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The Yates Memo: Friend or foe to compliance officers?

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Last month, newly appointed Deputy Attorney General (DAG) Sally Quillian Yates spoke at New York University (NYU) School of Law about the Department of Justice's (DOJ) ongoing focus on individual prosecutions. A seasoned prosecutor with a number of high-profile white collar cases under her belt, DAG Yates reminded the room that "[c]rime is crime. And it is [the] obligation at the Justice Department to ensure that we are holding lawbreakers accountable regardless of whether they commit their crimes on the street corner or in the boardroom. In the white collar context, that means pursuing not just corporate entities, but also the individuals through which these corporations act." These comments set the stage for the DOJ's September 9, 2015 memorandum on "Individual Accountability for Corporate Wrongdoing."

The memorandum, also known as the "Yates Memo," identifies six directives to federal prosecutors relating to an enhanced focus on individual prosecutions:

- To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct. During her NYU speech, DAG Yates emphasized "if a company wants any credit for cooperation, any credit at all, it must identify all individuals involved in the wrongdoing, regardless of their position, status or seniority in the company and provide all relevant facts about their misconduct. It's all or nothing. No more picking and choosing what gets disclosed. No more partial credit for cooperation that doesn't include information about individuals."
- Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.
- Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.
- Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals. While the resolution of enforcement actions with corporations has previously had a trickle-down effect for individuals, DOJ attorneys have been now been instructed "that they should not release individuals from civil

or criminal liability when resolving a matter with a corporation, except under the rarest of circumstances."

- Corporate cases can no longer be resolved without a clear plan to resolve related individual cases before the statute of limitations expires, and declinations as to individuals in such cases must be memorialized. Notably, a prosecutor who decides not to bring charges will need to have a declination memo approved by their U.S. Attorney.
- Civil attorneys must consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay. During her NYU speech, DAG Yates explained that "[t]here is real value, however, in bringing civil cases against individuals who engage in corporate misconduct, even if that value cannot always be measured in dollars and cents....[B]y holding individuals accountable, we can change corporate culture to appropriately recognize the full costs of wrongdoing, rather than treating liability as a cost of doing business – a change that will protect public resources over the long term."

The DOJ's focus on targeting individuals is nothing new. DAG Yates herself acknowledged that "some [of these policies] are being already being practiced at various places within DOJ []." For example, in the FCPA context, so far this year, four of the DOJ's six FCPA enforcement actions have been against individuals. Three of those actions were brought against vice presidents whose corporations entered into deferred or non-prosecution agreements (and paid hefty fines); in the other, there was no separate action against the corporate entity, which was owned and operated by the individual defendant. In the case of New Jersey-based construction management firm Louis Berger International Inc. (LBI), the DOJ entered into a deferred prosecution agreement with the corporation after LBI admitted to FCPA violations, agreed to a $17.1 million criminal penalty, and cooperated in providing evidence that ultimately led to guilty pleas by two of its vice presidents.

The DOJ's focus on individuals is not novel. That being said, the Yates Memo's requirement that to receive any credit at all, companies must throw their employees (or even their executives or Board members) under the bus, is potentially landscape changing for companies and their compliance officers. Compliance officers are likely to receive more support (financial and otherwise) from the C-Suite in recognition of the critical role they already serve in the company, and are less likely to be perceived as "cops," but rather as "protectors" and "trusted advisors." However, when it comes to self-reporting violations to the DOJ or SEC, it is likely that companies will think twice now where they otherwise may have self-reported. The requirement that *all* culpable employees (including executives and directors) must be identified will certainly give most pause, if it doesn't deter self-reporting altogether. No doubt that many will hold back to see how the DOJ and SEC implement the directives of the Yates Memo where there is disagreement between the self-reporting company and prosecutors as to whom in the company has culpability and how high up that culpability goes. Presumably, under the Yates Memo, where prosecutors disagree with the company's conclusions on culpability, the company would receive no credit for cooperation. So, why roll the dice then by self-reporting? For example, under the FCPA, where knowledge may be proved through "deliberate ignorance" or "willful blindness," regulators may take the position that higher-ups are culpable for a third parties payment of a bribe where the company failed to implement an effective compliance program; whereas, the company may reasonable interpret those same facts as suggesting no such culpability.

Hence, rather than having its intended effect of increasing individual prosecutions, the Yates Memo may have a chilling effect on self-reporting by companies thereby reducing the number of individual (and corporate) enforcement actions successfully brought by the DOJ and SEC. While watching to see how the DOJ and SEC implement these new directives, compliance officers should be sure to advise all employees (from top-level executives down) and board members on the Yates Memo and its implications, which should have the added benefits of further encouraging employees to adhere to the company's existing compliance policies and promoting a culture of compliance.

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