



DOJ revises USAM "Filip Factors" – focus on prosecuting individuals, cooperation credit, privilege and coordination

White Collar Alert

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By:

Deputy Attorney General Sally Quillian Yates has announced revisions to the United States Attorneys' Manual (USAM), with particular emphasis on Title 9, Chapter 28, "Principles of Federal Prosecution of Business Organizations," also known as the "Filip Factors."

Yates explicitly linked the revisions to principles outlined in the Department of Justice's September 9, 2015 Memorandum, commonly referred to as the Yates Memo.

The revisions reflect the DOJ's increased focus on prosecuting individuals and stricter scrutiny for cooperation credit, as presaged by the Yates Memo, as well as clarifications regarding the attorney-client privilege and work product protections and increased coordination within the DOJ and with its civil and regulatory counterparts.

Prosecuting individuals

The DOJ's focus on prosecuting individuals takes center stage in the revised introduction, restyled as "9-28.010 Foundational Principles of Corporate Prosecution." The introduction now directs prosecutors to "focus on wrongdoing by

individuals from the very beginning of any investigation,” with the following goals:

- Increased ability to identify the full extent of corporate misconduct
- Increased likelihood that those with knowledge of the corporate misconduct will be identified and provide information about the individuals involved
- Increased likelihood of charges against culpable individuals and not just the corporation.

The DOJ crystallizes its primary directives in a new section entitled “9.28.210 Focus on Individual Wrongdoers” while retaining the DOJ’s longstanding views as to criminal liability of corporations pursuant to the *respondeat superior* doctrine.

First, the DOJ strengthened its prior language in the USAM, emphasizing that “[p]rovable individual culpability should be pursued.” This section states further that “[i]t is important early in the corporate investigation to identify the responsible individuals and determine the nature and extent of their misconduct.”

Second, in keeping with the suggested early action and focus on individuals, this section urges that all efforts be undertaken to resolve matters within the statutorily allotted time, indicating that tolling agreements should be the rare exception. The DOJ puts particular emphasis on “prosecut[ing] culpable individuals before the limitations period expires or [preserving] the ability to charge individuals by tolling the limitations period by agreement or court order.”

Finally, if a DOJ office handling an investigation decides to pursue charges or other resolutions against a corporation but not against relevant individuals, “the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.”

In an existing section – “9.28.700 The Value of Cooperation” – the DOJ’s revisions further propel DOJ attorneys to investigate individuals “proactively ... at every step of the process” and “vigorously review any information” instead of “wait[ing] for the company to deliver the information about individual wrongdoers and then merely accept what the companies provide.” The revisions also instruct the DOJ to leverage potential corporate resolution to “obtain from the company as much information as possible about responsible individuals” both before resolving the corporate case and potentially post-resolution.

A new section – “9.28.1300 Adequacy of the Prosecution of Individuals” – instructs prosecutors to “consider the impact of prosecuting the responsible individuals along with the other factors [considered ... in Section 9.28.300]” when “deciding the most appropriate course of action for the corporation – *i.e.*, a corporate indictment, a deferred prosecution agreement (DPA), or non-prosecution agreement (NPA), or another alternative.”

Cooperation credit

In revising “9.28.700 The Value of Cooperation” the DOJ maintains its focus on prosecuting individuals by conditioning “any consideration for cooperation” on (1) the company “identify[ing] all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority,” (2) the company providing the DOJ with all facts relating to that misconduct, and, unsurprisingly, (3) “the various factors that have traditionally applied in making this assessment (e.g. the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation).” Accordingly, the DOJ states that it will not afford credit to companies that “decline to learn of such facts or to provide ... complete factual information.”

In a footnote to this section, the DOJ cautions that despite encouraging early voluntary disclosure of criminal wrongdoing even before all facts are known, the DOJ expects “the company will move in a timely fashion to conduct an appropriate investigation and provide timely factual updates to the Department.” Furthermore, even when “a company genuinely cannot get access to certain evidence or is prohibited from disclosing it to the government,” the company “will bear the burden of explaining the restrictions it is facing to the prosecutor.”

If not clear already, revisions to an existing section – “9.28.720 Cooperation: Disclosing the Relevant Facts” – stress even more emphatically that the DOJ expects cooperation “beyond mere disclosure of acts.” The revisions provide additional examples “such as providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records.”

The revisions also include a new section – “9.28.900 Voluntary Disclosures” – encouraging companies to disclose relevant facts to proper authorities and notes that even where the relevant agency or department does not have a formal disclosure program “prosecutors may consider a corporation’s timely and voluntary disclosure, both as an independent

factor and in evaluating the company's overall cooperation and the adequacy of the company's compliance program." Still, this section cautions that "prosecution may be appropriate notwithstanding a corporation's voluntary disclosure ... based on a consideration of all the factors set forth in these Principles."

Privilege

The DOJ's revisions to "9.28.720 Cooperation: Disclosing the Relevant Facts" also address expectations regarding attorney notes and interview memoranda within the cooperation context. The revisions acknowledge that "[t]o receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the interviews conducted by counsel for the corporation."

Nevertheless, "the corporation does need to produce, and prosecutors may request, relevant factual information – including relevant factual information acquired through those interviews, unless the identical information has otherwise been provided – as well as relevant non-privileged evidence such as accounting and business records, and emails between non-attorney employees or agents."

Although the same section has long recognized that privileged communications such as those made for the purpose of seeking or dispensing legal advice, lie at the heart of the attorney-client privilege, and cannot be requested by the Department, new language clarifies that "[t]hese privileged communications are not necessarily limited to those that occur contemporaneously with the underlying misconduct." Ultimately, "the key measure of cooperation is the disclosure of factual information known to the corporation, not the disclosure of legal advice or theories rendered in connection with the conduct at issue."

Increased coordination

For issues involving national or multinational corporations, a renumbered, pre-existing section – now "9.28.1200 Civil or Regulatory Authorities" – directs the DOJ "to determine the existence of other matters within the Department relating to the corporation in question" and instructs criminal prosecutors to coordinate with their civil and regulatory counterparts to consider the full range of the government's potential remedies and the corporation's conduct.

Conclusion

In sum, these revisions provide additional guidance on the principles announced in the Yates Memo, which introduced intense focus on individual wrongdoing. These revisions also provide further information concerning cooperation credit, and suggest that companies should be motivated to identify individual wrongdoers. In addition, although the revisions acknowledge existing attorney-client and work product protections that have long been respected by the DOJ, based on this guidance, companies should continue to expect the DOJ to pursue aggressively the disclosure of all non-privileged facts. Finally, the revisions emphasize coordination within the DOJ and with its civil and regulatory counterparts in addressing corporate wrongdoing. Each of these revisions reflects the Department's continued emphasis on compliance, transparency, and disclosure as critical in the resolution of corporate investigation, with the added dimension of more rigorous scrutiny of individual culpability.

Find out more about the implications of these revisions to USAM by contacting the authors.