

DOJ's New White-Collar Policy Directs Prosecutors to Focus on Individual Accountability

By William M. Sullivan, Jr., Thomas C. Hill, Mark R. Hellerer, Maria T. Galeno, Carolina A. Fornos, Marc H. Axelbaum, Aaron S. Dyer and Fabio Leonardi

On September 9, 2015, Deputy Attorney General Sally Quillian Yates introduced a new policy aimed at aggressively prosecuting individuals for white-collar crimes. A product of a DOJ working group that started under former Attorney General Eric H. Holder, the policy prioritizes the civil and criminal prosecution of individuals, in addition to companies, and puts renewed pressure on companies to turn over evidence against their executives.

According to the Department, the new policy guidance will serve as a blueprint for prosecutors across the nation to hold individuals accountable for corporate crimes, in addition to continuing to pursue large corporate penalties. It will also erase some barriers to prosecuting officers and employees, thus injecting a new dynamic into high-profile corporate investigations.

Cooperation: All or Nothing

To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

Until now, companies involved in government investigations could cooperate with the government by voluntarily disclosing improper corporate practices without identifying individuals engaged in the wrongdoing and the extent of their misconduct. While such companies were not entitled to full credit for cooperation, they could nonetheless receive partial credit, potentially enough to avoid indictment, based on the extent of their investigative actions and disclosures. Effective last week, however, companies will not be able to receive credit for cooperating with the government unless they:

- Investigate who is responsible for the alleged wrongdoing;
- Identify such employees; and

- Turn over evidence against them “regardless of their position, status or seniority.”

A company’s willingness to identify all culpable individuals will be a threshold requirement, in addition to the usual factors laid out in the federal Sentencing Guidelines and the U.S. Attorney’s Manual, when the Department weighs whether to charge the company with federal crimes and the extent of the penalties that it will seek. This institutional policy shift is perhaps the most significant component of the new guidance, as credit for cooperation is a vital consideration for firms under government scrutiny. This credit can potentially save companies billions in fines, and may mean the difference between a civil settlement and a criminal charge. This heightened standard of complete cooperation as to individuals applies to both civil and criminal investigations.

Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for individuals.

The newly released memorandum provides that if the Department reaches a resolution with a company before resolving matters with responsible individuals, the Department should retain its ability to pursue these individuals. Thus, absent extraordinary circumstances, government attorneys are now directed not to agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. Similarly, in a civil context and absent extraordinary circumstances, government attorneys are instructed not to release claims related to the liability of individuals based on corporate settlement releases.

Further, the policy guidance provides that any corporate plea agreement and settlement agreement will include a provision requiring the company to continue to provide relevant information to the government about any individuals implicated in the wrongdoing. According to the Department, a company’s failure to continue cooperating against individual employees will be considered a material breach of the agreement and grounds for revocation or stipulated penalties.

A Focus on Individual Prosecution

Both criminal and civil corporate investigations will focus on individuals from the inception of the investigation.

The new policy guidance further directs prosecutors to focus on individual employees from the start of an investigation, regardless of whether the investigation begins in the criminal or civil context. According to the Department, by focusing the investigation on individual employees, government attorneys can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against officers and employees higher up the corporate hierarchy.

Criminal and civil attorneys handling corporate investigations will be in routine communication with one another.

Under the Department’s new policy, civil and criminal government attorneys are directed to separate any corporate and individual evidence that they collect in the process of their corporate investigation and make early assessments as to individual culpability. Indeed, according to the policy guidance, if civil government attorneys identify individuals during their investigation that should be subject to criminal inquiry, the attorneys will be expected promptly to refer the matter to criminal prosecutors, regardless of the current status of the civil corporate investigation. Similarly, if the evidence collected is not enough to warrant

criminal prosecution, criminal attorneys handling corporate investigations are directed to refer matters to civil attorneys as early as possible to explore potential civil liability.

Corporate cases will not be resolved without a clear path to resolve related individual cases before the statute of limitation expires.

Further, consistent with the Department's commitment to prosecuting individual employees, the new policy provides that (i) corporate settlements may not grant immunity to individuals "absent extraordinary circumstances," and (ii) if government attorneys decide to resolve a corporate case before the matter is resolved against individuals, they will only be permitted to do so once they have demonstrated to their supervisors a "clear plan" for resolving the related individual cases before statutes of limitations expire.

Civil Suits Against Individuals

Civil government attorneys will evaluate whether to bring suit against an individual based on considerations beyond the individual's ability to pay.

Importantly, the Department's policy further states that the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision as to whether to bring a civil suit against them. Indeed, in deciding whether to file a civil action against an individual, government attorneys are now directed to consider factors such as whether the person's misconduct was serious and whether the action reflects an important federal interest, among others.

Implications for Corporations and Their Employees

In light of the Department's heightened standard for receiving cooperation credit, companies may need to conduct more comprehensive internal investigations that, while still tailored to the scope of the alleged wrongdoing, are broad enough to identify all potentially culpable officers and employees and meet the Department's threshold requirement that "all" facts relevant to individual liability be investigated and disclosed to the government. Moreover, existing compliance programs may have to be enhanced to identify potential wrongdoing earlier, to facilitate the effectiveness of a subsequent internal investigation, and to focus more on identifying culpable individuals.

Although many companies have been identifying responsible individuals long before the issuance of the new policy guidance, usually in an effort to receive additional cooperation credit, they may have sometimes downplayed certain individuals' knowledge or involvement in the alleged wrongdoing. However, as such disclosure would no longer be enough to qualify a corporation for cooperation credit, companies may now be less likely to cooperate with the government or self-disclose. As a result, final resolutions of government investigations may become more difficult.

Because these policy changes can potentially pit companies against their officers and employees, companies may face a number of difficult decisions. They should now consider carefully whether individuals need to be represented by their own counsel earlier than they would have been prior to the issuance of the new policy guidance. Further, while many executives already do so, more officers and employees may request individual counsel in internal investigations. This may, in turn, increase the cost of investigations that companies may have to bear because of indemnification obligations provided by statute, corporate charter, bylaws or agreement. Thus, companies may want to consider increasing the scope and amount of directors and officers (D&O) insurance policies, which often do not cover the costs of internal investigations.

Next, because the policy change applies equally to civil actions, and emphasizes the need for cooperation among the government's criminal and civil prosecutors, companies involved in securities, tax or other civil cases may now expect to encounter some resistance from executives and other employees who, until last week, may not have hesitated to cooperate with civil investigations by their employers or the government.

Finally, faced with pressure to identify responsible officers and employees and provide the government with all relevant facts related to their misconduct, companies may confront more complex decisions about whether the information requested may implicate the attorney-client privilege and attorney work product protection, and have resulting collateral consequences for individuals. Therefore, in an effort to render information developed in the investigative process usable by the government, Upjohn warnings will acquire even more significance in the internal investigation going forward.

If you have any questions about the content of this alert please contact the Pillsbury attorney with whom you regularly work, or the authors below.

William M. Sullivan, Jr. [\(bio\)](#)
Washington, DC
+1.202.663.8027
wsullivan@pillsburylaw.com

Thomas C. Hill [\(bio\)](#)
Washington, DC
+1.202.663.8073
thomas.hill@pillsburylaw.com

Mark R. Hellerer [\(bio\)](#)
New York
+1.212.858.1787
mark.hellerer@pillsburylaw.com

Maria T. Galeno [\(bio\)](#)
New York
+1.212.858.1833
maria.galeno@pillsburylaw.com

Carolina A. Fornos [\(bio\)](#)
New York
+1.212.858.1558
carolina.fornos@pillsburylaw.com

Marc H. Axelbaum [\(bio\)](#)
San Francisco
+1.415.983.1967
marc.axelbaum@pillsburylaw.com

Aaron S. Dyer [\(bio\)](#)
Los Angeles
+1.213.488.7321
aaron.dyer@pillsburylaw.com

Fabio Leonardi [\(bio\)](#)
Washington, DC
+1.202.663.8713
fabio.leonardi@pillsburylaw.com

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