UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

3rd Annual Government Enforcement Institute

September 29-30, 2016
Houston, Texas

Punishing Corporations Isn't Enough: The Government's Push to Prosecute Individuals

Paul E. Pelletier

Paul Pelletier: Will the Yates Memo further delay corporate FCPA resolutions?

Monday, October 5, 2015 at 10:18AM
Paul E. Pelletier in Investigations, Leslie R. Caldwell, Resource, Yates Memo

 While the much heralded Yates Memo has produced a frenzy of "what does it mean?" reporting, few analysts have examined the depth and breadth of the issues and events that led DOJ to re-emphasize the focus on prosecution of corporate executives.

The remedy may not be the cure, however, if the memo produces further unnecessary and costly delays to the corporate resolution process.

Whatever prompted the Yates Memo (**available here** in pdf), without additional programmatic enhancements, its impact on the pace and duration of FCPA investigations might well be to further stymie current efforts to efficiently resolve issues of corporate liability through the encouragement of investigatory collaboration between prosecutors and attorneys for the target entity.

To most white collar practitioners, the six principles set out in the Yates Memo seem to break no new ground. Since the first re-issuance of the Principles of Prosecution for Business Entities in 2003 and its implementation through the work of the President's **Corporate Fraud Task Force**, DOJ policy, as it has been understood, required prosecutors to focus their efforts on "culpable" executives involved in corporate misdeeds.

Where the Yates Memo seems to depart from existing policy is in its proscription against prosecutors finalizing corporate resolutions "without a clear plan to *resolve* related individual cases." (emphasis added). In particular, when the determination of individual criminal liability has not been concluded by the time of the corporate resolution, the Yates Memo requires a written report by the prosecutor including "a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period." This cumbersome process has been added despite a recognition in the memo that properly negotiated resolutions of corporate criminal liability can help ensure *future* corporate cooperation in the evidence gathering process as it relates to the potential criminal exposure of executives.

At this critical juncture, the requirement of a formal written recitation of evidence necessary to establish individual culpability, including the quantum, nature and future availability of evidence, an extremely nuanced endeavor, will challenge even the most experienced corporate white collar prosecutors. Absent an honest and objective analysis into the root causes of prior DOJ failures in this area, this new process thus has the potential to actually thwart the expeditious resolution of corporate criminal liability -- an issue especially relevant to FCPA matters.

As I discussed in **an earlier post** for the FCPA Blog, AAG Caldwell recently has expressed support for more open dialog between prosecutors and corporate counsel during the investigation -- an encouraging sign for those seeking more rational and efficient corporate FCPA investigations. I cautioned, however, that more needed to be done to lessen the financial burden on corporations, employees and shareholders, including the sustained training of prosecutors in the conduct of such investigations. The necessity to engage in such effort is perhaps now even more critical given the formalistic and potentially onerous requirements of the Yates Memo.

Because the Yates Memo essentially restates existing DOJ policy, it is safe to assume that its issuance was, at least in part, an effort to temper continuing criticism of DOJ's corporate settlements in the wake of the 2008 financial crisis. Whatever the intentions of the drafters of the Yates Memo, it is an unavoidable fact that the issues sought to be rectified were at least the products of lapses in prior leadership, the nationwide exodus from DOJ's ranks of experienced corporate white collar prosecutors and the failure to appropriately reboot and train newer prosecutors to efficiently and effectively resolve complex corporate fraud cases.

The Yates Memo suggests a renewed intent to provide appropriate leadership and guidance. As the DOJ cautioned in the recently published **FCPA Resource Guide**, even when a business organization messages an appropriate "Tone at the Top," absent an underlying program sufficient in scope and purpose to buttress that messaging, such tone will ultimately ring hollow. In a similar vein, achieving timely and just resolutions in these challenging cases requires that DOJ address the underlying causes of the enforcement malaise which spawned the Yates Memo.

To avoid delay in the efficient and timely prosecution of business entities, implementation of the formal requirements of the Yates Memo will require the deft and even hand of prosecutors, both experienced in investigating and prosecuting complex corporate white collar crime and trained in the methods of real time prosecutions. This unique experience and specific training are required and essential.

From 2002 through 2010, the average Criminal Division tenure of a Fraud Section prosecutor exceeded 5 years and according to the OECD's most recent **Foreign Bribery Report**, during that same time frame, the average duration of a foreign bribery investigation measured from the last act of the offense to resolution was approximately 3 years. Commentators have noted an increasingly high and troubling turnover rate in the Fraud Section since 2010, radically altering the average tenure of Section prosecutors. Moreover, since 2010 the average investigatory duration of foreign bribery matters has doubled to more than *six years*.

Whatever explanation may be offered for these jaw dropping statistics, the practical effect is that most FCPA investigations will be passed from prosecutor to prosecutor, almost certainly leading to unnecessarily protracted investigations—perhaps an exclamation point which highlights the critical consequences to FCPA investigations flowing from implementation of the Yates Memo, absent a root cause cure.

Given the formal requirements of the Yates Memo, no matter how good the prosecutors' intentions or how noble their cause, without the DOJ's commitment to sustained and focused training combined with a similar effort to retain prosecutors with the experience essential to the success of the endeavor, corporations (including employees and shareholders) caught up in the throes of an FCPA investigation, if they choose to cooperate, are likely to be forced to suffer the untold and unwarranted costs and disruptions of seemingly interminable investigations. That should not be the consequence of DOJ's renewed focus.

Paul E. Pelletier *is a partner in the Washington, D.C. Office of Mintz Levin Cohn Ferris Glovsky and Popeo PC. His practice focuses on white collar criminal defense and compliance. He previously spent more than 25 years at the U.S. Department of Justice, serving as Chief of the Economic Crimes Section for the U.S. Attorney's Office in Miami and from 2002 to 2011 as Acting Chief and Principal Deputy Chief of the Criminal Division's Fraud Section. He can be contacted* ***here****. Follow him on Twitter*

Also available as part of the eCourse
2016 Government Enforcement eConference

First appeared as part of the conference materials for the
3rd Annual Government Enforcement Institute session
"Punishing Corporations Isn't Enough: The Government's Push to Prosecute Individuals"