use of its own resources but also how companies evaluate and conduct risk assessments and internal investigations.

Nonetheless, it is important to recognize the unanswered questions these revisions raise. In particular, until there is greater clarity regarding how "substantially involved in or responsible for" will be applied in practice, the risk of inefficiency and uneven enforcement remains a concern.

⁹ John P. Cronan, Assistant Attorney Gen., U.S. Dept' of Justice, Remarks at Practising Law Institute Event (Nov. 28, 2018), <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-john-p-cronan-delivers-remarks-practising-law>.

¹⁰ *Id.*

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Further, it has become less clear whether the focus on individual accountability provides companies with any relief from the increasingly ponderous fines outside perhaps the voluntary self-disclosure context.

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