JUSTICE NEWS

Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference

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Thank you, Karen [Seymour] for that kind introduction. I also want to thank the New York City Bar Association White Collar Criminal Law Committee for organizing this conference. I am honored to have been invited here for the Fifth Annual White Collar Crime Institute.

In looking at your agenda, I saw that a little earlier this morning you had a panel discussion on what was described as the "cascading effects of the Yates Memo." First, I have to tell you how disconcerting it is to hear something described as the "Yates Memo." I call it the Individual Accountability Policy, but I may have long since lost that battle. But at the risk of talking this policy to death, I thought I would give you our perspective on it – why we did it and how it's working so far in practice.

First, I want to make clear that holding individuals accountable for corporate wrongdoing has always been a priority for the Department of Justice, both for the leadership of the department and for the line prosecutors who work the cases. And that's because we all know how important it is to the success of our enforcement efforts. The bad acts of individuals have grave consequences, from the loss of jobs to the corruption of government officials, from the foreclosure of homes to the destruction of financial security and economic confidence. So holding accountable the people who committed the wrongdoing is essential if we are truly going to deter corporate misdeeds, have a real impact on corporate culture and ensure that the public has confidence in our justice system. We cannot have a different system of justice – or the perception of a different system of justice – for corporate executives than we do for everyone else.

But as I and others at DOJ have said before, these cases do have a special set of challenges, challenges that can impede our ability to identify the responsible parties and to bring them to justice. It is not easy to disentangle who did what within a huge corporate structure – to discern whether anyone had the requisite knowledge and intent. Blurred lines of authority make it hard to identify who is responsible for individual business decisions and it can be difficult to determine whether high-ranking executives, who appear to be removed from day-to-day operations, were part of a particular scheme. There are often massive numbers of electronic documents and for corporations that operate worldwide, there are restrictive foreign data privacy laws and a limited ability to compel the testimony of witnesses abroad. I imagine that all of you here have witnessed these dynamics firsthand.

It was because of these two competing concepts – that, on the one hand, we believe it's critical to hold individuals accountable and on the other, doing so poses real world challenges – that we convened a working group of lawyers from all across the department – both litigating components and U.S. Attorney's Offices – to take a look at what we're doing and how we're approaching our corporate matters. The goal was to ensure that we're doing everything we can to overcome the barriers that I just mentioned and hold accountable those who are responsible for corporate wrongs. Insome areas, we identified best practices that were being followed in certain parts of the department and that we concluded should apply

department-wide. In others, we decided to make some changes and add new policy requirements. And the Individual Accountability Policy was the end product of those discussions.

I will confess that I haven't read every single client alert that has gone out since this policy was issued, but from what I have read, the reaction in the corporate defense bar seems to be everything from "The sky is falling," to "Nothing has changed." As I've said before, the truth, as it often is, is somewhere in the middle. The policy was certainly designed to change practices, both within the department and outside the department. And even though many of the concepts underlying the policy have long been part of the department's approach to these matters, we felt that it was important to say it explicitly, so everyone will know how the department is operating.

I expect you're familiar with the six steps set out in the policy, but the substance bears repeating:

We now require a company to provide all the facts about individual conduct in order to qualify for any cooperation credit. We have sought to increase coordination between the criminal and civil sides of our house and require all our attorneys to focus on individual liability from the very beginning of an investigation. We will initiate civil proceedings against a bad corporate actor, even if that individual may not have the financial resources to satisfy a large money judgment. And we have shifted the presumption on what a corporate resolution looks like: now, our attorneys must get approval if they decide not to bring charges against individuals and may not release individuals from civil or criminal liability except under the rarest of circumstances.

After we announced the individual accountability policy, it was the threshold cooperation credit requirement that received the most attention. But, as I'm sure many of you would agree, the notion that a cooperating company must relate facts about the conduct of individuals within the corporation is nothing new. The principles of federal prosecution of business organizations had long provided that companies that want cooperation credit should identify who did what. That concept has been repeated by department officials over and over again for the last several years in just about every speech given on corporate fraud. But despite all that, we found that we still got passive voice, "Mistakes were made," presentations from defense counsel, without identifying who made what mistakes. Companies were still expecting to get cooperation credit, even though they hadn't really advanced the ball at all in determining who did what. And sometimes, companies still got credit for cooperation even though they hadn't provided what is most valuable to us – the facts about individuals. So, we decided to make that information a threshold factor. While the requirement to provide all facts about individuals isn't new, what has changed is the consequence of not doing it.

But let me be clear – this does not mean companies are required to conduct overly broad investigations or embark on a years-long, multimillion dollar investigation every time a company learns of misconduct, or what I've heard described as "boiling the ocean." On the contrary, we expect companies to carry out a thorough investigation tailored to the scope of the wrongdoing. Nor will a company be disqualified from receiving cooperation credit simply because it didn't have all the facts lined up on the first day it began talking with us. Rather, we expect that cooperating companies will continue to turn over the information to the prosecutor as they receive it. The determination of the appropriate scope and how to proceed is always case specific – it's not possible to lay out hard and fast rules. Which is why, we've reiterated that if a company's counsel has questions regarding scope, they should do what many defense lawyers do now – contact the prosecutor directly and talk about it. Already, based on reports on the ground, firms are doing just that.

You should also know that counsel for the company is not required to serve up someone to take the fall in order for the corporation to get cooperation credit – a hypothetical person sometimes referred to as the "vice president in charge of going to jail." Our goal is not to collect corporate heads. Our goal is to get to the bottom of who did what and if there are culpable individuals, hold them accountable. The week after the policy issued, I spoke to department prosecutors and said that if a company conducted an appropriately tailored investigation and truly did everything they could reasonably be expected to do to determine who did what, but simply can't figure it out, they are not precluded from receiving cooperation credit. We don't want this to be the exception that swallows the rule. We're going to pressure test your investigation to ensure that you're not using a purported obstacle as an excuse, but there is always a good faith element to everything the department does and that includes the Individual Accountability Policy.

Likewise, we don't expect a company to make a legal conclusion about whether an employee is culpable, civilly or criminally. We just want the facts. Our goal is to uncover the truth. We will make our own judgment about whether any action has criminal or civil exposure.

And finally – this is one thing I want to put to bed right now – there is nothing in the Individual Accountability Policy that requires companies to waive attorney-client privilege or in any way rolls back protections already in place. The policy specifically requires only that companies turn over all relevant non-privileged information. We're asking for the facts. And we have always asked for the facts. The only difference now is that companies cannot – in the name of privilege or otherwise – pick and choose which facts to provide if they want credit for cooperation. But, of course, if there is a valid claim of privilege as to a relevant fact, we expect that it will be brought to the prosecutor's attention.

Since we issued the policy eight months ago, lots of people have been opining about what it's going to mean and what will happen as a result. But what we're seeing so far is that there are two different worlds. There is the world of client alerts and bar articles, where the cascading cavalcade of terribles is laid out in startling terms. And then there is the world of real life - of real cases and real lawyers. And right now, those worlds are very different.

So let me spend a few minutes on how implementation of the policy is going so far. First, we've read some predictions that companies will no longer cooperate with the government as a result of the policy. That has never made a lot of sense to me, that rather than providing all the facts about who did what within a company, the company would decide to forego the substantial benefits accorded cooperation and just roll the dice. That seems a particularly risky calculus, especially for a publicly traded company. While it's always possible that a company will make that calculus, I am not aware of any company that has refused to cooperate because of the new policy requirements. On the contrary, from what I'm told by our folks, companies are not only continuing to cooperate, they are making real and tangible efforts to adhere to our requirement that they identify facts about individual conduct, right down to providing what I'm told are called "Yates Binders" – an unnecessary term if you ask me – that contain relevant emails of individuals being interviewed by the government.

Moreover, to my knowledge, no one has told us that they will be forced to waive privilege in order to comply with the policy. I previously invited members of the white collar defense bar to let me know if this is not the case and that offer still stands. I have yet to receive a report about a privilege waiver, but I continue to invite you all to bring forward any specific examples of unintended consequences of the policy.

And it's not just that we haven't seen the dire predictions come to pass. We've affirmatively been hearing that our new approach is causing positive change within companies. Compliance officers have said that our focus on individuals has helped them steer officers and employees within their organizations toward best practices and higher standards. That's exactly what we had hoped for. After all, it is much better to deter bad conduct from happening in the first place than to have to punish it after the fact.

Just as the policy does not seem to have brought about the end of western civilization from the companies' perspective, it's not business as usual at DOJ either. In fact, in just the few months since the release of the policy, I can tell you that we're seeing a shift in how we approach cases at the department, both on the criminal side and the civil side.

On the criminal side, our lawyers aren't just talking about the potential culpability of individuals at the time they are resolving an investigation, they are thinking about individuals from the investigation's very beginning. I've seen it firsthand as we have sat around my conference table and I've been briefed on significant new matters. The first thing the lawyers briefing me discuss is what we are doing to identify the individuals involved and what the company is doing during the course of its cooperation to meet its obligation to provide all the facts about individual conduct.

This is not to say that the department wasn't focused on individuals before. We most certainly were. But the knowledge of our prosecutors that their supervisors are intently focused on the question of what evidence of individual culpability can be developed is leading to a more uniform, systematic and sustained focus on individuals. Now, this kind of culture shift takes time; it doesn't happen all at once. And our intensified focus on individuals from the inception of an investigation is not expected to result in a flurry of individual indictments overnight. But that was never the goal. The goal of this policy is to do everything we can to ensure that if there are culpable individuals, we are holding them accountable. The policy is not yet one year old. We're already seeing changes in how our criminal prosecutors conduct their investigations.

On the civil side, the philosophical shift embedded in our policy is even more pronounced. Historically, our civil lawyers have focused their efforts on recovering the most money possible for the public fisc, which generally meant focusing on the corporate actor. If an individual was potentially civilly liable, but that potential liability wouldn't add significantly to the overall amount of money that could be recovered, we deployed our resources elsewhere – to places where we had a greater likelihood of bringing in additional dollars. But now, the focus of our civil enforcement efforts has broadened. We recognize that our obligation is about more than recovering the most money from the greatest number of companies. It's also about deterrence, about stopping fraud from happening in the first place and about redressing misconduct of those responsible. There is a real deterrent value in the prospect of being named in a civil suit or having a civil judgment. And this kind of deterrence can change corporate conduct. So we have asked our civil attorneys to look at the same factors we consider on the criminal side, like the nature and seriousness of the offense, the offender's role and any past history of misconduct. Ability to pay is one of the factors considered, but it's no longer the determinative factor in deciding whether to bring an action in the first instance.

The shift to include individuals in our focus on the civil side has an important strategic benefit as well. Complex corporate fraud cases often begin as civil investigations. If the civil investigation is focused just on the company, documents are reviewed and interviews conducted just with an eye toward corporate liability and it's just about impossible to go back at the end of the investigation and unwind all that to

determine if there are individuals who should be held accountable, either civilly or criminally. That's why our shift to focus on individuals' right from the inception of an investigation is so important.

In addition to these big picture changes, the Individual Accountability Policy has led different corners of the Justice Department to announce new component-level policies focused on individuals. For example, the Antitrust Division has recently announced that it is revamping its procedures to ensure that each of its criminal offices systematically identifies all potentially culpable individuals as early in the investigative process as possible. Antitrust prosecutors are taking a hard look at which individuals are "carved in" – and thus receive protections against prosecution – and "carved out" of a corporate agreement. Now, after the new policy, they are erring on the side of "carving out," in order to ensure that those individuals most responsible for wrongdoing are not given a pass.

Similarly, as many of you know, the FCPA Unit of the department's Fraud Section recently announced an 12-month pilot program, under which companies must voluntarily self-disclose, fully cooperate, including by providing facts about individuals and remediate in order to be eligible for certain defined levels of credit for their efforts. This pilot helps put into practice not only the Individual Accountability Policy's threshold requirement for cooperation, but also the revisions to the U.S. Attorney's Manual I announced in November that separates the concept of self-disclosure from that of cooperation. Those revisions account for the difference between a company raising its hand and voluntarily disclosing misconduct and a company simply agreeing to cooperate once it gets caught. We made this this change to emphasize that while the concepts of voluntary disclosure and cooperation are related, they are distinct factors to be given separate consideration in charging decisions. To recognize the significant value of early, voluntary self-reporting, prompt voluntary disclosure by a company – or the lack thereof – is now an independent factor that will be weighed as we evaluate charging decisions.

And it is not just the Justice Department that is doing new things. Our agency and regulatory partners are also making changes as they sharpen their focus on individual accountability. For example, for the first time in more than 20 years, the Financial Crimes Enforcement Network (FinCEN) sued to enforce a civil penalty against an individual and to bar that individual from participating in the affairs of a financial institution. That case resulted in the first court decision to interpret FinCEN's authority to impose individual liability for anti-money laundering program violations. Even our friends in Congress are listening – a new bill was introduced that will target individuals at financial institutions responsible for money laundering.

I'll leave you with this. Change is hard. As a career prosecutor, I know that what both prosecutors and defense attorneys crave is certainty. It's easier to interact with one another when everyone agrees on the rules of the road. And I get that our Individual Accountability Policy has changed those rules – slightly in some places and more significantly in others. I also understand those changes may result in some temporary uncertainty, as both prosecutors and defense attorneys adjust to the new expectations. But equilibrium will return. A new normal will exist. And with it, I expect that both the reality – and the perception – of how the Justice Department treats individual corporate wrongdoers will have been strengthened. There is one system of justice – one in which wrongdoers can and must be held accountable based on facts and evidence, not on position or title, power or wealth. This notion, of equal justice under law, has always been and will continue to be, the Justice Department's fundamental mission.

Thank you for having me here today.