

JUSTICE NEWS

Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing

United States

~

Thursday, September 10, 2015

Remarks as prepared for delivery

Thank you, Professor [Jennifer] Arlen, for that kind introduction and for everything you and your colleagues have accomplished at NYU. In the few years since its launch, the Program on Corporate Compliance and Enforcement has made its mark here in New York and in the legal profession across the country. You have provided a much needed venue to explore both the causes of and potential solutions to corporate misconduct.

It's an honor to be joined today by so many prominent leaders in the law and the world of corporate compliance, including a number of our federal judges and Department of Justice (DOJ) officials. In particular, I'd like to recognize three of our local U.S. Attorneys: Kelly Currie, from the Eastern District of New York, Paul Fishman, from the District of New Jersey, and Deirdre Daly, from the District of Connecticut, who are with us this afternoon and who have done such great work in the white-collar realm. Let me also thank Dean [Trevor] Morrison and the entire NYU Law community for hosting us here today.

Twenty-six years ago, I started as a line prosecutor in the U.S. Attorney's office in Atlanta and I've been with the Department of Justice ever since. During that time, I've had the opportunity to participate in a wide range of cases, from guns and drugs to domestic terrorism and political corruption. But a significant portion of my career has been spent handling white-collar prosecutions. I've had a chance to experience them from many angles – first, as an Assistant United States Attorney (AUSA) cutting grand jury subpoenas and interviewing witnesses and later as the Chief of the Fraud and Public Corruption Section in Atlanta, where I oversaw investigations, approved charging decisions and signed off on corporate resolutions. I know first-hand how important and challenging this work is. As U.S. Attorney in Atlanta and now Deputy Attorney General, I've had the opportunity to view the world of corporate enforcement through a much wider lens and I have an even greater appreciation for how these efforts affect our economy and fellow citizens. This work has undoubtedly shaped the way I view DOJ's approach to civil and criminal enforcement.

From these experiences, I've learned what many of you know. These cases can present unique challenges for DOJ's agents and attorneys: there are complex corporate hierarchies, enormous volumes of electronic documents and a variety of legal and practical challenges that can limit access to the evidence we need.

In the most basic ways, though, corporate misconduct isn't all that different from everything else DOJ investigates and prosecutes. Crime is crime. And it is our obligation at the Justice Department to ensure that we are holding lawbreakers accountable regardless of whether they commit their crimes on the street corner or in the boardroom. In the white-collar context, that means pursuing not just corporate entities, but also the individuals through which these corporations act.

Few people understood this better – or were more committed to ensuring equal justice – than our former Attorney

General, Eric Holder. Last September, he spoke forcefully about this very topic here at NYU. In that speech, he discussed the many reasons why individual accountability in corporate cases is so important – because it deters future illegal activity, because it incentivizes changes in corporate behavior and because it ensures that the people who engage in wrongdoing are held responsible for their actions. He made clear that, as a matter of basic fairness, we cannot allow the flesh-and-blood people responsible for misconduct to walk away, while leaving only the company’s employees and shareholders to pay the price. And, as he pointed out, nothing discourages corporate criminal activity like the prospect of people going to prison.

But former Attorney General Holder was also frank about the challenges we face in pursuing financial fraud cases against individuals. In modern corporations, where responsibility is often diffuse, it can be extremely difficult to identify the single person or group of people who possessed the knowledge or criminal intent necessary to establish proof beyond a reasonable doubt. This is particularly true of high-level executives, who are often insulated from the day-to-day activity in which the misconduct occurs. Without an inside cooperating witness, preferably one identified early enough to wear a wire, investigators are left to reconstruct what happened based on a painstaking review of corporate documents, looking for a smoking gun that most financial criminals are far too savvy to leave behind. And since virtually all of these corporations operate worldwide, restrictive foreign data privacy laws and a limited ability to compel the testimony of witnesses abroad make it even more challenging to obtain the necessary evidence to bring individuals to justice.

But regardless of how challenging it may be to make a case against individuals in a corporate fraud case, it’s our responsibility at the Department of Justice to overcome these challenges and do everything we can to develop the evidence and bring these cases. The public expects and demands this accountability. Americans should never believe, even incorrectly, that one’s criminal activity will go unpunished simply because it was committed on behalf of a corporation. We could be doing a bang-up job in every facet of the department’s operations – we could be bringing all the right cases and making all the right decisions. But if the citizens of this country don’t have confidence that the criminal justice system operates fairly and applies equally – regardless of who commits the crime or where it is committed – then we’re in trouble.

This issue has been at the front of my mind since coming to Washington eight months ago. I know the same is true for Attorney General [Loretta E.] Lynch, who cares deeply about it as well. And most importantly, it’s been on the minds of the talented men and women of the Justice Department who do the hard work to make the cases. Over the past months, a group of experienced lawyers from all across the department and the U.S. Attorney community have examined how we approach corporate investigations. They asked themselves: how can we overcome these challenges and maximize our efforts to make the strongest possible cases against individuals in corporate cases? It’s a tall order, but the dedicated men and women of the Justice Department have never been daunted by a difficult task. In fact, throughout the recent working group process, they have demonstrated determination to adapt our practices to evolving demands. In taking on this project, we analyzed our civil and criminal investigations and thought carefully about what we should do within the Justice Department to ensure that individual accountability lies at the heart of our corporate enforcement strategy.

And so, based on this work, we’re taking six specific steps to hold individual corporate wrongdoers accountable. These steps are the subject of a memo that I issued yesterday to all of the department’s prosecutors and civil litigators. I’d like to discuss these six steps with you today. Some are institutional policy shifts that change the way we investigate, charge and resolve cases. Some address the way that DOJ interacts with the targets of an investigation. Some of these policies are new and some are already being practiced at various places within DOJ but now will apply to everyone across the department. Fundamentally, these new policies ensure that all department attorneys – from main justice to the 93 U.S. Attorney’s Offices across the country – are consistent in using our best efforts to hold individual wrongdoers accountable.

To codify and supplement the changes announced in yesterday's memo, we will be revising several of the guidance documents that our attorneys rely on when investigating corporate misconduct, including the U.S. Attorney's manual and the principles of federal prosecution of business organizations, sometimes known as the Filip Factors.

The first change relates to one of those Filip Factors. Effective immediately, we have revised our policy guidance to require that if a company wants any credit for cooperation, any credit at all, it must identify all individuals involved in the wrongdoing, regardless of their position, status or seniority in the company and provide all relevant facts about their misconduct. It's all or nothing. No more picking and choosing what gets disclosed. No more partial credit for cooperation that doesn't include information about individuals.

Now, to the average guy on the street, this might not sound like a big deal. But those of you active in the white-collar area will recognize it as a substantial shift from our prior practice. While we have long emphasized the importance of identifying culpable individuals, until now, companies could cooperate with the government by voluntarily disclosing improper corporate practices, but then stop short of identifying who engaged in the wrongdoing and what exactly they did. While the companies weren't entitled to full credit for cooperation, they could still get credit for what they did do and that credit could be enough to avoid indictment.

The rules have just changed. Effective today, if a company wants any consideration for its cooperation, it must give up the individuals, no matter where they sit within the company. And we're not going to let corporations plead ignorance. If they don't know who is responsible, they will need to find out. If they want any cooperation credit, they will need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals.

While this is new for the corporate world, there's nothing radical about the concept. It's the same rule we apply to cooperators in any other type of criminal investigation. A drug trafficker can decide to flip against his co-conspirators. He can proffer to the government the full scope of the criminal scheme. He can take the stand for the government and testify against a dozen street-level dealers. But if he has information about the cartel boss and declines to share it, we rip up his cooperation agreement and he serves his full sentence. The same is true here. A corporation should get no special treatment as a cooperator simply because the crimes took place behind a desk.

This position builds on the tremendous work advanced by Leslie Caldwell, our Assistant Attorney General for the Criminal Division, since she returned to DOJ last year. Leslie and the Criminal Division have been demonstrating that corporate cooperation can and must focus on individual accountability, and our new policy guidance now makes that crystal clear.

This threshold requirement of complete cooperation as to individuals not only governs criminal investigations, but applies to civil investigations as well. Companies will be expected to provide the same type of information about individuals if they want any consideration on the civil side, including how a case is charged or resolved and whether we bring action against a parent or its subsidiary. Similarly, it will be the department's position going forward that in order to qualify for the reduced damages provision under the False Claims Act, the company must identify any culpable individuals and provide all material facts about those individuals.

This new cooperation requirement does not mean that DOJ will sit back and wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, department attorneys will be actively investigating individuals at every step of the process – before, during and after any corporate cooperation. Department attorneys will be vigorously testing information provided by companies and comparing it to the results of our own investigation to ensure that it is indeed complete and that it doesn't seek to minimize the role of any one person or group of individuals.

Building on this point, a company should not assume that its cooperation ends as soon as it settles its case with the government. Going forward, corporate plea agreements and settlement agreements will include a provision that requires the companies to continue providing relevant information to the government about any individuals implicated in the wrongdoing. A company's failure to continue cooperating against individuals will be considered a material breach of the agreement and grounds for revocation or stipulated penalties.

And one final note on this point. The purpose of this policy is to better identify responsible individuals, not to burden corporations with longer or more expensive internal investigations than necessary. We are not asking companies to "boil the ocean," so to speak, and embark upon a multimillion-dollar investigation every time they learn about misconduct. We expect thorough investigations tailored to the scope of the wrongdoing. So for all the defense lawyers in the room – and I know there are plenty of you – keep this in mind. If you are representing a corporation and there's a question about the scope of what's required, you can do what many defense attorneys do now – pick up the phone and discuss it with the prosecutor.

As part of this broader policy shift, we're not just changing what we expect of companies; we're also changing what we expect of ourselves. The second policy I want to discuss involves how we initiate and develop corporate investigations. One of the things we have learned from experience is that it is extremely difficult to build a case against individuals, civil or criminal, unless we focus on individuals from the very beginning. For example, if an investigation starts as a civil inquiry into the company and interviews are conducted and documents gathered with a focus on corporate liability, it is often challenging for our attorneys to then go back at the conclusion of the civil matter and build a criminal case against individuals. This is particularly true not only because of the sheer passage of time, but also because individual criminal liability often hinges on proving a level of criminal intent much more demanding than what was required in the civil case.

To address this problem, the department yesterday instructed its attorneys that, going forward, they are to focus on individuals from the start of an investigation, regardless of whether the investigation begins civilly or criminally. Moreover, once a case is underway, the inquiry into individual misconduct can and should proceed in tandem with the broader corporate investigation. Delays in the corporate case will no longer suffice as a reason to delay pursuit of the individuals involved.

The third policy dovetails with the second. The best way to ensure that criminal prosecutors don't need to go back and build a new case after the civil attorneys finish their inquiry – or vice versa – is to make sure that everyone's talking to each other from the very beginning. And so we are directing our civil and criminal attorneys to collaborate to the full extent permitted by law at all stages of the investigation. The Department of Justice has access to a wide range of enforcement remedies – from civil penalties to lengthy prison sentences – and the only way to leverage our full authority is by ensuring early and regular communication. To make sure nothing slips through the cracks, we're formalizing these lines of communication. Going forward, regardless of whether a corporate case begins as a civil or criminal inquiry, the DOJ attorneys initially handling the matter will be responsible for notifying the "other side of the house" about the investigation. As the case proceeds, civil and criminal attorneys will be in regular contact. If prosecutors decide not to bring criminal charges against individuals, they will need to notify their civil counterparts, who can make an independent assessment of civil liability. And if civil attorneys identify individuals during their investigation who should be subject to a criminal inquiry, they will be expected to promptly refer the matter to criminal prosecutors, regardless of the current status of the civil corporate investigation.

The fourth and fifth policies relate to how we resolve cases. As I mentioned earlier, delays in corporate investigations should not delay our ability or willingness to resolve related cases against individuals. In most instances, this will mean that we resolve cases with individuals before or at the same time that we resolve the matter against the corporation. If, however, DOJ attorneys decide it is necessary to resolve the corporate case first, they will only be permitted to do so once they have demonstrated a clear plan to their supervisors for resolving the

related individual cases – promptly and before the statute of limitations expires. If at the conclusion of the investigation the DOJ attorneys decide not to bring charges against individuals, they will be expected to memorialize their justification and then obtain approval from the U.S. Attorney or the Assistant Attorney General overseeing the investigation. Likewise, we are instructing our attorneys that they should not release individuals from civil or criminal liability when resolving a matter with corporation, except under the rarest of circumstances. When such circumstances do arise, the litigating attorneys will be required to obtain written approval from the relevant U.S. Attorney or Assistant Attorney General. We will be monitoring these approval processes closely, in no small part so we can more readily identify whatever trends are limiting our ability to pursue individual cases.

Sixth and final, we're broadening the focus of our civil enforcement strategy. Generally speaking, when a criminal prosecutor is deciding whether to charge an individual, he or she consults with the department's principles of federal prosecution, which lays out various considerations, including the nature and seriousness of the offense and the impact of the crime on its victims. While some of our civil litigators have routinely pursued individuals, others have not – primarily because they have focused on the likelihood of financial recovery from their investigative targets. This was an understandable practice, given that monetary sanctions are the most common form of relief in civil case, but it naturally prioritized large-scale corporate investigations over civil enforcement actions against the individuals who perpetrated the wrongdoing.

There is real value, however, in bringing civil cases against individuals who engage in corporate misconduct, even if that value cannot always be measured in dollars and cents. Civil enforcement actions, like criminal prosecutions, hold wrongdoers accountable for their actions and deter future wrongdoing. While we may not be able to satisfy the entire judgment with an individual's resources, if that individual is liable, we can take what they have and ensure that they don't benefit from their wrongdoing. These individual civil judgments will also become part of corporate wrongdoers' resumes that will follow them throughout their careers. And by holding individuals accountable, we can change corporate culture to appropriately recognize the full costs of wrongdoing, rather than treating liability as a cost of doing business – a change that will protect public resources over the long term.

Beyond that, our civil attorneys recognize that they have an obligation to protect not only the public fisc, but also the public itself. So, going forward we will be pursuing civil actions against corporate wrongdoers even if those wrongdoers don't have the financial resources to satisfy a significant money judgment. And our civil lawyers will be looking at factors similar to those considered by our criminal prosecutors, such as the individual's misconduct, past history and the circumstances relating to the commission of the misconduct, in deciding whether to bring suit. An individual's financial resources will be only one consideration in that assessment, rather than a determinative factor.

We are going to continually reexamine our practices to ensure that we're doing everything we can to hold corporate wrongdoers accountable. Despite this, there will still be cases where we don't have the evidence necessary to establish an individual's criminal intent beyond a reasonable doubt. And regardless of public demand, we will never bring charges against anyone unless we are satisfied that the individual is in fact guilty of a crime. That is the core of our responsibility and promise to the American people. And I should be clear: while these policy shifts are effective immediately, the public won't see the impact of these steps over night. Some of these policies will affect cases that are only beginning now and may take years to become public. In the coming weeks and months, we'll be providing additional training and guidance to our prosecutors to help them take full advantage of these policy shifts. Next week, for example, I will be convening a national training conference in Washington for experienced white collar prosecutors and civil litigators from across the department to discuss these new policies and other practical ways to enhance our efforts to hold corporate wrongdoers accountable.

We make these changes recognizing the challenges that they may present. Some corporations may decide, for example, that the benefits of consideration for cooperation with DOJ are not worth the costs of coughing up the high-level executives who perpetrated the misconduct. Less corporate cooperation could mean fewer settlements

and potentially smaller overall recoveries by the government. In addition, individuals facing long prison terms or large civil penalties may be more inclined to roll the dice before a jury and consequently, we could see fewer guilty pleas.

Only time will tell. But if that's what happens, so be it. Our mission here is not to recover the largest amount of money from the greatest number of corporations; our job is to seek accountability from those who break our laws and victimize our citizens. It's the only way to truly deter corporate wrongdoing.

At the Department of Justice, our ability to fulfill our responsibilities – to advocate for victims, to vigorously pursue misconduct, to seek justice in all its forms – depends on public confidence in the institutions we represent. But the public's confidence is not something to be assumed or expected; it is something that we must earn and be vigilant in maintaining over time. We do that by relentlessly pursuing wrongdoing, no matter who those wrongdoers may be.

The men and women of the Department of Justice have always embraced this challenge, as both an opportunity and a privilege and once again, we embrace the task presented here. There is one system of justice, demanding that all be held accountable when laws are broken. We look forward to the work that will be required as we seek greater accountability from those who use corporations to lie, cheat and steal. It won't always be easy, but we're ready for it. Our nation and its citizens deserve nothing less.

Thank you.

A copy of the new policy can be found [here](#).

Office of the Deputy Attorney General

Updated September 10, 2015