THOMSON REUTERS
Westlaw®

DOJ embraces a more realistic position on corporate cooperation

By Gejaa Gobena, Esq., Mitch Lazris, Esq., Peter S. Spivack, Esq., and Karla Aghedo, Esq., *Hogan Lovells US LLP*

JANUARY 18, 2019

As a result of policy changes implemented in November 2018, government attorneys now have more discretion to award cooperation credit to a corporation that meaningfully assists the government's investigation — without necessarily identifying every individual person outside of senior management who was involved in the alleged misconduct.

To earn maximum cooperation credit, in both criminal and civil cases, a corporation will still be required to identify individuals who were involved or responsible for the wrongdoing. However, that obligation is now limited to identifying senior officials, members of senior management or the board of directors, and any other individuals who were "substantially involved" in the misconduct.

In civil cases, a corporation may now also earn credit for providing meaningful assistance even if it has not provided information identifying all such individuals.

Deputy Attorney General Rod J. Rosenstein announced the new policy Nov. 29, 2018, during his keynote address at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act.[1] The new policy has been added to the Justice Manual with immediate effect. It applies to all Justice Department cases involving corporate misconduct, including False Claims Act[2] cases. The change is the latest in a series of small but significant steps back from the policy described in the Yates Memo.

THE YATES MEMO ADAPTS TO A COMPLEX WORLD

On Sept. 9, 2015, then-DAG Sally Yates issued the fifth in a series of memos penned by a sitting DAG that outline how corporate investigations and prosecutions should proceed. These memos, generally referred to as the Holder Memo,[3] the Thompson Memo,[4] the McNulty Memo,[5] the Filip Memo[6] and the Yates Memo,[7] build on and, in some respects, pivot away from specific policies articulated in preceding memos.

The Yates Memo, which followed widespread criticism of the DOJ's failure to prosecute individual corporate executives following the 2008 financial crisis, reflects the agency's commitment to pursue such cases.

The goal of holding individuals accountable for corporate wrongdoing, reflected in the Yates Memo, was of course not new. But the Yates Memo upped the ante by requiring that corporations disclose *all* relevant facts relating to individuals responsible for misconduct in order to get *any* cooperation credit.

The rationale was that corporations should be held accountable under the same standards that apply to individuals. Under those standards, *total* cooperation is a prerequisite to a reduced penalty.

The ability to earn cooperation credit in an FCA or other DOJ investigation is intended to ease the often enormous expense cooperation can entail for a corporation. Until recently, the all-or-nothing approach to awarding cooperation credit articulated in the Yates Memo applied equally to civil and criminal DOJ investigations. The requirement that corporations disclose *all relevant facts* relating to individuals responsible for misconduct significantly shaped internal investigations of all types, including FCA investigations.

The Yates Memo upped the ante by requiring that corporations disclose *all* relevant facts relating to individuals responsible for misconduct in order to get *any* cooperation credit

The DOJ's all-or-nothing requirement for cooperation credit theoretically meant a company settling an FCA investigation could only get full cooperation credit or no credit at all, although other factors such as litigation risk frequently would impact the course of settlement discussions.

Under the Yates Memo, before awarding any cooperation credit, the DOJ was supposed to evaluate not only what information and data corporations provided during an investigation, but also how those corporations investigated and treated employees and executives who might have been involved in the wrongdoing.

In his announcement revising the policy articulated in the Yates Memo, DAG Rosenstein emphasized that the DOJ remains committed to prosecuting individuals who are responsible for corporate crimes. He said, "The most effective deterrent to corporate criminal misconduct is identifying and punishing the people who committed the crimes."[8]

However, the revised policy softens the Yates Memo in two significant ways. First, criminal and civil defendants may now receive cooperation credit if they provide information about all individuals who were *substantially involved* in the criminal conduct. Second, DOJ prosecutors resolving civil cases, including FCA cases, have additional discretion to award partial cooperation credit.

In a large, complex corporation, the task of rooting out *all* individuals who may have had something to do with alleged wrongdoing can be daunting, time-consuming and difficult. It is one thing for an individual to tell the DOJ all they know about unlawful activity; it is quite another to expect a corporation with thousands of employees across the globe to do the same.

These changes take into account the challenges noted above and focus the DOJ's efforts on receiving information about key individuals involved in alleged wrongdoing.

BREAKING DOWN THE NEW POLICY

Rosenstein drew a clear line between criminal and civil cases. To receive any cooperation credit in a criminal investigation, companies must provide information on all individuals who were *substantially involved* in the criminal conduct at issue, regardless of level of seniority.[9]

By limiting the obligation to individuals substantially involved, the new policy acknowledges that criminal investigations "should not be delayed merely to collect information about individuals whose involvement was not substantial."[10]

In a large, complex corporation, the task of rooting out *all* individuals who may have had something to do with alleged wrongdoing can be daunting, time-consuming and difficult.

Moreover, Rosenstein acknowledged that when allegations involve activities throughout the company over a long period of time, "it is not practical to require the company to identify every employee who played any role in the conduct."[11]

Rosenstein also observed that "civil cases are different" because the primary goal of civil enforcement is to recover money. In FCA cases, that means recovering money for the government. He noted that the DOJ must seek to make such recoveries efficiently and said the all-or-nothing approach to granting cooperation credit has been inefficient and counterproductive in civil cases.

Because FCA cases are about pursuing fraudulently obtained government monies, the DOJ now appears to realize that pursuing judgment-proof, lower-level employees is a waste of resources.

Rosenstein acknowledged the prior policy "was not strictly enforced in every case." And he made clear the purpose of the new policy is to set "realistic internal guidance that allows [DOJ attorneys] to reach just results while following the policy in good faith."

Under the new policy, DOJ prosecutors resolving civil FCA cases may award:

•Maximum credit to corporations that identify "every individual person who was substantially involved in or responsible for the misconduct."

•Some discretionary credit to corporations that "meaningfully assist" in the government's investigation despite not reaching an agreement with DOJ "about every employee with potential individual liability."

•No credit to corporations that do not "identify all wrongdoing by senior officials, including members of senior management or the board of directors."[12]

THE BIGGER PICTURE OF FCA ENFORCEMENT REFORM

Increased discretion in granting cooperation credit is just one piece of a larger DOJ effort to reform FCA enforcement. Rosenstein's announcement comes after months of anticipation following then-acting Associate Attorney General Jesse Panuccio's June 14, 2018, remarks at the American Bar Association's 12th National Institute on Civil False Claims Act and Qui Tam Enforcement. Those remarks outlined several new DOJ policy initiatives to reform FCA enforcement.

In addition to changes to the cooperation policy, Panuccio detailed the following priority initiatives:

•Increasing government intervention in qui tam actions.

•Encouraging corporate compliance.

•Limiting "piling on" whereby multiple law enforcement and regulatory agencies pursue a single entity for the same conduct.

•Limiting the use of sub-regulatory guidance.[13]

Even before Panuccio's remarks, the DOJ actively sought to limit piling on and curtail the use of sub-regulatory guidance. Attorney General Jeff Sessions' Nov. 17, 2017, memorandum, prohibiting DOJ from issuing any guidance documents that have the effect of adopting new regulatory requirements or amending the law, offers more detail regarding those efforts.[14]

And, when DAG Rosenstein announced the agency's policy against piling on at a New York City Bar Association conference in May 2018, he explained this policy aims to avoid subjecting defendants to unfair duplicative penalties and enhance DOJ's relationships with law enforcement partners in the U.S. and abroad.

The policy has four key features. First, federal criminal enforcement authority should not be used against a company for purposes unrelated to the investigation and prosecution of a possible crime (i.e. to persuade a company to pay larger civil or administrative penalties).

Second, DOJ lawyers and groups in different departments or offices are to coordinate with one another to avoid the unnecessary imposition of duplicative fines, penalties and/or forfeiture against a company and should strive for "an overall equitable result." That might mean crediting and apportioning financial penalties, fines and forfeitures to avoid disproportionate punishment.

Third, prosecutors should, when possible, coordinate with, and consider the amount of fines paid to, other enforcement authorities relating to the same misconduct.

Fourth, prosecutors should evaluate several factors to determine whether multiple penalties "serve the interests of justice in a particular case." These factors include the egregiousness of the wrongdoing, statutory mandates regarding penalties, the risk of delay in finalizing a resolution, and the adequacy and timeliness of a company's disclosures and cooperation with the DOJ.

We expect that the DOJ will continue to emphasize the importance of compliance, cooperation and voluntary disclosure through speeches and policy statements, and will expand its recent interventions in qui tam actions to dismiss lawsuits it does not consider to be consistent with the government's interests.

LOOKING AHEAD

The application of a couple of key, but as yet undefined, terms could shape the impact of the new policy. First, it is not clear when an individual's involvement is substantial enough to require identification for purposes of earning maximum cooperation credit. However, the phrase "substantially involved" is used throughout the Justice Manual.

Second, the DOJ has not defined what it means to "meaningfully assist" an investigation. This term does not appear elsewhere in the Justice Manual. However, Rosenstein's remarks offer some guidance on when a corporation would be considered to have meaningfully assisted.

In a civil False Claims Act case, for example, a company might make a voluntary disclosure and provide valuable assistance that justifies some credit — even if it is either unwilling to stipulate about which non-managerial employees are culpable, or eager to resolve the case without conducting a costly investigation to identify every individual who might face civil liability in theory but in reality would not be sued personally.[15]

Two other policy changes announced by Rosenstein are intended to further restore discretion to civil DOJ attorneys and may shape future FCA investigations.

First, government attorneys may now negotiate civil releases for individuals who do not warrant additional investigation in corporate FCA civil settlement agreements. After the issuance of the Yates Memo and until the changes Rosenstein announced in November 2018, DOJ explicitly carved out individual civil liability in all corporate FCA resolutions as a matter of policy, leaving individual employees open to the risk of later being sued for related conduct. The new policy announcement signals a significant shift in approach.

Second, in addition, civil DOJ attorneys are once again permitted to consider an individual's ability to pay in deciding whether to pursue a civil judgment. One of the FCA's main goals in civil cases is the reimbursement of government funds, and this new policy restores flexibility in how best to achieve that goal.

It is also important to note the impact of cooperation on the calculation of civil FCA settlement amounts remains a mystery. Most companies conclude that some level of cooperation with the DOJ in connection with an FCA investigation is prudent for any number of reasons. And DOJ civil enforcement attorneys often explicitly state during the course of an investigation that the level of cooperation will impact the dollar amount a company is required to pay. But the actual financial impact of cooperation remains murky, and Rosenstein's comments provide no additional clarity.

CONCLUSION

The new DOJ cooperation credit policy reflects the reality of modern corporate investigations, as well as a more nuanced grasp of how limited resources on both sides should be deployed to resolve corporate cases. It encourages realistic cooperation efforts without compromising the DOJ's policy of holding individuals accountable for wrongdoing.

The announcement should come as some measure of relief to large corporations, where the task of identifying every potentially culpable individual — no matter at what level within the company — can be a challenging undertaking.

The previous binary approach — full cooperation or no credit — was counterproductive to encouraging cooperation, forcing companies to analyze whether it was more economical to undergo a costly investigation or to miss out on the cooperation credit that could significantly affect the multiplier in civil cases.

Rosenstein's remarks recognize that most companies seek to mitigate or avoid penalties through cooperation, and the new policy is meant to incent the effort to do so. It still remains to be seen how Rosenstein's remarks and the new policy will actually impact resolutions, particularly in the civil False Claims Act arena.

NOTES

[1] Rod J. Rosenstein, Dep. Att'y Gen., Dep't of Justice, Keynote Address at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018).

[2] 31 U.S.C.A. §§ 3729-3733.

[3] Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice, To All Component Heads and U.S. Att'ys, Bringing Criminal Charges Against Corporations (June 16, 1999), available at https://bit.ly/22JISfs.

[4] Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Att'ys, Principles of Federal Persecution of Business Organizations (Jan. 16, 2003), available at https://bit.ly/2pLdUJS.

[5] Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Att'ys, Principles of Federal Persecution of Business Organizations (Dec. 12, 2006), available at https://bit.ly/2SChy5f.

[6] Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Att'ys, Principles of Federal Persecution of Business Organizations (Aug. 28, 2008) available at https://bit.ly/2nJ5eCU.

[7] Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to All U.S. Atty's et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), available at https://bit.ly/2nLMPa4.

[8] Rosenstein, supra note 1.

[9] Justice Manual § 9-28.700.

[10] Rosenstein, supra note 1.

[11] *Id*.

[12] Justice Manual § 4-3.100.

[13] Jesse Panuccio, Acting Ass. Att'y Gen., Dep't of Justice, American Bar Association's 12th National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 14, 2018).

[14] Memorandum from Jeff Sessions, Att'y Gen., Dep't of Justice (Nov. 17, 2017).

[15] Rosenstein, supra note 1.

This article first appeared in the January 18, 2019, edition of Westlaw Journal White Collar Crime.

ABOUT THE AUTHORS

(L-R) **Gejaa Gobena** is a Washington-based partner in **Hogan Lovells US LLP**'s Litigation and Investigations, White Collar, and Fraud practices and is a member of the Life Sciences and Health Care industry sector group and False Claims Act Steering Committee. Prior to joining Hogan Lovells, Gobena served as deputy chief of the Fraud Section in the U.S. Justice Department's criminal division. **Mitch Lazris**, also based in Washington, is a partner in the firm's Litigation practice and is also a member of the LSHC industry sector group, the firm's IWCF Steering Committee, and the FCA Steering Committee. Prior to joining Hogan Lovells, he was a trial attorney in the Civil Fraud Section of the Justice Department. **Peter S. Spivack**, a Washington-based Litigation partner and member of the FCA Steering Committee, is one of the firm's most experienced members in the IWCF practice area and served as the global co-leader of the practice for six years. Previously, Spivack was a federal prosecutor focusing on the investigation and prosecution of complex white-collar criminal matters involving corporations and individuals. **Karla Aghedo** is a senior associate in the firm's Houston office and is a member of the Litigation practice and FCA Steering Committee. As a former state prosecutor, she brings her trial experience to bear in strategizing from the government's point of view to defend individuals and companies. Jennifer Cochrane, an associate with Hogan Lovells, also assisted with the preparation of this article.