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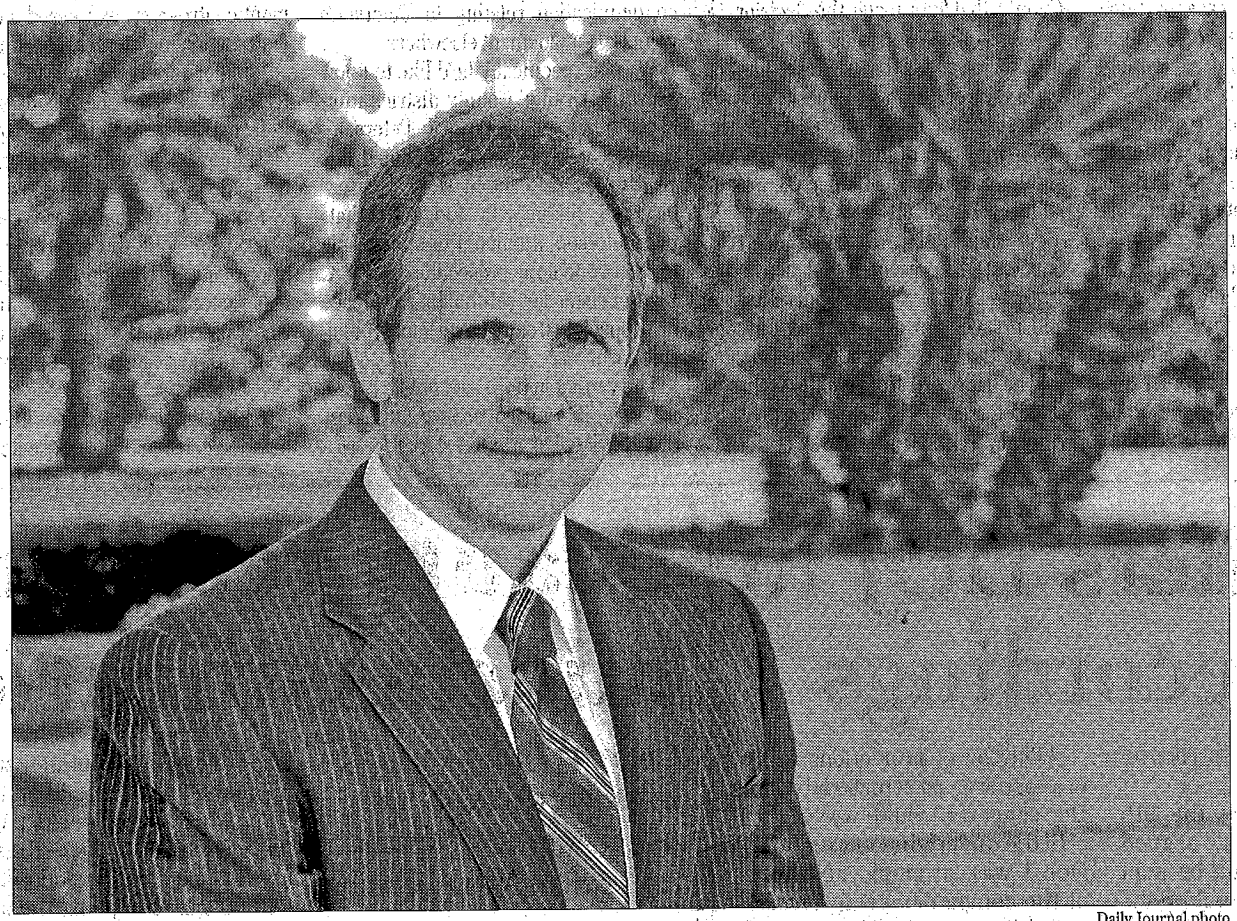

Daily Journal photo

John C. Hueston, a partner at Hueston Hennigan LLP and a former federal prosecutor, said the U.S. Department of Justice's new policy on handling corporate crimes is neither radical nor new.

Justice Department guidelines stir debate

By Gautham Thomas
Daily Journal Staff Writer

The U.S. Department of Justice released new guidelines for federal prosecutors Wednesday in an internal memo, signaling a renewed focus on individual prosecutions for cases of corporate malfeasance amid criticism toward the department and Obama administration over a lack of individual prosecutions in the wake of the financial crisis.

The new guidelines signal a policy shift away from a long-standing practice of financial settlements and deferred prosecution agreements toward individual criminal prosecutions and deterrence.

Titled "Individual Accountability for Corporate Wrongdoing" and addressed to all U.S. attorneys, the seven-page memo by Deputy Attorney General Sally Q. Yates outlined six steps to re-prioritize individual prosecutions in cases of corporate wrongdoing.

Most importantly, to be eligible for "cooperation credit" with the department, corporations must turn over any facts regarding individuals responsible for misconduct.

Further, individual prosecutions will be pursued from the inception of an investigation to the close of prosecution, and it will now take "extraordinary circumstances or approved departmental policy" to release individuals from culpability even in the case of corporate settlements or agreements with the government.

"[The department] has now put in a protocol that would make it difficult for [U.S. attorneys] not to proceed against individuals without explaining why," Debra Wong Yang, a former U.S. attorney for the Central District and current partner at Gibson, Dunn & Crutcher LLP, said via email.

"This is a very different rule from the past," Yang said. "It's a centralized accounting and will very likely lead to increased individual prosecutions."

Walter F. Brown, Jr., the practice group leader of Orrick, Herrington & Sutcliffe LLP's white collar criminal defense and corporate investigations group, strongly criticized the policy as a shift in the wrong direction, arguing that the new guidelines mean there will be a higher hurdle to receiving credit for voluntary disclosure of relevant facts.

"You have to disclose all facts for cooperation to even be considered as a mitigating factor," Brown said. "That includes an obligation, as I read it, to learn all facts."

"If you don't disclose facts you should have known, you don't get cooperation credit. It's a pretty onerous threshold."

John C. Hueston, a partner at Hueston Hennigan LLP and a former federal prosecutor who lead the case against Enron Corp. executives Kenneth Lay and Jeffrey Skilling, disagreed about a potential sea change, and instead said the policy shift brings the department

Criminal guidelines stir disagreement among attorneys

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back to basics.

"There's nothing radical or new here," Hueston said, calling the guidelines "a return to the roots of DOJ corporate prosecutions."

The requirement for corporations to turn over wrongdoers puts pressure on them to convince the department that they are being fully cooperative, Hueston said.

"I think the danger is that a company might read this policy shift too broadly and panic," Hueston said. "The wrong conclusion would be that they need to name individuals in their company as criminally culpable in order to find a way to avoid a corporate indictment."

The memo marks the most recent change to the Principles of Federal Prosecution of Business Organizations, a document that lays out the department's approach to corporate prosecutions.

Andrew Stolper, a former federal prosecutor and partner at Eagan Avenatti LLP, traced the development of the Principles from the so-called Holder Memo. The document, circulated in 1999 by then-deputy attorney general Eric Holder, was an early attempt to provide uniformity for federal corporate cases.

The approach advocated by Holder and a 2003 follow-up by then-deputy attorney general Larry D. Thompson relied on hardball tactics such as pressuring companies to waive attorney-client privilege and to not pay for the defense of employees accused of wrongdoing.

In 2007, however, U.S. District Judge Lewis A. Kaplan found that prosecutors violated defendants' constitutional rights by pressuring their employer, KPMG LLP, into not paying defense costs, setting off a backlash against the department's policies. *United States v. Stein*, S1 05 Crim. 0888 (S.D.N.Y., filed Oct. 12, 2007).

After that, the department grew wary, pulling back from pursuing individual prosecutions and instead chasing large financial settlements and deferred prosecution agreements, according to Stolper.

"If you work for a company and you commit crimes, the company writes a check and you get to get on with your life," Stolper said. "That's not fair and that's not just."

"If you want to deter crime, you don't do it by having someone write a check with someone else's money. You do it by prosecuting the people engaged in wrongdoing."

Yates pursued such a theme in her department memo.

"[Individual] accountability is important for several reasons," wrote Yates. "It deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system."

The guidelines grew out of discussions from a working group composed of justice department senior attorneys and experienced U.S. attorneys, Yates wrote.

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