

Litigation Alert

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Justice Department Updates United States Attorneys' Manual to Emphasize Priority on Prosecuting Individuals in Corporate Criminal Cases

On November 16, 2015, the U.S. Department of Justice revised the United States Attorneys' Manual (USAM) to align the principles by which federal government prosecutors investigate and prosecute criminal cases involving corporations and other types of business organizations with the principles announced in a September 2015 memorandum on "Individual Accountability for Corporate Wrongdoing," issued by Deputy Attorney General Sally Quillian Yates (the "Yates Memo"). The new revisions are to the USAM chapter entitled the Principles of Federal Prosecution of Business Organizations (the "Principles"), which was first issued by former Deputy Attorney General Mark Filip in August 2008. The Principles set forth binding guidance by which Department lawyers and federal government lawyers at the U.S. Attorney's Offices around the country resolve criminal corporate cases, and are sometimes referred to as the "Filip factors."

The Yates Memo **guidance** addressed the Department's view that although corporations and other business organizations operate through the actions of individuals, it was sometimes difficult to determine which individuals have the requisite knowledge and criminal intent to impose criminal culpability because "responsibility can be diffuse and decisions are made at various levels." The Yates Memo sought to "combat corporate misconduct" by announcing six "key steps" through which the Department expected prosecutors to "seek[] accountability from the individuals who perpetrated the wrongdoing."

In remarks at the November 16 American Bank Association and American Bar Association Money Laundering Enforcement Conference in Washington, D.C., Ms. Yates explained that the USAM changes formally implement the guidance put forth in the Yates Memo. Ms. Yates emphasized that the USAM changes are intended to "emphasize the primacy in any corporate case of holding individual wrongdoers accountable" by listing steps that criminal and civil prosecutors are expected to take "to maximize the opportunity to achieve that goal." In November 17, 2015 remarks at the American Conference Institute's annual conference on the Foreign Corrupt Practices Act (FCPA), Assistant Attorney General Leslie Caldwell, referencing the policy changes made by the Yates Memo, stated that companies seeking cooperation credit must now "affirmatively work to identify and discover relevant information about the individuals involved" in a corporate criminal case.

I. New Provisions Focusing on Individual Accountability

The revisions mark the first major changes to the Principles in seven years. The revised USAM implements the six "key steps" announced in the Yates Memo through the addition of several new provisions, edits to existing language and the reorganization of some material.

A. Resolution of Corporate Criminal Cases Requires Resolution of Individual Culpability

A new introductory section to the Principles echoes the guidance announced in the Yates Memo and explains that combating corporate misconduct by “holding accountable all individuals who engage in wrongdoing” accomplishes the following goals: (1) efficiently and effectively determining the facts and the extent of any corporate misconduct by identifying the individuals who engaged in corporate misconduct, (2) increasing the likelihood that those with knowledge of corporate misconduct will be identified and provide information about individuals involved and (3) maximizing the likelihood that the final resolution includes charges against culpable individuals in addition to the corporation. See Section 9-28.010.

One of the key revisions is the creation of a new USAM section, USAM Section 9-28.210, appropriately titled “Focus on Individual Wrongdoers.” That provision, for the first time, makes it an affirmative requirement that prosecutors pursue individual culpability in corporate criminal cases and requires the evaluation and resolution of cases against individuals in conjunction with the resolution of corporate cases. In a new complementary pronouncement, the section recounts, nearly word for word, the Yates Memo’s general prohibition against Department attorneys providing releases or immunity for individuals upon resolution of charges against the corporate entity, unless the reason for doing so is memorialized and approved by the attorney general or other high-level Department officials.

B. Cooperation Credit Requires Timely and Voluntary Disclosure

The most significant change to the USAM is the requirement that a company seeking “credit for cooperation” disclose facts related to individual responsibility for corporate criminal conduct. Specifically, the company “must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct.” These changes flow from the enforcement goals stated at the outset of the revised Principles and require disclosure before cooperation credit will be considered. Cooperation credit includes consideration of lesser charges or a lower penalty in connection with the resolution of corporate criminal conduct.

A company that the Department adjudges has “decline[d] to learn of such facts” will receive no credit for cooperation, and the company bears the burden of proving that its efforts to determine the relevant facts were sufficient. In this context, the USAM revisions reaffirm assurances in the Principles that the Department does not require or expect companies to turn over privileged material in order to obtain cooperation credit. However, consistent with the Yates Memo, changes to the USAM disclosure provisions draw the distinction between legal advice—which is privileged—and facts—which are not privileged—and requires companies to turn over relevant facts to be eligible for cooperation. In November 17, 2015 remarks at the American Conference Institute’s annual conference on the Foreign Corrupt Practices Act (“FCPA”), Assistant Attorney General Leslie Caldwell stated that a company must do three things to be eligible for maximum cooperation credit in an FCPA case: (1) voluntarily self-disclose; (2) fully cooperate; and (3) timely and appropriately remediate.

According to the November 16 remarks by Ms. Yates, the disclosure requirement is not new, but the consequence of failing to fully disclose all facts is new. Ms. Yates called the past relationship between the extent of disclosure and cooperation credit a “sliding scale,” such that a company would receive cooperation credit to the extent that it disclosed relevant facts. Now, with the changes to the USAM flowing from the Yates Memo, whether a company has fully disclosed all relevant facts is a threshold, all-or-nothing inquiry. The USAM formalizes the principle that untimely disclosure or disclosure of incomplete information will result in no cooperation credit for the company.

Another change to the USAM separates what used to be a single factor—consideration of a company’s voluntary disclosure, along with its willingness to cooperate—into two separate factors. The first factor considers the company’s timely and voluntary disclosure. The second factor considers the extent of the company’s cooperation. According to Ms. Yates’ comments accompanying the announcement of the revisions, the changes were driven by the Department’s recognition that, although the two factors are related, they should be “given separate consideration in charging decisions.”

By breaking out the two factors, the Department has directed its attorneys to give specific consideration to the timing of disclosures. Department officials have, in recent years, publicly encouraged companies to make early self-disclosure of facts giving rise to potential criminal culpability, particularly in the context of prosecution of the U.S. Foreign Corrupt Practices Act, the U.S. federal anti-foreign-bribery statute. This change emphasizes the Department’s view of the importance of that factor. Relatedly, in her comments, Ms. Yates emphasized the need for corporations to disclose information as early as possible, even if not all of the facts are known at the time, with the understanding that the company would continue to discover relevant facts and would share them with the Department. Following this change to the USAM, the timing of when a company has learned of facts, and the scope of what they have learned, may have increased significance.

C. Resolution of Individual Cases Considered in Resolving Corporate Criminal Cases

Once a company has met the threshold requirement for cooperation consideration by making timely and full disclosure of all relevant facts, a new USAM provision directs prosecutors to consider whether “charges against the individuals responsible for the corporation’s malfeasance will adequately satisfy the goals of federal prosecution.” Section 9-28.1300, “Adequacy of the Prosecution of Individuals.”

This provision expands the original Principles, which required prosecutors to consider whether civil or other regulatory options for resolving corporate criminal cases would meet the enforcement goals of punishing and deterring wrongdoing and rehabilitating wrongdoers, thereby making further corporate enforcement unnecessary. Now, if a company meets the disclosure requirements, the Department may also determine that further prosecution by bringing criminal charges against the company is not necessary based on the resolution of cases against responsible individuals.

Similarly, where a decision has been made to charge a company, the case may be resolved through an agreement between prosecutors and the company to plead to “an appropriate” offense. This revision relaxes the former requirement that a company plead to “the most serious, readily provable offense.”

Thus, under the new USAM provisions, in situations where the Department has decided—because of the severity, extent or nature of the conduct—that it will charge a company that has met the disclosure requirement, the Department will take into account the resolution of cases against culpable individuals in crafting a resolution.

D. Required Coordination Between Civil and Criminal Justice Department Lawyers

The revised Principles require, for the first time, early coordination between the Department’s Criminal and Civil Divisions concerning potential individual culpability for corporate misconduct and the future resolution of the investigation. Since the issuance of the Principles, Department attorneys have operated with the understanding that, in resolving corporate criminal cases, they should consider factors such as (1) the sanctions available under the alternative means of disposition, (2) the likelihood that an effective sanction will be imposed and (3) the effect of a non-criminal disposition on federal law enforcement interests. Now, a new section of the USAM specifically instructs Department prosecutors and civil attorneys to “timely communicate, coordinate, and cooperate with one another and with agency attorneys” in all white-collar matters where there is the potential for “criminal, civil, regulatory, and/or agency administrative parallel (simultaneous or successive) proceedings.” See Sections 9-28.1200 and 1-12.000. This coordination is to continue throughout the life of a case, from intake, through investigation and to resolution.

The new provisions also require the Criminal and Civil Divisions to give greater consideration to the enforcement interests of their counterparts. Criminal attorneys handling corporate investigations are instructed to notify civil attorneys “as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought,” and vice versa. Similarly, if Department prosecutors determine not to pursue a criminal action against an individual, they should confer with the Department’s civil attorneys so that the latter can determine whether there are applicable civil statutes. In addition, a new provision requires civil attorneys to follow the same principles guiding criminal attorneys in the prosecution of individuals, including each of the “key steps” identified in the Yates Memo. See Section 4-3.100, “Pursuit of Claims Against Individuals.”

According to the USAM, this consultation between the two sides of the Department “permits consideration of the fullest range of the government’s potential remedies and promotes the most thorough and appropriate resolution in each case.” In her remarks, Ms. Yates underscored the change as necessary to ensure effective and efficient use of the Department’s resources.

II. Effect of USAM Updates

Although the Yates Memo was issued a little more than two months ago, we have already noted an increased focus on individuals by the Department at earlier stages in corporate cases. Now that the

additions to, and revisions of, the USAM have formalized the principles announced in the Yates Memo and have extended them to the Department's civil attorneys, counsel can expect to see a tangible impact on civil investigations. The extent of the impact of the new Principles on the disposition of corporate criminal and civil investigations will become clearer in the months ahead.

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