

The Death of the Sweetheart Deal

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White Collar Defense, Investigations and Corporate Compliance Alert

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The United States Department of Justice (DOJ) has announced a new policy intended to further the DOJ's increased effort to hold individuals accountable for corporate wrongdoing. The policy was laid out in a September 9, 2015 memorandum by Deputy Attorney General Sally Quillian Yates issued to federal prosecutors nationwide. This shift in policy comes in direct response to continued criticism of the DOJ for failing to target individuals who presided over the rampant fraud that facilitated the 2008 financial crisis and for offering multi-billion dollar settlements to banks that profited from the same.

The new policy has six main components that seek to strengthen the DOJ's "pursuit of individual corporate wrongdoing:"

1. **To be eligible for *any* cooperation credit, corporations must provide to the DOJ all relevant facts about the individuals involved in corporate misconduct.** The new policy requires a corporation to investigate all facts relevant to individual misconduct and provide all such facts about individuals who engaged in misconduct to the DOJ as a "threshold requirement" to be eligible for consideration for cooperation credit, regardless of whether the matter is civil or criminal. This "condition of cooperation" thus appears designed to impact the scope of both the corporation's investigation and its ensuing disclosures to the DOJ.
2. **Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.** DOJ attorneys in both the Civil and Criminal Divisions are instructed to "focus on building cases against individual wrongdoers" early on in an investigation. Because all corporate conduct is carried out through the corporation's individual agents, investigating the conduct of individuals is an effective way to determine the facts and extent of the corporate misconduct. Such a focus also increases the likelihood that individuals with knowledge of the cooperate misconduct will cooperate with the investigation early on.
3. **Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.** The memorandum calls for full consultation between DOJ's civil and criminal attorneys. This cooperation is required from the outset of an investigation. Civil Division attorneys and prosecutors are also tasked with discussing civil referrals when a prosecutor decides not to pursue a criminal case due to challenges in showing intent or meeting burdens of proof, and civil attorneys should involve prosecutors when they believe that an individual identified in a corporate investigation should be criminally prosecuted.
4. **Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.** Under the new policy, DOJ attorneys may "not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees." The policy, which also applies to the release of civil claims against individuals, allows for exceptions based only on "extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy."
5. **Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.** In cases where "the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include" a discussion of the potentially liable individuals and a plan to bring the matter to resolution before the statute of limitations expires. Notably, if a decision is made not to prosecute such individuals or charge them civilly, the government attorney must memorialize that determination and have it approved by the United States Attorney or Assistant Attorney General or their designees.

6. **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.** The new policy states the decision to pursue those who violate the law "should not be governed solely by those individuals' ability to pay," but instead DOJ attorneys "should consider factors such as [the seriousness of the offense], whether it is actionable, whether the admissible evidence will probably be sufficient to sustain a judgment, and whether pursuing the action represents an important federal interest."

While issues remain with implementation of the DOJ's new policy, including attorney-client privilege and resolving cases with limited evidence of intent, corporations should carefully review these changes. Although corporations have long had reasons to provide the government with information about individuals who engaged in misconduct, this new policy makes those incentives even stronger and reinforces the need for corporate compliance and transparent action in the wake of potential misconduct. White-collar prosecutions may be at their lowest level in twenty years, but with the release of this new policy, corporations can expect a drastic upswing in the near future. Additionally, the policy clearly signals that federal criminal and civil enforcement efforts in the white-collar sphere and the resolution of these cases will be carefully scrutinized by senior DOJ officials.

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