

KIRKLAND ALERT

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DOJ Issues New Guidance on Individual Accountability for Corporate Wrongdoing

On September 9, 2015, the U.S. Department of Justice issued new guidance focusing on individual accountability in federal criminal and civil investigations that may have significant ramifications for clients involved in current and future federal investigations. The guidance, issued by Deputy Attorney General Sally Yates, is titled “Individual Accountability for Corporate Wrongdoing,” and comes at a time when the Department has faced criticism from the media and some political leaders based on the perceived lack of individual accountability in connection with major corporate criminal and civil resolutions in recent years. The overall focus of the guidance is the need to “fully leverage [the Department’s] resources to identify culpable individuals at all levels in corporate cases”—both criminal and civil—through six specific directives.

In terms of concrete policies, the guidance mandates that to qualify for cooperation credit, when resolving criminal or civil cases, a corporation must provide the Department all relevant information about the individuals involved in the relevant misconduct. In other words, information that may not be relevant to the overall culpability of the corporation and might in the past not have been considered relevant in deciding whether a corporation had cooperated for purposes of charging, sentencing, and civil penalty determinations, may now be required to the extent that it is relevant to the *individual* culpability of employees, officers, or directors, essentially tying the corporation’s ability to reach its own resolution to its cooperation in potential investigations and prosecutions of its personnel. In addition, the new guidance mandates that any determination not to prosecute or bring civil claims against culpable individuals at the conclusion of a corporate investigation must be justified in writing and approved by the U.S. Attorney or Assistant Attorney General whose office supervised the investigation. While it is difficult to predict how stringent this requirement will be in practice, it may in effect lead to an increase in actions against individuals by imposing a burden on Department attorneys to justify decisions not to pursue individuals much as they were already required to justify decisions to prosecute or bring civil claims.

The guidance also contains directives regarding priorities and cooperation between criminal and civil attorneys in the conduct of investigations. The guidance makes clear that criminal and civil attorneys should focus on individual culpability “from the very beginning of any investigation of corporate misconduct” and that they should be in “routine” communication with each other to identify opportunities to work in parallel and to inform each other of information that might lead to criminal or civil liability arising from their investigations. Finally, the guidance directs civil attorneys specifically that they should consistently focus on individuals as well

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as corporations and take other factors beyond an individual's ability to pay into account in determining whether to pursue civil claims against those individuals. The guidance specifically mentions other factors to consider beyond ability to pay, including the seriousness of the alleged misconduct and the importance of the federal interest at stake. We may see an increase in civil actions brought against individuals as a result.

In short, while it is difficult to say with certainty how and to what extent the new guidance will impact pending and future investigations, it is clear that the Department is attempting to tip the scales in the direction of increased criminal and civil actions against individuals. This new emphasis, and the concrete procedures announced in the guidance, introduce new complexity to corporate investigations by heightening the stakes for individual officers and employees and perhaps marking a clearer separation between individual and corporate interests in many situations. Clients with current or potential federal investigations should familiarize themselves with the new guidance and should consult a Kirkland attorney to discuss these matters further.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

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