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New DoJ Memo by DAG Yates Intended to Increase Prosecutions of White Collar Executives and Other Employees

In a speech yesterday at NYU Law School, Deputy Attorney General Sally Q. Yates announced new Department of Justice (“DoJ”) policies intended to strengthen the DoJ’s efforts to hold corporate executives accountable for unlawful conduct.¹ In particular, Deputy Attorney General Yates said that she had issued a memo to all DoJ prosecutors and civil litigators outlining six specific steps that the DoJ believes will “maximize [its] ability to deter misconduct and to hold those who engage in it accountable.”²

In her speech, Deputy Attorney General Yates said that the six steps were the result of the efforts of a working group of senior attorneys from the DoJ and the United States Attorney’s offices who were tasked with developing solutions to the unique challenges presented when pursuing cases against individuals. “Fundamentally,” she said, “these new policies ensure that all department attorneys – from main justice to the 93 U.S. Attorney’s Offices across the country – are consistent in using our best efforts to hold individual wrongdoers accountable.”

The key policy changes outlined in the six steps are as follows:

- (1) Cooperation Credit only available if companies “give up individuals.” In order to earn any credit for cooperation with the DoJ in civil or criminal investigations, and thus potentially reduce fines or monetary penalties or other remedies, companies must identify all individuals involved in the relevant wrongdoing, “regardless of their position, status or seniority in the company.” Companies must also provide all relevant non-privileged facts about these individuals’ misconduct. Deputy Attorney General Yates stated that companies will not be required to “boil the ocean” every time they identify individual misconduct, but the new guidance notes that DoJ attorneys are required to “vigorously review any information provided by companies and compare it to the results of their own investigation.”

¹ Department of Justice Speech, 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 (Sept. 10, 2015) *available at* <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.

² Department of Justice Memo, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) *available at* <http://www.justice.gov/dag/file/769036/download>.

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- (2) No releases for individuals in corporate resolutions. The new guidance also addresses how the DoJ will resolve cases against companies. It states that the DoJ will not release individuals from criminal or civil liability in corporate resolutions except in “extraordinary circumstances.” DoJ attorneys must also demonstrate to their supervisor that they have a clear plan to resolve related individual cases in order to seek a corporate resolution. Any individual releases or declinations must be approved by the relevant United States Attorney or Assistant Attorney General.
- (3) Renewed focus on individuals in civil cases: the new memo requires a renewed focus on individuals by the DoJ’s civil attorneys, and states that considerations of an individual’s ability to pay should no longer predominate in decisions about whether to bring a civil suit. The Department acknowledged that this policy change may result in less “monetary return on the Department’s investment” in the short term. Deputy Attorney General Yates noted, however, that the change ensures “we can take what [individuals] have” while creating a civil judgment that will “become part of corporate wrongdoers’ resumes” and “follow them throughout their careers.”
- (4) Changes to the investigation process: the new memo also expressly requires all DoJ attorneys to focus on individuals from the outset of corporate investigations. This early focus is intended to create a better factual record against individuals, increase the likelihood that corporate employees will cooperate with the government, and maximize the chances of a resolution against individuals. The DoJ’s criminal and civil attorneys must also be in early and routine communication with each other regarding individual misconduct because, as Deputy Attorney General Yates stated, “the best way to ensure that criminal prosecutors don’t need to go back and build a new case after the civil attorneys finish their inquiry – or vice versa – is to make sure that everyone’s talking to each other from the very beginning.”

Observations

Although the new policy incorporates principles and practices that have been part of the DoJ’s approach for some time, the memo has potentially significant implications for companies and individuals facing DoJ investigations. As Deputy Attorney General Yates acknowledged, the new policy may create additional obstacles for companies attempting to resolve cases with the DoJ. It will place increased pressure on companies to develop and present evidence of wrongdoing by senior executives and other employees in order to get credit for cooperation. The policy also will also put additional pressure on prosecutors to charge individuals and thereby increase the exposure of senior corporate executives to government scrutiny.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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