WHITE COLLAR

THE YATES MEMO: PRESUMPTION OF GUILT?

The Department of Justice's Yates Memo has gained a great deal of attention for its focus on individual accountability in white-collar investigations. But it creates other fundamental shifts that are likely to complicate internal investigations.

The Yates Memo says that corporate cooperation credit—which can significantly reduce corporate sanctions, to the point of a full declination—will be given *only* if the company identifies employees involved in wrongdoing and turns over "all relevant facts" relating to those individuals.

"Yates transformed cooperation credit into an all-or-nothing proposition. You get full credit or no credit," says Thomas Hanusik, a Crowell & Moring partner and co-chair of the firm's White Collar & Regulatory Enforcement Group. "It really puts the onus on companies to investigate and identify all culpable individuals and then inform the DOJ."

In essence, corporations have to give the government all the information they have on potentially guilty employees relatively quickly, which can create complications. The DOJ does not require corporations to waive privilege around interviews with their executives in order to get the credit. However, says Hanusik, "the Yates Memo does say that you have to tell the DOJ who the culpable individuals are and provide all evidence you've gathered about them. The government says it just wants the facts, but a lot of those facts are garnered during privileged interviews—so in practice, you could end up waiving privilege."

UNDERSTANDING THE CHALLENGES

For companies that are self-reporting, the Yates Memo may not create significant challenges. Generally, they are already aware of any misconduct and have a clear idea of what information they have and which individuals are involved. They understand what they will need to disclose to the government and the potential impact of doing so for the company.

The situation is quite different when companies are not self-reporting—that is, when an issue comes up as a result of a subpoena, a whistleblower, or some other government allegation of improper conduct. In those situations, the company essentially starts out in the dark, with little understanding of the facts surrounding the alleged misconduct.

"The general counsel has to walk the razor's edge of trying to gather facts and evidence to be ready to defend the company, while also worrying about risking the loss of the cooperation credit because they're not handing the government everything from the outset," says Hanusik. To get credit for cooperating, companies may determine that they should disclose information about employees before they have a truly solid understanding of their potential involvement or culpability.

"That's a very difficult position for a company," he continues. "You may not know all the facts but find that you have to make a choice right away about what you're going to do with the information that you do have." And the general counsel has to think not only about whether the company should pursue the cooperation credit, but also how the decision could affect employee morale in the near term and potential civil lawsuits down the road.

In short, says Hanusik, the Yates Memo tends to replace the presumption of innocence with a presumption of culpability. In some circumstances, it can shift the burden of proof to the corporation, requiring it to perform and share

KEY POINTS

All or nothing
The DOJ's Yates Memo requires complete disclosure about employee conduct for cooperation credit.

A new burden
Companies face added pressure to do the government's investigative work.

Hurdles to compliance
Corporations may not have access to all the information they need for cooperation credit.

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much of the investigative work traditionally done by the government in order to get cooperation credit.

Due to no fault of their own, corporations are not always in a position to successfully take on that work. While they often have the ability to examine internal servers and ask employees questions, they also have "significant investigative disadvantages that are very difficult, if not impossible, to overcome," says Hanusik. In particular, they don't have subpoena power to compel third parties to give them documents or to make anyone talk to them. What's more, with the Yates Memo's focus on individual accountability, some employees, former employees, and outside parties might decide not to talk to company investigators at all.

Unless there is an ongoing business relationship, companies typically have little leverage with outside parties. "Misconduct does not always occur only within the company's walls," says Hanusik. "People use external email accounts, they engage consultants and third-party vendors—and you can't compel them to talk." The Yates Memo makes some allowances for situations where international data privacy and data-blocking laws prevent companies from disclosing information, but that is not necessarily true for situations where the corporation simply cannot access relevant information.

Thus, even if a company's board and executives decide to cooperate with the DOJ in order to get cooperation credit, the company may still fall short of the DOJ's all-or-nothing requirements.

PICK A DIRECTION—EARLY

All of this means that companies looking at potential misconduct need to map out an investigation plan as soon as possible. "In a likely self-reporting situation, you need to assure yourself that your information is sufficient enough to withstand the scrutiny of a prosecutor with 20/20 hindsight. And in a non–self-reporting situation, you need to basically get the buy-in of the enforcement agency about how you're going to proceed," says Hanusik. That buy-in might include agreed-upon search terms, identification of witnesses to interview, and prioritization of documents to review.

That said, corporations may not have to contend with these challenges indefinitely. The Yates Memo is the latest in a long line of such memos put out by various deputy attorneys general over the years. While they tend to have an impact on white-collar investigations, they also tend to be altered over time—and a future memo may recast the issue.

"With a new administration and things playing out in various cases in the courtroom," says Hanusik, "we may see drastic changes in the next couple of years." There is little likelihood that the emphasis on individual accountability will change, since being perceived as weak on crime is political suicide. But tying cooperation credit for companies to individual accountability could become a non-priority, if not tossed aside altogether.

WHAT'S OFFICIAL?

In June 2016, the U.S. Supreme Court overturned the conviction of former Virginia Governor Bob McDonnell, who had been convicted of bribery for receiving gifts in return for setting up meetings for a Virginia businessman. For the Court, the question in *McDonnell v. United States* hinged on whether setting up a meeting qualified as on "official act." The Court decided it did not—at least in this case—and determined that the jury had been given erroneous instructions on that point.

While the ruling seemed to make it harder to convict government officials for apparent corruption, it also said that such activities were not always innocent. If one official were to accept gifts in return for pressuring another official to attend a meeting, for example, that might be considered an official act. "It doesn't actually have to be an act performed by the person setting up the meeting," says Crowell & Moring's Tom Hanusik. "It could be one person putting pressure on another person to commit the official act."

"While *McDonnell* gives some guidance about what's not an official act, it leaves the door pretty wide open as to what sorts of things are official acts. When you consider that exerting influence on somebody else to commit an official act counts, you're talking about a pretty subjective interpretation—something like beauty is in the eye of the beholder." With that sort of uncertainty—and the stakes including jail time—*McDonnell* may lead to even more litigation.