

Yates Sees Compliance Officers As DOJ's 'Crucial Partner'

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On Monday, Sally Q. Yates, the deputy attorney general in the U.S. Department of Justice, spoke before a group of bankers, lawyers and compliance officials in Washington, D.C., about the new DOJ corporate enforcement strategy she announced in a publicly distributed memorandum on Sept. 9, 2015.[1] Also Monday, this strategy was incorporated in the “Principles of Federal Prosecution of Business Organizations” (found in the U.S. Attorney’s Manual), emphasizing the importance of holding individual wrongdoers accountable in cases where a corporation may be criminally liable. She identified six steps, including internal reporting and approval requirements, to accomplish this. The incorporation of the Yates memorandum into the USAM was done to ensure consistency among all assistant U.S. attorneys in the 93 field offices and at Main Justice. Yates described the USAM as “one of the most important documents within the Justice Department community.”



Linda Dale Hoffa

Yates Remains Unchanged by Criticism of Her Policy

Most of what Yates said Monday was not new. She roundly rejected arguments from the white collar criminal defense bar that it is unrealistic to expect corporations to provide all nonprivileged information about individual wrongdoing in order to be eligible to receive any credit for cooperating, and that such policies will impinge on a corporation’s attorney client privilege. She remains unconvinced that fewer companies will cooperate with the government because of her newly announced strategy. With regard to joint defense agreements not permitting the disclosure of information learned pursuant to the agreement, Yates gently punted. “If there are instances where you do not, or you are legally prohibited from handing [information] over,” Yates reasoned, “then you need to raise these issues with the prosecutor.”

Yates Emphasizes Importance of Corporate Culture

Quite remarkably, Yates placed significant emphasis on the importance of a culture of compliance and responsibility in corporations, and her desire to prevent corporate crimes. She addressed the compliance professionals in the audience as DOJ’s “crucial partner in the fight against white-collar crime.” Yates said that corporate prosecutions are not just about going “after the corporate wrongdoers simply as an end to itself; we want to decrease the amount of corporate wrongdoing that happens in the first place.”

Criminal prosecutions and sentencing generally serve three important goals: retribution, deterrence and rehabilitation. Yates, in her speech explaining and justifying her revisions to the Principles of Federal Prosecution Business Organizations, chose to emphasize the importance of rehabilitation to reduce recidivism. This strategic direction, she claims, will “restore and help protect the corporate culture of responsibility.” Yates acknowledged that this can only be accomplished by a strong compliance program with “rigorous internal controls that help companies self-assess and self-correct.”

The Takeaway for Corporate and Defense Counsel from Yates’ Speech

The takeaway for in-house counsel and white collar criminal defense attorneys from Yates’ speech Monday is that the DOJ continues to give great weight to establishing and maintaining an ethical corporate culture. The DOJ clearly understands that corporate culture will likely determine the effectiveness of a compliance program, and a company’s ability to prevent corporate wrongdoing. A commitment of corporate leaders to a culture of compliance is key and centers on how leadership demonstrates their commitment. What leadership says is important. More important, though, are the actions assumed by leadership, and what is being heard and observed by all employees.

All companies have a culture, and it is necessary to identify what kind of culture exists, assess where improvements are needed, and develop an action plan to implement it. The aim, as Yates clearly frames it, is to ensure the development and maintenance of a corporate culture that supports the compliance function, and that those efforts are commensurate with the company’s risks.

Of course, it remains to be seen if this newly articulated strategy will succeed in working to “restore and help protect the corporate culture of responsibility” and thus “build and preserve institutions that are fair, honest and accountable.”

—By Linda Dale Hoffa, Dilworth Paxson LLP

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[1] Speech available at <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0>

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