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DOJ Corporate Enforcement Policy Shift – Substantially Better?

Speaking last week at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (FCPA), Deputy Attorney General Rod J. Rosenstein announced a revised policy on individual accountability in corporate cases. The revised policy eases the requirements for corporations to receive cooperation credit by restoring discretion to Department of Justice (DOJ) lawyers to offer credit to a company that is unable to identify ***all*** relevant individuals or provide complete factual information despite good faith efforts to cooperate.

The revised policy shifts away from the policy memo issued in September 2015 by former Deputy Attorney General Sally Yates in respect of individual accountability. To receive any credit for cooperation under the "Yates Memo," a company had to "identify ***all individuals involved*** in or responsible for the misconduct at issue, regardless of their position, status or seniority." There was concern that the Yates Memo would have a chilling effect on company cooperation – requiring a company to identify ***all*** employees involved in the misconduct is both expensive and time-consuming.

Consistent with former Attorney General Jeff Sessions' announcement over a year ago, the revised policy is not a guidance memo. Instead, the revised policy is reflected in Section 9-28.700 of the Justice Manual of the Department of Justice, which is internal DOJ guidance.

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The Shift

Section 9-28.700 requires companies to "identify all individuals ***substantially*** involved in or responsible for the misconduct at issue, regardless of position status or seniority, and provide the Department all relevant facts relating to the misconduct." If companies fail to do so, they will not be eligible to receive any consideration (credit) for cooperation, unless they can explain any restrictions preventing them from identifying those individuals.

Although Mr. Rosenstein praised the previous policy as a "great idea," there were practical reasons why a shift was required. He noted that the "all or nothing" approach is arguably impossible to implement in cases where conduct spans many years and involves multiple departments, states, and even countries. Mr. Rosenstein was also very clear that "investigations should not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted."

But what is deemed to be substantial involvement? Mr. Rosenstein's speech gives some indication by stating that the Department's intention is to "focus on the individuals who play significant roles in setting a company on the course of criminal conduct. We want to know who authorized the misconduct, and what they knew about it."

These comments suggest the focus should be on those directly involved in the wrongdoing. For example, a senior sales executive involved in devising a scheme whereby bribes could be concealed behind a façade of legitimacy through a consultancy agreement would certainly amount to substantial involvement. However, does substantial involvement include the secretary who simply assisted in arranging meetings and drafting the documents or the individuals working on the finance team who may have processed the payments? According to Sandra Moser, acting chief of the DOJ's Fraud Section, who spoke on a panel later the same day, unwitting acts by lower-level employees will not be ignored, particularly where the DOJ may want their testimony to make a case against those at a higher level within the company. Ms. Moser went on to clarify her comments, explaining that while the policy puts an emphasis on substantial involvement, it doesn't preclude companies from disclosing relevant involvement on the basis that "the facts in the story would not be complete if we were not able to discern those facts."

The changes did not stop at the criminal policy. Mr. Rosenstein also announced changes to the DOJ's policy in civil cases. Similarly, the DOJ revised the policy to restore to its attorneys some discretion to pursue select individuals through civil actions and to award some credit where cooperation was meaningful but not sufficient to qualify for maximum credit. As Mr. Rosenstein noted, "[t]he most important aspect of the policy is 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 cooperating in a civil case."

While the DOJ has revised its policy to earn cooperation credit, it continues to stress that an effective compliance program remains a key ingredient in the ultimate outcome of an enforcement case.

Conclusion

While the emphasis on substantial involvement may appear to be a significant change, this revised policy appears to acknowledge the practical effect that the DOJ's policies have on companies and individuals subject to enforcement, and that the previous policy may have at times inhibited rather than helped the DOJ achieve its goals. As Mr. Rosenstein himself acknowledged in his speech, "we learned that the policy was not strictly enforced in some cases because it would have impeded resolutions and wasted resources."

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How this policy will be applied in practice remains to be seen, but the revisions represent a pragmatic, real-world approach, and should generally be welcomed by those companies who may find themselves subject to criminal or civil investigation.

Both companies and their advisers, however, will need to ensure that their own work remains proactive and rigorous, with an extra dimension of analysis to be presented fully and frankly to preserve positions, as well as valuable credit.

Authors

This GT Alert was prepared by **Cuneyt A. Akay**, **Sandra D. Gonzalez**, **Anne-Marie Ottaway**, **Barry Vitou, Adelaida Vasquez,** and **Gareth Hall**. Questions about this information can be directed to:

- Cuneyt A. Akay | +1 303.572.6576 | akayc@gtlaw.com
- Sandra D. Gonzalez | +1 512.320.7234 | gonzalezsd@gtlaw.com
- Anne-Marie Ottaway | +44 (0) 203.349.8700 | ottawayam@gtlaw.com
- Barry Vitou | +44 (0) 203.349.8700 | vitoub@gtlaw.com
- Adelaida Vasquez | +1 713.374.3635 | vasqueza@gtlaw.com
- Gareth Hall | +44 (0) 203.349.8700 | hallg@gtlaw.com
- Or your Greenberg Traurig attorney

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