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Justice Department Releases New Prosecution Policies

United States Attorneys' Manual Revised to Incorporate Recently Announced Policies on Individual Liability and Cooperation in Corporate Prosecutions

On November 16, 2015, the Department of Justice revised the United States Attorneys' Manual to incorporate previously announced guidance addressing the accountability of individual employees in civil and criminal investigations of corporate wrongdoing.

As expected, the revisions to the Manual's chapter on the "Principles of Federal Prosecution of Business Organizations" reflect guidance published by the Department in the September 9, 2015 "Yates Memo" (see "[New Justice Department Guidance on Individual Accountability: Analysis of the Justice Department's New Guidance on Individual Liability in Matters of Corporate Wrongdoing](#)"). The new policies require that to receive *any* cooperation credit, a 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."

The new policies also clarify issues relating to the attorney-client privilege, timely self-reporting, foreign data privacy restrictions, and the prosecution of individuals.

Protection of Attorney-Client Privilege and Attorney Work Product. Under the new policies, a company will only be eligible for cooperation credit once it "meets the threshold requirement of providing all relevant facts with respect to individuals." The revised Manual addresses concerns that the new policies effectively require companies to waive attorney-client privilege and attorney work product protection, stating: "To be clear, a company is not required to waive its attorney-client privilege and attorney work product protection in order satisfy this threshold." Rather, a company "may be eligible for

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cooperation credit regardless of whether it chooses to waive privilege or work product protection in the process, if it provides all relevant facts about the individuals who were involved in the misconduct. But if the corporation does not disclose such facts, it will not be entitled to receive any credit for cooperation.”

In a November 16 speech announcing the new policies, Deputy Attorney General Sally Q. Yates sounded the same theme, saying, “[L]egal advice is privileged. Facts are not.” She stated that although counsel’s notes and memoranda of employee interviews “may be protected, at least in part, by attorney-client privilege or as attorney work product . . . to earn cooperation credit, the corporation does need to produce all relevant facts—including the facts learned through those interviews—unless identical information has already been provided.” Deputy Attorney General Yates noted that the Department “will respect the privilege, but we will also expect companies to respect its boundaries and not to wrongly exploit its legitimate purpose by using it to shield non-privileged information from investigators.”

It remains to be seen whether the boundaries of privilege and work product can be as easily navigated as Deputy Attorney General Yates suggests, given the elements of the new prosecution policies. But the revised Manual and her comments indicate that the Department’s position on this issue has not changed as a result of the new policy on cooperation.

Foreign Data Privacy Restrictions. The new policies also address restrictions on the production of certain foreign documents. The Manual notes that in circumstances in which “a company genuinely cannot get access to certain evidence or is actually prohibited from disclosing it to the government . . . the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor.”

This language appears directed at foreign data privacy, bank secrecy, and other foreign law restrictions, which often require companies to decide between responding fully to requests from U.S. prosecutors and adhering to the laws of foreign countries in which they operate. The new policies clarify that, to receive cooperation credit, a company facing such a conflict will need to satisfy the Department that foreign law in fact forbids production and that the company is not attempting to use foreign law as a shield against production.

Timely Self-Reporting. When determining an appropriate resolution, the updated Manual instructs prosecutors to consider separately a company’s “willingness to cooperate in the investigation of its agents” and its “timely and voluntary disclosure of wrongdoing.” In previous versions of the Manual the two factors were considered together.

Under the revised policies, “prosecutors may consider a corporation’s timely and voluntary disclosure, both as an independent factor and in evaluating the company’s overall cooperation.” The Manual notes, however, that “prosecution may be appropriate notwithstanding a corporation’s voluntary disclosure.”

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Adequacy of the Prosecution of Individuals. Finally, when deciding whether to charge a corporation, the revised policies instruct prosecutors to “consider whether charges against the individuals responsible for the corporation’s malfeasance will adequately satisfy the goals of federal prosecution.”

The implication appears to be that, in certain cases, the prosecution of individuals may suffice in lieu of prosecution of the company, potentially opening further avenues of corporate defense advocacy. Companies should consider this argument in certain circumstances—for example, where employees have committed clear offenses. Companies will also need to continue to consider whether to recommend separate counsel for individuals early in certain investigations, as the risk that conflicts will develop between the company and individual employees may be increased.

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