September 15, 2015

Weil

Alert
White Collar Defense & Investigations

The Empire Strikes Back: New Leverage For Prosecutors in Corporate Investigations

By Christopher L. Garcia and Raquel Kellert

On September 9, 2015, U.S. Deputy Attorney General Sally Quillian Yates issued a memorandum to federal prosecutors nationwide outlining new policies designed "to strengthen [the Department of Justice's] pursuit of individual corporate wrongdoing."[1] While the Department of Justice's focus on the culpability of individuals is not news, the new guidelines make significant amendments to the Principles of Federal Prosecution of Business Organizations that provide prosecutors new leverage in their dealings with corporations. Under the new rules, companies must "disclose all relevant facts about the individuals involved in corporate misconduct" in order to receive cooperation credit, and they risk receiving *zero* credit if their disclosures about individual misconduct are viewed by prosecutors as incomplete.[2] This new policy presents both opportunities and challenges for corporations and the lawyers and compliance professionals who advise them.

The new policy is notable for the leverage it vests in prosecutors. It directs that "[i]n order for a company to receive *any* consideration for cooperation," a company must identify "all individuals" involved in corporate misconduct "regardless of their position, status or seniority."[3] Critically, prosecutors are empowered to deny cooperation credit to a company if they believe the company has either (i) "decline[d] to learn of [] facts" concerning misconduct, or (ii) failed to provide "complete factual information" concerning such misconduct.[4] We expect that prosecutors will explicitly or implicitly utilize the prospect of denying cooperation credit to pressure companies to look harder for, and disclose more about, misconduct, both actual and perceived.

Here's the good news: The policy provides in-house lawyers and compliance professionals an opportunity to re-emphasize codes of conduct and to implement trainings in support of such policies. This new weapon in the arsenal of government investigators will undoubtedly be of interest to employees, especially senior executives. It provides an obvious reason to remind everyone of the rules and best practices that will keep them—and the company—out of the government's crosshairs.

But the challenges presented by this new policy are manifold. Here are three that we anticipate:

- ***First***, knowing that companies are under additional pressure to identify and disclose misconduct by individuals, employees may be more cautious

when thinking about whether and to what extent they will cooperate with internal investigations. Among other things, candor may be chilled, actually making it harder for companies to identify and address misconduct, and employees may request their own counsel when they might not otherwise, potentially adding time and expense to investigations.

- ***Second***, the threat that cooperation credit may be denied if prosecutors believe that a company has "decline[d] to learn" of misconduct may put pressure on companies to investigate more than otherwise might be reasonable or necessary.[5] This creates a risk of unduly protracted and expensive investigations.
- ***Third***, pressure on companies to deliver bad actors to the government creates a risk that companies will choose to disclose conduct that does not otherwise warrant disclosure. It also gives rise to the danger that companies will overplay the significance of certain conduct and/or decline to defend conduct that is defensible.

In the face of these challenges, companies should use the opportunity provided by compliance and other trainings to build trust and understanding with employees so that they will feel comfortable cooperating with internal investigations when they occur. Additionally, in executing an investigations plan, a company will be well-advised, if it is already in dialogue with the government, to have an express understanding as to the conduct that the company is and is not investigating so that it cannot later be accused of having "decline[d] to learn" of misconduct.[6] Finally, companies must have discipline in making disclosures to the government. In the end, overplaying the significance of certain conduct may subject a company to more exposure in exchange for cooperation credit that may be of marginal value.

1. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to the Assistant Attorney General, Antitrust Division, *et al.*, Individual Accountability for Corporate Wrongdoing (September 9, 2015) at 2, available at http://www.justice.gov/dag/file/769036/download.
2. *Id.* at 3. Deputy Attorney General Yates's Memorandum also provided important guidance concerning cooperation between the criminal and civil divisions of the Department. This aspect of the Memorandum will be the subject of a future alert.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

White Collar Defense & Investigations is published by the Litigation Department of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

For more information about Weil's White Collar Defense & Investigations practice, please contact:

Steven A. Tyrrell (DC)	Bio Page	steven.tyrrell@weil.com	+1 202 682 7213
Christopher L. Garcia (NY)	Bio Page	christopher.garcia@weil.com	+1 212 310 8896
Holly E. Loiseau (DC)	Bio Page	holly.loiseau@weil.com	+1 202 682 7144
Adam G. Safwat (DC)	Bio Page	adam.safwat@weil.com	+1 202 682 7236