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DOJ Announces New Standards for Corporate Cooperation

The Department of Justice announced last week significant changes to its policies for granting corporations credit for cooperating with criminal investigations. The policy changes now allow corporations to receive cooperation credit where corporations identify “all individuals substantially involved in or responsible for the misconduct at issue.”¹ Previously, DOJ policy provided that corporations could receive credit only where “all individuals” involved in the misconduct were identified. The policy changes include other revised standards that may assist defense counsel in effectively representing corporations in connection with DOJ investigations. The changes were announced during a speech by Deputy Attorney General Rod Rosenstein on November 29, 2018 and implemented through revisions to DOJ’s Principles of Federal Prosecution of Business Organizations and other agency guidelines.

Background: The Yates Memo

In September 2015, then-Deputy Attorney General Sally Yates announced revised DOJ standards relating to individual accountability for corporate wrongdoing. Under the “Yates Memo,” in “order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct.”² Consistent with this requirement, DOJ policy required that a company “must identify **all individuals** involved in or responsible for the misconduct” as a prerequisite to receiving any cooperation credit.³

The New Policy

Under the new policy announced last week, DOJ’s Principles of Federal Prosecution of Business Organizations was amended to permit corporations to receive cooperation credit where “all individuals **substantially involved** in or responsible for the misconduct” are identified.⁴ According to DAG Rosenstein, these changes were made with the goal that “investigations should not be delayed merely to

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- ¹ Rod. J. Rosenstein, U.S. Deputy Att’y Gen., Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act (hereinafter “Rosenstein Remarks”) (Nov. 29, 2018), available [here](#).
 - ² Memorandum from Sally Quillian Yates, U.S. Deputy Att’y Gen., to Heads of Dep’t Components & All U.S. Attorneys, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) (emphasis in original), available [here](#).
 - ³ *Id.* (emphasis added).
 - ⁴ Justice Manual (formerly United States Attorneys’ Manual), § 9-28.700 *et seq.* (as revised Nov. 2018) (emphasis added).

collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted.”⁵ At the same time, DAG Rosenstein emphasized that “a company must identify all wrongdoing by senior officials, including members of senior management or the board of directors, if it wants to earn any credit for cooperation.”⁶ He added: “If a corporation wants to earn maximum credit, it must identify every individual person who was substantially involved in or responsible for the misconduct.”⁷

The new guidelines also provide that a corporation may be eligible for cooperation credit if it is unable to identify all individuals or provide complete factual information despite good faith efforts to do so.⁸ For example, the new policy recognizes that “there may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is legally prohibited from disclosing it to the government.”⁹ Where these circumstances exist, “the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor.”¹⁰

Finally, the new policy cautions DOJ attorneys that when reviewing information provided by companies, in addition to ensuring that the information is “complete and does not seek to minimize,” prosecutors should also ensure that companies or their counsel do not “exaggerate, or otherwise misrepresent the behavior or role of any individual or group of individuals.”¹¹ This revision appears to recognize the incentives that certain corporate constituencies may have to assign responsibility to others and encourages prosecutors to evaluate the potential for exaggeration or deflection of responsibility based on those incentives.

Practical Implications

As is often the case with policy revisions, the ultimate effect of these latest amendments to the Principles of Federal Prosecution of Business Organizations will depend in large part on how they are applied. At minimum, the changes provide counsel for corporations a basis to resist attempts by prosecutors to “boil the ocean” and demand information that goes beyond those individuals who are “substantially involved” in the misconduct. The revisions also have the potential to streamline certain DOJ investigations that may otherwise be sprawling and unnecessarily protracted. In effect, the revisions provide prosecutors with a basis to conclude investigations once they are substantially complete. The new policy also signals that

⁵ Rosenstein Remarks.

⁶ *Id.*

⁷ *Id.*

⁸ Justice Manual, § 9-28.700 (as revised Nov. 2018).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

prosecutors, in addition to being sensitive to information that “minimizes” conduct, should also be alert to attempts to “exaggerate” the behavior of a particular individual or group of individuals.

As companies test these practical implications, it will be important to hold the DOJ to the new standards, which should lead to more reasonable outcomes and more efficient investigations if implemented in good faith along the lines described by the Deputy Attorney General.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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