

Compliance & Ethics Professional

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Meet Kristy Grant-Hart

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Compliance Officer*
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How to Be a
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Officer

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Ethics and our criminal justice system

- » A new DOJ policy targets individuals for criminal prosecution in cases of business misconduct.
- » New risks are posed to business managers at all levels by the new policy.
- » We need to balance the use of the criminal sanction to deter business misconduct.
- » We need to remember the importance of teaching ethics to deter criminal conduct.
- » We need to teach ethics from within business culture.

I have long been an advocate in our criminal justice system. I spent 22 years as a federal prosecutor, holding individuals and corporations accountable for their misdeeds, and now have occasion to defend those held to answer in such



Friedman

matters. I care deeply about our criminal justice system, and over the years, I have had occasion to see what works and what does not.

The Yates Memorandum

Recently, I read with much concern a September 2015 official pronouncement by the United States Department of Justice (DOJ) that attracted national attention, wherein the Department announced a new policy and directive in regard to its pursuit of individuals caught up in corporate investigations. The memorandum, titled “Individual Accountability for Corporate Wrongdoing,”¹ authored by Deputy Attorney General Sally Yates, directs federal prosecutors throughout the country to prioritize the prosecution of individuals over that of the corporation in all instances, and instructs prosecutors to target such

individuals for criminal prosecution anytime a corporate plea is considered.

The Yates Memorandum, as it has come to be called, speaks in newly energized terms regarding the DOJ’s desire that individuals be the “focus” of the government’s investigation from its “inception...regardless of whether the investigation begins civilly or criminally.” The Memorandum states that absent “extraordinary circumstances” individuals should be charged criminally and/or civilly, anytime a matter is being resolved with the corporation.

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The Memorandum emphasizes that corporate employees should be targeted for

civil actions and fines in cases of corporate wrongdoing, regardless of the individual's ability to pay. Further, the Memorandum provides that any decision by a prosecutor to decline criminal prosecution of an involved individual must be "memorialized" and "approved in writing" by the United States Attorney in the district of investigation or by higher-ups in the Justice Department. As stated in United States Attorneys Manual (USAM) Section 9-28.200:

If a decision is made at the conclusion of the investigation to pursue charges or some other resolution with the corporation but not to bring criminal or civil charges against the individuals who committed the misconduct, 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.²

This new policy, since formally adopted through revisions to the United States Attorneys Manual,³ applies to every United States Attorney's Office across the country and every litigating arm of the DOJ. It applies to all pending and future investigations. It creates, for the first time, an affirmative obligation that prosecutors pursue individual culpability in all cases of corporate malfeasance and requires the evaluation and resolution of cases against individuals in conjunction with the resolution of all corporate cases. Although the directive speaks in terms of "corporate" malfeasance, the DOJ has made clear that its new policy applies with equal force to all types of business entities, including partnerships and sole proprietorships. As stated in USAM Section 9-28.200: "While these guidelines refer to corporations, they apply to the

consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations."⁴

The DOJ has expressly acknowledged that this new policy constitutes a shift in emphasis, and anyone involved in business should be aware of it. The shift is away from the measured informal discretion traditionally accorded line federal prosecutors to determine how best to pursue instances of wrongdoing, in favor of a structure that leverages the prosecution of the individual at every turn by forcing prosecutors to write a memorandum that justifies any decision to decline to prosecute officers, directors, managers, and employees. The prosecutor's memorandum requires approval by the United States Attorney who heads the local office or by a higher-up at the Justice Department for any decision not to prosecute. In truth, no Assistant United States Attorney is going to relish the extra work and effort involved with justifying a decision not to prosecute, especially where they are aware that their commanders in DC have indicated the goal is just the opposite. Thus, we are putting in place a system which incentivizes and will reflexively result in more prosecutions of individuals at all levels anytime business misconduct is uncovered.

The big question is, Why? Why have we enacted a policy that will necessarily inundate our prisons with ever more individuals? It is generally believed that this new "get tough" policy is the Justice Department's response to public criticism leveled at the Department for its perceived lack of prosecution of high-level individuals as a result of our 2007 economic near collapse. However, this asserted justification ignores

the truth that, in fact, many, many individuals were prosecuted. For example, during fiscal year 2011 alone, cases developed by the Federal Bureau of Investigation resulted in 241 convictions of individuals for corporate fraud, including bank executives and individuals engaged in mortgage fraud.

The number of fraud investigations has risen consistently since 2007.⁵ Review of virtually any United States Attorney's Office website as well as the Federal Deposit Insurance Corporation website depicts the successful prosecution of numerous individuals engaged in corporate fraud at banks, lending institutions, and securities firms between 2007 and the present.^{6,7,8}

In addition, this policy shift in favor of the prosecution of individuals comes at a time of increasing public concern with "over criminalization," where many in our society are legitimately asking whether, in fact, we are relying upon our criminal justice system too much to address social ills, and using the criminal sanction as a proxy solution for a general lack of ethics in business. In truth, we have witnessed a veritable explosion of our prison population beyond that of any modern democracy in recent years, and we are currently spending a staggering 25% of the Department of Justice's overall annual budget simply to house people. Since 2000 the Bureau of Prisons annual budget has nearly doubled from 3.8 billion to 6.9 billion.^{9,10} And ethics do not seem to be improving.

Conclusion

Whether in the healthcare sector, or in any other business sector, what our corporations

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suffer from all too frequently is a lack of ethics, a failure to do right by the people they are serving, a failure to honor the trust placed in them. This is something that needs to be taught deeply within a corporation at all levels, through internal processes, effective leaders, and a system that consistently and uniformly rewards ethics over profit. It does not result from criminal prosecution of anyone.

Whether or not this new emphasis by the DOJ will have any positive impact on increasing legal compliance is open to doubt. In the meantime, executives and employees are well advised to expect that their individual conduct will be increasingly scrutinized by the federal arms of justice. Carefulness in formulating a response to any government inquiry and investigation is paramount. *

1. Yates SQ: Memorandum for Assistant Attorney Generals, et al., USDOJ, Office of Deputy Attorney General, September 9, 2015. Available at <http://bit.ly/justice-dag-file>
2. United States Attorneys Manual Section 9-28.200: Principles of Federal Prosecution of Business Organizations. Available at <http://bit.ly/justice-usam>
3. See, United States Attorneys' Manual, Chapters 9-28.000 and 4-3.100: Compromising and Closing. Available at <http://bit.ly/justice-compromising>
4. Ibid, Ref #2.
5. FBI, Financial Crimes Report to the Public (Fiscal Years 2010-2011). Available at <http://bit.ly/fbi-gov-stats>
6. U.S. Attorney's Office, Eastern District of Virginia, press release: "Executives, Borrower Convicted in Fraud Scheme That Led to Collapse of Bank of the Commonwealth" May 23, 2013. Available at <http://bit.ly/usao-edva>
7. U.S. Attorney's Office, Western District of Washington, press release: "Former Chairman and CEO of Skagit Community Bank Pleads Guilty in Connection with False Information Provided to Bank Regulators" August 21, 2013. Available at <http://bit.ly/bank-pleads-guilty>
8. See also FDIC Office of Inspector General press releases at <https://www.fdicig.gov/press.asp>
9. Andrew Cohen: "Obama's Prison Crisis" *The Marshall Project* website, November 17, 2014. Available at <http://bit.ly/obama-prison-crisis>
10. Statement of Inspector General of the Department of Justice Michael E. Horowitz. August 4, 2015 (rev. February 2016). Available at <http://bit.ly/horowitz-justice>

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