

Naming Names: DOJ's New Guidance Should Impact the Approach Government Contractors Take Toward Internal Investigations and Voluntary Disclosures

Article By:

Michael D. Maloney

Michael J. O'Leary

Last week, the DOJ issued new internal guidance for its prosecutors entitled “[Individual Accountability for Wrongdoing](#)” issued by Deputy Attorney General Sally Quillian Yates (the “Yates Memo”). The Yates Memo outlines the Department’s revised approach to the prosecution of individuals in the context of corporate investigations. For government contractors conducting internal investigations and considering voluntary disclosures, the Yates Memo means it’s not enough to uncover and disclose potential wrongdoing that led to waste, fraud and abuse. Now, it’s time to point fingers and name names.

The Yates Memo contains six “key steps to strengthen [the DOJ’s] pursuit of individual corporate wrongdoing”:

1. **The DOJ will not award a corporation or financial institution “any consideration for cooperation” credit unless it fully discloses the misconduct of its employees and provides the Department with all inculpatory evidence in its possession regarding those employees.**

In the past, the DOJ has frequently cited the importance of providing evidence of individual misconduct. Nevertheless, the lack of individual prosecutions in connection with some recent high-profile cases has called that commitment into question. In part, the new policy appears to be a response to that criticism.

2. **The DOJ will focus on culpable individuals from the inception of an investigation.**

The import of this guidance is that from the outset, the DOJ will be focused not just on the *how* and *why* relating to the misconduct but also the *who*. Accordingly, government contractors should structure their own investigations in a similar manner.

3. The DOJ is implementing stronger coordination amongst its prosecutors and civil attorneys (and other agency counterpart) to pursue individual defendants.

The Department has long stressed the importance of coordination in parallel proceedings. The Yates Memo seems intended to stress that this coordination is equally vital with respect to pursuing individuals—particularly since in many cases criminal prosecutors may not be able to meet their burden of proof for a criminal prosecution yet there may be sufficient evidence to warrant a civil or regulatory enforcement action.

4. Absent extraordinary circumstances, no corporate resolution will provide protection to individual executives or employees.

Notably, this guidance focuses on corporate “resolutions,” not just corporate criminal prosecutions, suggesting the focus on individuals will be equally strong where a corporation is able to successfully enter into a Deferred Prosecution Agreement or Non-Prosecution Agreement.

5. DOJ attorneys cannot resolve corporate prosecutions “without a clear plan to resolved related individual cases before the statute of limitations expires.” Moreover, in instances where the DOJ decides to pursue a corporate resolution but declines to charge any individuals, the prosecution team must memorialize the justification for the declination(s) internally and obtain approvals from senior DOJ officials.

Although it has always been uncommon for DOJ corporate resolutions to explicitly resolve the criminal liability of individual employees or executives, there have been a disproportionate number of corporate resolutions where no individuals were ever prosecuted. This has fostered criticism both that: (1) the Department was more serious about collecting criminal fines and forfeitures than pursuing criminal activity; and (2) the Department has coerced corporations into resolving relatively weak cases using the threat of a criminal indictment

The Yates Memo seems designed to address both these concerns by requiring DOJ Trial Attorneys and AUSAs to justify their decision not to pursue individual prosecutions internally and obtain approval from senior Department officials.

6. The DOJ will not forego civil enforcement efforts because of a defendant’s inability to pay.

There has been speculation in the past that the DOJ will not expend resources to pursue civil enforcement actions against defendants with a limited ability to pay. The Yates Memo specifically prohibits DOJ attorneys from premising their decision not to initiate an action on that basis. They are now directed to look to the merits of the action and its potential deterrent effect regardless of whether the Government will be able to collect substantial fines.

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