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Individual liability and corporate compliance

Last September, U.S. Deputy Attorney General Sally Quillian Yates announced an important new policy for settling federal criminal cases involving business organizations:

If a company wants any credit for cooperation, any credit at all, it must identify all individuals involved in the wrongdoing, regardless of their position, status or seniority in the company and provide all relevant facts about their misconduct. It's all or nothing. No more picking and choosing what gets disclosed. No more partial credit for cooperation that doesn't include information about individuals.¹



Kaplan

While defense lawyers might have the greatest interest in this policy change, it is important for compliance and ethics (C&E) professionals too, in two respects.

First, the Yates Memo should be addressed in training senior managers. That is because the “old way” of settling cases was in effect for so long that it likely still shapes how many, and perhaps most, business leaders view the risks of engaging in wrongdoing.

Of course, one would like to think that the prospect of corporate liability – particularly given the “mega fines” that have become routine under the Federal Sentencing Guidelines for Organizations – would be enough to ensure that senior managers

behave in a lawful manner. But if that was true, there would have been no need for the new policy. So, in training senior managers and others, C&E professionals should be very explicit about this new risk to them. Hopefully, that will not only promote good individual behavior; it will also encourage them to be active supporters of their company's C&E program.

Second, the Yates Memo underscores the need for companies to have independent investigations of suspected wrongdoing where there seems to be a reasonable possibility of implicating senior managers. In this connection, at least since the Enron case, both prosecutors and legal ethicists have articulated the importance of independence in internal investigations. Yet, often it is a company's regular outside counsel that is tapped for these inquiries.

The danger here is that a lawyer or law firm that has a long-standing relationship with senior managers of a company might—even if just on a subconscious level—fail to “provide all relevant facts about their misconduct.” So, when it comes to selecting an investigator, C&E professionals may need to remind the relevant decision-makers about the need for independence. *

1. Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing. September 10, 2015. Available at <http://bit.ly/Quillian>

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