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DOJ TO PROSECUTE MORE COMPANY OFFICIALS AND EMPLOYEES FOR CORPORATE CRIMES

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The Department of Justice (“DOJ”) will be bringing more criminal cases against company officials and employees engaged in corporate wrongdoing and will severely restrict its current practice of just charging corporate entities alone for white collar crimes. At New York University School of Law, Deputy Attorney General Sally Q. Yates announced today major new policies for the DOJ regarding individual liability in matters of corporate crimes. These new DOJ white collar crime policies are a sea change that may result in more contested prosecutions.

Since the Financial Crisis of 2008, DOJ has brought major civil and criminal prosecutions against many corporate entities and has recovered billions and billions of dollars in criminal fines in these cases. Yet, in only very few of these cases have individual corporate officials and employees been charged. And this has not gone unnoticed. Congress and the press have roundly blasted DOJ for this.

The Deputy Attorney General's policy announcement today (released yesterday in an internal memorandum to both civil and criminal attorneys at the 93 United States Attorney's Offices and to all Department attorneys in Main Justice) bluntly declares that this is going to change. Yates announced "Americans should never believe, even incorrectly, that one's criminal activity will go unpunished simply because it was committed on behalf of the corporation."

To make this major policy shift in white-collar civil and criminal prosecutions, Yates announced six specific steps to hold individual corporate officials and employees criminally responsible. Some of these steps address the way DOJ investigates, charges and resolves cases. Other steps address how DOJ interacts with an investigation's targets. The six steps follow:

- The first is the biggest. It revises what is known as the Filip factors (also known as DOJ's Principles of Federal Prosecution of Business Organizations) to now require that if a company wants credit for cooperation, it must identify *all individuals* involved in the wrongdoing. In other words, "it's all or nothing." As the Deputy Attorney General said in her NYU Law School speech today: "[W]e're not going to let corporations plead ignorance." In defending this new policy, Yates said that this is the same rule that has always been applied to cooperators in drug investigations. It is noteworthy that this change also applies to civil cases typically brought under the False Claims Act. Corporations also will now be required to provide continuing cooperation to the government as part of all corporate plea agreements.
- The second change: going forward DOJ attorneys at the start of all civil and criminal investigations will now focus on individuals as well as the corporate entity.

- The third step dictates that all DOJ attorneys on the civil and criminal sides of the office will now be directed to collaborate fully to the extent permitted by law and at all stages of an investigation. This means that civil and criminal attorneys will be expected to be in regular communication with each other, such that declinations by prosecutors are to be communicated immediately to the civil side, and civil attorneys are expected to refer matters promptly to the criminal side of the office for investigation.
- The fourth and fifth policy changes are related. One step is that DOJ attorneys will not be permitted to resolve the corporate case before the individual cases are resolved, unless the attorney can demonstrate to his or her supervisors a clear plan for resolving the related individual cases. The other step is that DOJ attorneys will be instructed that they cannot release any individuals from civil or criminal liability if they want to only resolve the corporate matter, except under the rarest circumstances. To do so, an Assistant United States Attorney will need to first obtain written approval from his or her U.S. attorney, and a Main Justice attorney from his or her assigned Assistant Attorney General.
- The final policy change concerns civil enforcement strategies. Previously, individual civil cases were not pursued if it was unlikely that a financial recovery could be obtained. Yates announced that the Department believes now that there is value in bringing civil cases against individuals - even if it cannot be measured in dollars and cents. Going forward, if an individual is civilly liable, the Department will pursue civil actions whether or not wrongdoers have the financial resources to pay a significant monetary judgment.

Regarding how this will play out, the Deputy Attorney General herself noted: “[O]nly time will tell.” But in her final remarks today, she stated that DOJ’s “[m]ission is not to recover the largest amount of money from the greatest number of corporations; our job is to seek accountability from those who break our laws and victimize our citizens.” And the only offered justification for these new policies is the belief that this “is the only way to truly deter corporate wrongdoing.”

These are very major changes for white collar civil and criminal prosecutions, and all corporate counsel, particularly those in highly regulated and scrutinized businesses, need to be aware of the new steps federal attorneys must follow in conducting and resolving these matters.