Reflections on the Yates Memo

BY ROBERT APPLETON

The Department of Justice (DOJ) recently released a potential game changing enforcement policy on September 9, 2015, called “Individual Accountability for Corporate Wrongdoing” (The Yates Memo). The Memo, publicized broadly, is receiving unprecedented attention and significant concern, and with good reason. While not entirely new in many aspects, the Yates Memo clarifies and re-emphasizes the DOJ’s enhanced focus on holding corporate executives accountable for corporate wrongdoing in both criminal and civil cases. Under the Yates Memo, two new aspects of the policy have potentially profound implications. First, prosecutors can no longer recommend that the company receive any “credit” in the form of reduced penalties for cooperation unless the corporation turns over all information on everybody in the company that may have participated in wrongdoing. Second, prosecutors are required to prosecute all individual employees where there is sufficient evidence to do so.

In the past, the DOJ has routinely agreed to settle cases of corporate wrongdoing by requiring the organizations to pay fines, change their business practices, and sometimes agree to a corporate monitor and/or terminate the wrongdoer. At the same time, the DOJ had generally not pursued actual prosecutions against individuals except in egregious instances of fraudulent or corrupt conduct. In some cases, DOJ has historically used the carrot of foregoing individual prosecutions as an incentive for the company to pay big
fines. In short: The corporations paid and the individuals skated. No more.

The Yates Memo changes that standard and emphasizes that prosecutors should “seek accountability from the individuals who perpetrated the wrongdoing.” No longer will a company resolve its civil or criminal problems by terminating the wrongdoer. This means that investigations will take longer and involve more individual subjects and targets as prosecutors look at the role of everyone involved and try to find possible individuals to prosecute.

Clearly, the directive is for investigators to work these cases up the chain of command within an organization now, and evaluate what directors and officers, as well as senior management and involved employees knew, or reasonably should have known about a regulatory or criminal problem. Such individuals could be prosecuted under a “conscious avoidance” theory, popular among prosecutors to employ in cases where there is evidence of misconduct all around an official, but little immediately implicating her directly. The theory, recognized in the federal law, allows the government to “impute” knowledge to the senior official.

These requirements will no doubt cause the process, both internally, and externally with the DOJ, to become more adversarial, with savvy employees, officers and directors that find themselves being asked questions internally about alleged wrongdoing, thinking twice before they voluntarily submit to interviews within the company and turn over materials. Such concerns are valid because any information they disclose will now be turned over to the government. In this climate, these statements and evidence could be used against the official in an individual prosecution, and the officer or director will be faced with the unenviable choice of whether to put his or her job, or liberty, first. As such, prudent employees finding themselves the subject of inquiries will also quickly retain counsel.

These directives also have implications for D&O insurance policies as there will be more claims against them. Individuals who are subjects or targets of investigations must hire separate defense counsel. There will be more documents to review and produce as prosecutors “reconstruct what happened based on a painstaking review of corporate documents.” This, in turn, will increase the litigation costs as more documents will be relevant in an investigation. And there will be more trials of individuals, who might not be as amenable as their corporate employers to plead guilty and reach a resolution with the DOJ. (After all, corporations only have to pay money, people often have to go to prison.) More trials will be costly and time consuming, and ultimately decrease the number of cases the government can address. Trials are huge resource drains, and take up time, energy and effort of prosecutors, agents and support staff.

In this new climate, companies would be advised to not only enhance their focus on their corporate-compliance activities, but also review their D&O coverage in light of the government’s announcement on individual culpability for corporate wrongdoing. Officers and Directors should also take preventive steps, documenting key events, being proactive in anti-corruption compliance, and taking measures to protect themselves.

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