DOJ’s Renewed Emphasis on Individual Accountability Highlighted in ABA Article by Litigator Zac Greene

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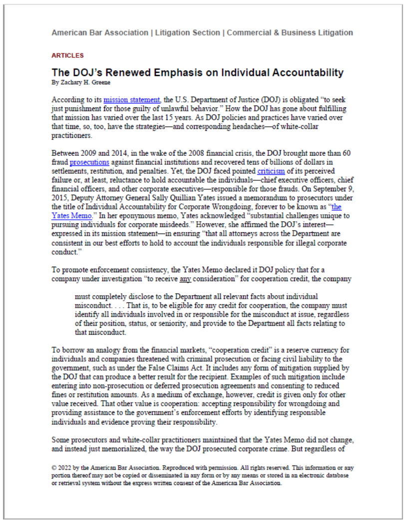
Miller & Martin White Collar & Corporate Investigations litigation attorney Zac Greene’s article titled “The DOJ’s Renewed Emphasis on Individual Accountability” was published in the American Bar Association’s Commercial & Business Litigation Winter quarterly newsletter in March 2022.

To read the full article as published by *ABA*, please click here.



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ARTICLES

The DOJ’s Renewed Emphasis on Individual Accountability

By Zachary H. Greene

According to its mission statement, the U.S. Department of Justice (DOJ) is obligated “to seek just punishment for those guilty of unlawful behavior.” How the DOJ has gone about fulfilling that mission has varied over the last 15 years. As DOJ policies and practices have varied over that time, so, too, have the strategies—and corresponding headaches—of white-collar practitioners.

Between 2009 and 2014, in the wake of the 2008 financial crisis, the DOJ brought more than 60 fraud prosecutions against financial institutions and recovered tens of billions of dollars in settlements, restitution, and penalties. Yet, the DOJ faced pointed criticism of its perceived failure or, at least, reluctance to hold accountable the individuals—chief executive officers, chief financial officers, and other corporate executives—responsible for those frauds. On September 9, 2015, Deputy Attorney General Sally Quillian Yates issued a memorandum to prosecutors under the title of Individual Accountability for Corporate Wrongdoing, forever to be known as “the Yates Memo.” In her eponymous memo, Yates acknowledged “substantial challenges unique to pursuing individuals for corporate misdeeds.” However, she affirmed the DOJ’s interest—expressed in its mission statement—in ensuring “that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.”

To promote enforcement consistency, the Yates Memo declared it DOJ policy that for a company under investigation “to receive any consideration” for cooperation credit, the company

> must completely disclose to the Department all relevant facts about individual misconduct. . . . That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority, and provide to the Department all facts relating to that misconduct.

To borrow an analogy from the financial markets, “cooperation credit” is a reserve currency for individuals and companies threatened with criminal prosecution or facing civil liability to the government, such as under the False Claims Act. It includes any form of mitigation supplied by the DOJ that can produce a better result for the recipient. Examples of such mitigation include entering into non-prosecution or deferred prosecution agreements and consenting to reduced fines or restitution amounts. As a medium of exchange, however, credit is given only for other value received. That other value is cooperation: accepting responsibility for wrongdoing and providing assistance to the government’s enforcement efforts by identifying responsible individuals and evidence proving their responsibility.

Some prosecutors and white-collar practitioners maintained that the Yates Memo did not change, and instead just memorialized, the way the DOJ prosecuted corporate crime. But regardless of