The Yates Memo –
The Background and Its Impact

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ISSUANCE OF THE YATES MEMO

On September 9, 2015, United States Deputy Attorney General Sally Q. Yates issued a memorandum (the “Yates memo”) directing the Department of Justice (“DOJ”) to fully leverage its resources to seek accountability from individuals for corporate misdeeds. Although the Yates memo identified the “many substantial challenges” unique to pursuing individuals, it set forth the following six key steps that the DOJ plans to take to strengthen its ability to seek individual culpability: (1) in order to qualify for any cooperation credit, corporations must provide to the DOJ all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) DOJ attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should 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.

CRITICISM THAT LED TO THE YATES MEMO

This memorandum was issued after years of criticism against both the DOJ and the Securities and Exchange Commission (“SEC”) for the lack of criminal and civil cases brought with regard to the financial crisis. For example, as early as 2013, U.S. District Court Judge Jed Rakoff, who oversaw several fraud trials against companies brought by the SEC, criticized the government for failing to hold individuals responsible for massive frauds, stating that this approach “speaks greatly to weaknesses in our prosecutorial system.”

BANK OF AMERICA INVESTIGATION

One of the initial cases in which Judge Rakoff expressed concern about the failure to bring actions against individuals occurred is a matter that I investigated while serving as the Inspector General of the SEC, in 2010. In January 2009, the SEC’s Enforcement division began an investigation of the circumstances surrounding Bank of America’s approximately $50 billion acquisition of Merrill Lynch. The SEC began investigating allegedly false and misleading statements made by Bank of America in a joint proxy statement filed in connection with the merger. In August 2009, the SEC entered into a provisional settlement with Bank of America for a penalty of $33 million subject to court approval. After the SEC filed the proposed settled action with Judge Rakoff, he held a hearing during which the SEC and Bank of America presented arguments supporting the proposed settlement. In September 2009, the Court rejected the SEC’s proposed settlement with Bank of America on the grounds that the penalty amount was too low, and no actions were brought against the individuals who allegedly committed the fraud. As Inspector General of the SEC, I was asked to investigate the circumstances surrounding the SEC’s decision to proceed with the initial settlement and found that after Judge Rakoff rejected the SEC’s first proposed settlement, a second SEC Enforcement team continued litigating the case, conducting extensive discovery and adding a new claim to strengthen its litigation position. In the end, however, they concluded that “there simply wasn’t a factual and legal basis to bring a claim against individuals.”

REASONS FOR FEW ACTIONS BROUGHT AGAINST INDIVIDUALS

In my experience, one of the primary reasons that the government has not brought many actions against individuals for wrongdoing arising out of the financial crisis is that the government prefers to bring cases that it has a high probability of settling favorably before trial. In cases brought against companies, the government can utilize its leverage to compel defendants to settle cases without having to use resources that are needed for trial. In addition, companies often make the determination that settling a case even with a relatively large penalty can be cost-effective, particularly when they consider the legal fees associated with defending a claim to trial. Settlements also provide finality for the company, which is beneficial for their bottom line. For example, on the day in July 2010 when the SEC announced a settlement with Goldman Sachs (“Goldman”) over misleading investors in the subprime mortgage market with a penalty of $550 million, Goldman’s stock price surged 4.43 percent on the rumors of the settlement and an additional 5 percent after the settlement.

was officially announced, which meant a financial windfall for the company even after it would pay its penalty. Individuals, on the other hand, face the prospect of jail time and/or penalties and fines that may not be reimbursed by their companies and accordingly, are less likely to engage in a settlement. From the perspective of the individual DOJ prosecutor or SEC Enforcement attorney, a quick settlement in a particular action is preferable since they are then able to bring more cases and do not run the risk of lengthy litigation, possibly culminating in an unfavorable decision from a jury. Thus, they are unlikely to initiate a case against an individual defendant where the facts are murky, as they are aware that the matter will likely proceed to trial rather than settle.

In addition, in my experience, particularly at the SEC, there are internal influences that may incentivize the bringing of “easier to prove” cases in general. In another investigation I conducted as Inspector General of the SEC, I found that one of the reasons the SEC failed to uncover the $7 billion Ponzi scheme perpetrated by Allen Stanford in a timely manner was the perception by the SEC Enforcement personnel that the Stanford case was difficult, novel and challenging to prove. The former head of the SEC’s Fort Worth office indicated in the investigation that SEC regional offices were “heavily judged” by the number of cases they brought and that it was very important for the Fort Worth office to bring a high number of cases. Another senior official who worked on the Stanford matter said that everyone in Fort Worth was mindful of “stats” since they were recorded internally by the SEC in Washington, and there was a lot of pressure to bring a high volume of cases. As a result, the SEC’s Fort Worth Enforcement program focused on “easier cases” or “quick hits” and any potential investigation or action that did not appear likely to produce a number (in the form of a successful prosecution or settlement) in a very short period of time was not prioritized. As was seen in the Bank of America context, cases against individual defendants are rarely “quick hits” as there are additional burdens (such as establishing intent or negligence) when attempting to prove liability against individuals, and as noted above, individuals are less likely to agree to a quick settlement or resolution.

**UNEXPECTED IMPACT OF THE YATES MEMO**

As the Yates memo outlines, one of the new approaches of the government is to tie the receipt by corporations of cooperation credit, which can potentially significantly reduce their penalties, to the companies giving them evidence of individual culpability. In this way, the government can build stronger cases against individuals that are closer to the “quick hits” that they often prefer. This will lead to an interesting dynamic where companies’ decisions to cooperate may now involve their willingness to give potentially damning information about individuals who could potentially be senior-level executives in the company. In the past, it seemed that cooperating with the government was the obvious choice to make, since the feeling was often that the government would find out about the wrongdoing anyway, and cooperation would lead to lower fines and more lenient terms for a settlement. However, when companies are asked to give information about individuals in the company, the decision to cooperate may not be so clear cut. Companies may be very reluctant to divulge information about executives’ roles in activities especially where they are not entirely convinced that the individual or even the company actually engaged in wrongdoing. Previously, settlement was often viewed as a significant positive for the company's bottom line, but beginning a process that may lead to personal exposure on the part of company officials may not be favored in the same way.

These new considerations about whether to cooperate with the government may also be impacted by the relatively new policy of the SEC regarding obtaining admissions of guilt in settlements. In 2013, SEC Chair Mary Jo White announced that certain enforcement cases would require an admission of guilt or the regulator would be forced to take the defendant to trial. She explained that “Defendants are going to have to own up to their conduct on the public record. This will help with deterrence, and it’s a matter of strengthening our hand in terms of enforcement.” This announcement represented a significant departure from the previous policy of the SEC, for which the “neither admit nor deny” settlement approach had been a hallmark of its enforcement strategy. Accordingly, the fact that an admission of guilt by an individual can have significantly greater consequences than similar admissions on the part of companies is another reason that settlements may be seen as less than ideal.

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In addition, the Yates memo policy regarding cooperation credit requiring information about individuals could cause significant conflicts between the company and the individual executives and even adversely impact the company’s ability to conduct an internal investigation. Certainly, an individual defendant who would be a witness in an internal investigation is much more likely to retain separate counsel in light of the approach outlined in the Yates memo by the government. The addition of separate counsel for witnesses will necessarily complicate the efforts of investigators to conduct the internal investigation as well as make the investigations longer and more costly. Moreover, counsel for an individual defendant could justifiably advise his or her client that cooperating with a company’s internal investigation would not be prudent where it may lead the investigation to reveal evidence that will be provided to the government in order to obtain cooperation credit for the company.

Finally, the company would face a particularly difficult dilemma if, in their efforts to secure cooperation credit, they seek to obtain evidence against individuals in the internal investigation, but realize during the course of the internal investigation that they will simply be unable to locate such evidence to the satisfaction of the government. At that point, they may consider abandoning any effort to continue to cooperate.

CONCLUSION AND PREDICTING THE FUTURE

It is important to understand what led to the issuance of the Yates memo to determine the actual impact of this new policy on criminal and civil actions brought by the government. While the government will, undoubtedly, make greater efforts to investigate allegations of wrongdoing against individuals that may lead to actions being brought against them, the inherent incentives in place for bringing cases where the evidence is particularly strong will likely not disappear, and it is simply and will remain more difficult to develop and prove a strong case against an individual than a company. While it is unclear whether the end result will be more prosecutions of individuals, it is clear that there will be more pressure placed on corporations to provide damaging information about any wrongdoing on the part of individuals. Much to the government’s chagrin, this increased pressure may not always necessarily lead to the increased cooperation that the government is seeking.