

## INDIVIDUALS BEWARE: A SHIFT IN FOCUS TO INDIVIDUAL ACCOUNTABILITY FOR CORPORATE WRONGDOING

### EXECUTIVE SUMMARY

On September 9, 2015, Deputy Attorney General Sally Quillian Yates of the Department of Justice ("DOJ") issued to various divisions within the DOJ and released to the public a Memorandum addressing individual accountability for corporate wrongdoing. This Memo is the latest in a long-running series of DOJ memorandums addressing corporate misconduct. Specifically, this Memo embodies the government's ongoing policy seeking to hold individuals accountable who are found to be responsible parties for corporate misconduct. The DOJ believes that individual accountability is important to: 1) deter future illegal activity; 2) incentivize changes in corporate behavior; 3) ensure the proper parties are held responsible for their actions; and 4) promote the public's confidence in the federal justice system. For purposes of this effort, the Memo provides six key factors as set forth below for the government to consider in pursuing individual liability in an investigation for corporate wrongdoing. The Memo can be found [here](#).

### SIX KEY FACTORS REGARDING INDIVIDUAL ACCOUNTABILITY

1. *Eligibility for cooperation credit to be dependent on the corporation supplying all information about individuals involved in the corporate misconduct.*

According to the Memo, companies under federal investigation should identify all individuals involved in or responsible for the misconduct at issue and provide all facts relating to that misconduct. Those companies that do not provide the DOJ with complete factual information about individual wrongdoers will not have their "cooperation" considered as a mitigating factor. Additionally, in accordance with past guidance, the extent of cooperation credit received by the company will depend upon the timeliness of the cooperation; the diligence, thoroughness and speed of the organization's internal investigation; and the proactive nature of the cooperation, along with other considerations. Despite this expectation of cooperation and exchange of information, DOJ attorneys will throughout the case continue to proactively investigate and obtain information from companies regarding potentially responsible individuals.

2. *Focus on individuals from the beginning of the investigation.*

Criminal and civil government investigations will focus on individual misconduct from the beginning and until the close of the investigation. The DOJ believes that a continued focus on personal wrongdoing is important since the corporation can only act through individuals. Additionally, focusing on key individuals may increase the likelihood that, if culpable, they will face civil or criminal charges for their actions.

3. *Routine communication between criminal and civil attorneys handling corporate investigations.*

The Memo indicates that the DOJ will increase early and ongoing communications between attorneys in the DOJ's Civil and Criminal Divisions to ensure that the full range of potential government remedies are available and promote the most appropriate resolution of each case. These communications between parallel proceedings are designed to promote the prosecution of culpable individuals.

4. *Avoid corporate resolutions that provide protection for individuals from criminal or civil liability.*

Going forward, the DOJ plans to avoid resolving matters in a way that will prevent or dismiss charges against culpable individual officers or employees. Under the guidance provided, for both civil and criminal claims and absent extraordinary circumstances, the United States will not in the future release claims against individuals or provide immunity from criminal prosecution, which will not be granted without the personal written approval of the relevant Assistant Attorney General or United States Attorney.

5. *Only resolve corporate cases with a clear plan to address related individual cases before the statute of limitations expires; any declinations as to individuals in such cases must be memorialized.*

The Memo further directs that in situations where the investigation into individual misconduct has not concluded at the time authorization is sought to resolve the main case against the corporation, the DOJ will determine the current status of the individual investigations and decide upon a plan of action to bring those cases to resolution. Any DOJ determination at that point to discontinue the investigation against

identified individuals will need to be memorialized in writing and approved by the relevant Assistant Attorney General or United States Attorney.

6. *Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.*

While the DOJ acknowledges in the Memo that one focus of civil enforcement efforts is to recover as much money as possible, an additional consideration is future deterrence of individual misconduct. As such, according to the Memo, the DOJ will not limit their pursuit of civil actions against individuals solely based on an individual's ability to pay. The DOJ maintains an interest in deterring all corporate fraud, such that it anticipates bringing some actions against individuals for the purpose of long-term deterrence regardless of the resulting monetary recovery.

## **PRACTICAL TAKEAWAY**

The Memo sends an important new warning to individuals and executive leaders of all industries, including health care, about corporate malfeasance. While historically much of the DOJ's enforcement activity has focused on corporate entities, the Memo perhaps confirms the DOJ's current focus on individuals and the actions they take on behalf of the corporation. To avoid liability, individuals should remain abreast of all pertinent laws affecting their work and actively seek guidance from their legal or compliance advisors if any questions arise regarding compliance with these requirements. Corporate employees should also continue to actively follow and support their organizational compliance program.

If you have any questions or would like additional information about this topic, please contact:

- Scott W. Taebel at (414) 721-0445 or [staebel@hallrender.com](mailto:staebel@hallrender.com);
- Katherine A. Kuchan at (414) 721-0479 or [kkuchan@hallrender.com](mailto:kkuchan@hallrender.com);
- Wesley R. Sylla at (414) 721-0917 or [wsylla@hallrender.com](mailto:wsylla@hallrender.com); or
- Your regular Hall Render attorney.

Please visit the Hall Render Blog at <http://blogs.hallrender.com/> or click [here](#) to sign up to receive Hall Render alerts on topics related to health care law.