

## DOJ Announces Revised Guidance for Corporate Cooperation Credit

***Revised policies seek to end the Yates Memo's all-or-nothing approach to corporate cooperation and should enable more timely and cost-efficient resolutions.***

### Key Points:

- Companies are eligible for criminal cooperation credit if they identify individuals substantially involved in or responsible for the alleged misconduct, as opposed to all culpable individuals.
- Companies are eligible for partial civil cooperation credit if they identify wrongdoing by senior officials. To receive maximum civil cooperation credit, companies must identify all those substantially involved in or responsible for the alleged misconduct.
- Civil prosecutors again have discretion to consider an individual's ability to pay when assessing whether to pursue a civil judgment.

Deputy Attorney General Rod Rosenstein announced on November 29, 2018, that the Department of Justice (DOJ or Department) has adopted policy changes regarding individual accountability in criminal and civil enforcement actions.<sup>1</sup> Speaking at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act, Rosenstein suggested that existing policies reflected in the "Yates Memo" — a September 2015 memorandum issued by then Deputy Attorney General Sally Yates<sup>2</sup> — were well-intentioned but had proved inefficient and unduly burdensome. To remedy those issues, Rosenstein announced revised standards governing eligibility for corporate cooperation credit that place greater emphasis on identifying and disclosing only those individuals who had substantial involvement in or were responsible for the alleged misconduct, as opposed to all those who may have participated in misconduct. The revised policies also articulate different standards for cooperation in civil cases, namely the possibility of securing partial credit upon voluntarily disclosing wrongdoing by senior officials, and restore prosecutors' discretion to consider an individual's ability to pay when determining whether to pursue a civil judgment. These policies have been added to the *Justice Manual*, which contains the rules by which federal prosecutors must operate.

### The Revised DOJ Policies

The changes announced by Rosenstein are the product of the Department's wide-ranging review of its existing corporate enforcement policies.<sup>3</sup> That effort included reconsideration of the standards governing individual accountability that were set forth in the Yates Memo.

Rosenstein explained that the Yates Memo had been interpreted to require companies “to locate and report to the government every person involved in alleged misconduct in any way, regardless of their role.” According to Rosenstein, this interpretation proved impractical and ineffectual. In criminal cases, companies taking that approach tended to “penalize employees and shareholders without effectively punishing” those individuals most culpable for the alleged misconduct. It also proved unduly burdensome to both prosecutors and companies under investigation: Prosecutors in both criminal and civil cases were forced to delay corporate resolutions while awaiting the results of a company’s internal investigation. And companies were forced to undertake overly broad and costly internal investigations of misconduct, particularly in cases involving company-wide violations over an extended period of time. Such efforts provided marginal benefit to the Department’s enforcement efforts, because the Department typically lacks the resources necessary to prosecute either criminal or civil cases against every individual identified. The benefits were especially dubious in civil cases, for which many individuals often lack the resources to pay a judgment, even if they did engage in wrongdoing.

To address these shortcomings, Rosenstein announced numerous revisions to the *Justice Manual*, with particular emphasis on articulating revised standards for corporate cooperation.

### **Criminal Actions**

The *Justice Manual* now provides that eligibility for cooperation credit in a criminal matter requires the company to make good-faith efforts to “identify all individuals *substantially involved in or responsible for* the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct”<sup>4</sup> (emphasis added). Employees who are less central to the misconduct no longer need to be identified, nor must their actions be reported in detail to the government. Further, if the company engages in good-faith efforts but is unable to identify all those who are “substantially involved in or responsible for” the misconduct, it may retain eligibility for cooperation credit. Under the revised policy, companies that decline to investigate and disclose wrongdoing remain ineligible for cooperation credit. The Department also will continue to refuse to support a cooperation-related reduction in sentencing if the company is later prosecuted.<sup>5</sup>

These revised standards should allow for less burdensome investigations and more limited disclosures, which in turn may result in more timely and cost-efficient resolutions. The *Justice Manual* does make clear that, as before, “the company’s continued cooperation with respect to individuals may be necessary post-resolution,” and instructs that “the corporate resolution agreement should include a provision that requires the company to provide information about all individuals substantially involved in or responsible for the misconduct.”<sup>6</sup> As before, the company’s failure to fulfill that obligation could render it subject to stipulated penalties or be classified as a material breach.

### **Civil Actions**

The Department has adopted a two-tier standard regarding a company’s eligibility for cooperation credit in civil actions.

To earn maximum credit, the company should investigate and voluntarily disclose the wrongdoing, including the identities of “all individuals substantially involved in or responsible for the misconduct.”<sup>7</sup> This should occur without the government seeking to compel the information through subpoenas or other investigative demands.

Department prosecutors also may “exercise their discretion in appropriate circumstances to offer some cooperation credit to a corporation that has meaningfully assisted the government’s investigation,” even if it falls short of the standard for maximum credit. The *Justice Manual* states that such credit is available if

the award “serves the public interest and furthers the administration of justice,” but does not otherwise elaborate on eligibility for partial credit.<sup>8</sup> Rosenstein, however, suggested in his remarks that “to earn any credit for cooperating in a civil case,” the company “must identify all wrongdoing by senior officials, including members of senior management or the board of directors.”<sup>9</sup>

Consistent with prior policy, a company is ineligible for any cooperation credit if it “conceals involvement in the misconduct by members of senior management or the board of directors, or otherwise demonstrates a lack of good faith in its representations regarding the nature or scope of the misconduct.”<sup>10</sup> A company is also generally ineligible for credit based on “[t]he mere submission of legally required information,” such as producing documents in response to a subpoena.<sup>11</sup>

In addition to outlining a revised standard for cooperation credit, the *Justice Manual* changes course from the Yates memo and authorizes “the release of civil claims related to the liability of individuals based on a corporate settlement . . . [if] further action against the individuals is not necessary or warranted.”<sup>12</sup> The new guidance, also unlike the Yates Memo, does not discourage prosecutors from considering an individual’s ability to pay when determining whether to pursue a civil judgment.<sup>13</sup>

## Analysis

The revised DOJ policies correct a common misperception regarding the Yates Memo, which arguably was never intended to adopt an all-or-nothing approach to corporate cooperation. Its plain language notwithstanding,<sup>14</sup> many persons within and outside the Department believed that the Yates Memo was not meant to force companies to engage in the far-ranging investigations and broad disclosures that became more common in recent years. Instead, it was meant to prioritize individual accountability while still focusing Department and company resources on identifying and pursuing those persons most culpable for alleged misdeeds. In that sense, these revised policies give effect to the Yates Memo’s original intent.

The *Justice Manual* now recognizes the need for different standards governing cooperation credit in criminal and civil actions. In criminal cases, for which the Department’s objective is to identify and punish those responsible for corporate misconduct, it is sensible to require companies to identify all persons who were substantially involved in or responsible for that misconduct. Prosecuting those individuals, regardless of their position, status, or seniority, arguably has a stronger deterrent effect than criminal prosecution of the corporation itself.

By contrast, the revised civil standards recognize that civil prosecutors are principally concerned with securing monetary judgments. There is little benefit in delaying corporate civil resolutions while a company identifies all persons who may have had a hand in misconduct, particularly when many of those identified may be judgment-proof. There are some cases when non-monetary civil remedies, such as debarment, warrant action against judgment-proof individuals. However, in most cases, seeking unrecoverable monetary judgements is an inefficient and ineffective use of Department resources. As a result, the revised cooperation standards enable companies to focus their investigations on the misconduct of senior company managers (or, if seeking maximum credit, the most culpable actors in misconduct). They also restore a prosecutor’s discretion to consider an individual’s ability to pay when deciding whether to pursue a civil judgment, a practice discouraged by the Yates Memo. These changes should aid the Department in bringing timely civil actions against culpable individuals with the capacity to pay. If no malfeasance is found, or those culpable are judgment-proof, then civil prosecutors have the discretion to preserve resources and pursue other enforcement actions.

The policy changes announced by Rosenstein are part of a larger trend within the Department, which has increasingly adopted corporate-friendly policies since President Trump took office. For example, Rosenstein announced in November 2017 a series of policy changes that included a presumption in favor of declination for companies that voluntarily self-disclose, cooperate, and remediate violations of the Foreign Corrupt Practices Act.<sup>15</sup> In May 2018, Rosenstein announced a policy to curb “piling on,” thereby requiring the Department’s prosecutors to coordinate with their counterparts within the Department as well as regulators in other parts of local, state, federal, and foreign governments, all in an effort to avoid the imposition of multiple penalties for the same corporate conduct.<sup>16</sup> Most recently, Assistant Attorney General Brian Benczkowski issued a memorandum and remarks that discourage the use of a corporate monitor when the costs to the company outweigh the benefits.<sup>17</sup>

## Conclusion

The Department’s policy changes regarding individual accountability, like many of the Department’s recent policy announcements, reflects a growing trend to incentivize corporations to voluntarily investigate, disclose, and remediate potential wrongdoing. While a company must still engage in a complex, fact-sensitive inquiry when determining whether to make the disclosures necessary for cooperation credit, the Department’s decision to revise the Yates Memo’s all-or-nothing approach should result in more timely, cost-efficient resolutions when cooperation is appropriate.

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## Endnotes

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- <sup>1</sup> Deputy Attorney General Rod J. Rosenstein, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (November 29, 2018), *available at* <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.
- <sup>2</sup> Deputy Attorney General Sally Q. Yates, Individual Accountability for Corporate Wrongdoing (Sep. 9, 2015), *available at* <https://www.justice.gov/archives/dag/file/769036/download>.
- <sup>3</sup> *Id.*
- <sup>4</sup> U.S. DEP'T OF JUSTICE, JUSTICE MANUEL § 9-28.700(A) (Dec. 10, 2018), *available at* [https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations?utm\\_medium=email&utm\\_source=govdelivery#9-28.700](https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations?utm_medium=email&utm_source=govdelivery#9-28.700).
- <sup>5</sup> *Id.*
- <sup>6</sup> *Id.* § 9.28-700(B).
- <sup>7</sup> *Id.* § 4-3.100(3).
- <sup>8</sup> *Id.*
- <sup>9</sup> Deputy Attorney General Rod J. Rosenstein, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (November 29, 2018), *available at* <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.
- <sup>10</sup> U.S. DEP'T OF JUSTICE, JUSTICE MANUEL § 4-3.100(3) (Dec. 10, 2018), *available at* [https://www.justice.gov/jm/jm-4-3000-compromising-and-closing?utm\\_medium=email&utm\\_source=govdelivery#4-3.100](https://www.justice.gov/jm/jm-4-3000-compromising-and-closing?utm_medium=email&utm_source=govdelivery#4-3.100).
- <sup>11</sup> *Id.*
- <sup>12</sup> *Id.* § 4-3.100(4).
- <sup>13</sup> Deputy Attorney General Rod J. Rosenstein, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (November 29, 2018), *available at* <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0> ("[O]ur attorneys once again are permitted to consider an individual's ability to pay in deciding whether to pursue a civil judgment.").
- <sup>14</sup> Deputy Attorney General Sally Q. Yates, Individual Accountability for Corporate Wrongdoing, at 3 (Sep. 9, 2015), *available at* <https://www.justice.gov/archives/dag/file/769036/download> ("[T]o be eligible for any credit for cooperation, 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.").
- <sup>15</sup> For further analysis regarding that announcement, please see Latham & Watkins' [November 2017 Client Alert](#).
- <sup>16</sup> For further analysis regarding that announcement, please see Latham & Watkins' [May 2018 Client Alert](#).
- <sup>17</sup> For further analysis regarding that announcement, please see L. Caldwell & C. Ting, *Compliance Remains a Key DOJ Priority*, LAW360 (Oct. 29, 2018), [available here](#).