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OFFICER LIABILITY

Corporate Officers Take Note: Justice Department Is Telling U.S. Attorneys to Aim High

BY STEVEN A. LAUER

The U.S. Attorneys' Manual (USAM) ''is one of the most important documents within the Justice Department community.''[1] Among its applications, that compendium ''contains guidance on everything from initiating an investigation to closing a case.''[2]

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The USAM outlines the considerations that U.S. Attorneys should bear in mind as they review corporate behavior and organizations' internal operations with a view to possible prosecution. A main element of that review revolves around the extent to which the businesses have established corporate compliance and ethics programs and, if they have, how well those programs operate and how effective the prosecutors believe them to be. The considerations relevant to that portion of prosecutors' analysis appear in USAM 9-28.000 *et seq*. For years, those standards and the related Sentencing Guidelines for Business Organizations set the standard for whether an organization's compliance and ethics program would be deemed ''effective'' for purposes of qualifying for credit against otherwise-applicable sentencing standards for violations of federal law.

An intensified focus on individual responsibility, especially at the upper ranks of an organization

Recently, the DOJ announced an increased focus—in the context of the analysis called for in the USAM for possible sentencing credit or for purposes of considering whether to file charges—on seeking to establish personal responsibility for corporate misdeeds. In other words, federal prosecutors should attempt to hold individual corporate employees responsible, through fines or imprisonment, for the violations of law committed by the companies for which they work.

The increased focus on the liability of individual employees presents some problematic issues for corporate compliance personnel. It highlights the dichotomy (and even potential antagonism) between the interests of the organization and those of its employees when the organization may have or has been found to have violated federal law. Those interests have always been distinct,

[1] ''Deputy Attorney General Sally Quillian Yates Delivers Remarks at American Banking Association and American Bar Association Money Laundering Enforcement Conference,'' posted at http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0.

[2] *Ibid*.

but prosecutors' interest in holding organizations responsible for wrongdoing—expressed through fines or the imposition of corporate monitors—enabled that divergence to exist.

Another impact of that heightened focus on individuals is that the organization's compliance and legal personnel need to collaborate more effectively than may have been the case previously. Many compliance matters arise without the involvement of the attorneys and issues with legal import can arise at any stage of the internal investigative process. If any such issues appear and later come to the attention of prosecutors, that will lead to increased scrutiny of all actions taken in the course of the organization's internal inquiry about the facts and its willingness to identify individual employees for possible referral to the DOJ.

The policy announced in September 2015 suggests another focus of prosecutors that, while not as pertinent to the day-to-day operation of a corporate compliance program, may have greater implications for the organization itself.

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In the memorandum announcing its intensified focus on individual liability, the DOJ made clear that ''to be eligible for any credit for cooperation, the company must identify *all individuals* involved in or responsible for the misconduct at issue, *regardless of their position, status or seniority*, and provide to the department all facts relating to that misconduct.''[3] The Yates memo goes even further, stating that ''by focusing our investigations on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy.''[4] The implications of that latter statement are clear: lower-level employees will benefit (once they've become ensnared in a federal investigation of their employer's possible non-compliance with federal law) by informing on superiors who might have instigated or approved the criminality.

Remarks by Assistant Attorney General Leslie Caldwell, when she explained the rationale for the DOJ Criminal Division's hire of its first compliance counsel soon after issuance of the Yates memo, revealed even more. Caldwell catalogued the areas on which the new official would focus, one of which is evaluating the compliance programs of organizations under review. In that context, she admonished that ''[t]he department does not look favorably on situations in which low-level employees who may have engaged in misconduct are terminated, but the more senior people who either directed or deliberately turned a blind eye to the conduct suffered no consequences.''[5]

This focus on more-senior personnel reflects two ideas. First, the Sentencing Guidelines include as an element of an ''effective compliance and ethics program'' that discipline is ''enforced consistently throughout the organization.''[6] In the DOJ's view, this means that all employees and agents must face comparable penalties for compliance violations, regardless of position. Second, the DOJ takes the position that the only effective deterrent to corporate misconduct is going after the highest corporate executive or officer who instigated or led the illegal conduct and that the department should not conclude its proceedings without ensuring that it has identified any such responsible personnel and pursued them.

What does this mean for corporate compliance and corporate executives?

The policy recently expressed and emphasized by very senior DOJ officials evidences a strong intention on their part to focus on securing convictions of the employees at the highest possible levels in the organization's hierarchy when it pursues corporations for legal offenses. It will not be feasible to offer only lower-level personnel as those responsible for the organization's foibles unless the evidence that nobody above them was involved is very clear.

Will the DOJ meekly accept at face value a corporation's suggestion that only lower- or mid-level employees were responsible for a violation? Whether it may have done so under the guidance of the USAM previously, the policy statement quoted above certainly evidences a mindset of skepticism. Clearly, federal prosecutors will want the head on the wall (after conviction) to be that of the ''biggest animal in the forest.'' Teddy Roosevelt preferred trophies of lions and equivalent prey to adorn the walls of his home, rather than the heads of squirrels and small game (even if the latter were adequate for consumption at mealtime). U.S. Attorneys likely will wish for equivalent mementos of their ''hunts.''

The Yates memo contains other developments that themselves portend significant changes in the environment in which corporate compliance and ethics programs work. An organization's law and compliance departments (if separate) will need to coordinate their investigations and their activities more fully to ensure that they have thoroughly investigated potential criminal activities within the company and properly divulged the facts that they uncover if the organization wishes to secure credit—either prior to charges being brought or, if they are brought and the organization is convicted, for the existence and operation of its program. Internal investigations will exacerbate the tension between the

[3] Memorandum entitled ''Individual Accountability for Corporate Wrongdoing,'' issued Sept. 9, under signature of Deputy Attorney General Sally Quillian Yates, p. 1 (Yates memo) (emphasis added) (13 CARE 1952, 9/11/15). Deputy Attorney General Yates expressed this view in remarks shortly after she signed the memo that bears her name.

[4] Yates memo, p. 4.

[5] *Op cit*., n. 3, at 4.

[6] See USSG § 8B2.1(b)(6).

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defensive interests of individual employees, particularly those from middle management down the hierarchy, and those of the organization.

Suggested actions

How should compliance personnel react to the DOJ's initiatives? Taking no action because federal interest doesn't exist (at least, as far as the organization is aware)—in other words, burying one's head in the sand—will not suffice, because the ramifications of being in error would be too great. Several steps should increase the defensibility of the company's program, such as the following:

- Review and strengthen the collaborative relationship between the company's lawyers and its compliance personnel. Ensure that their communications are unhindered at every point in a compliance investigation. Any issues that deserve or necessitate the lawyers' involvement should be flagged and communicated appropriately as soon as they arise.
- Buttress the organization's ability to claim privilege as to compliance matters by clarifying the distinction between the work of the compliance personnel prior to the attorneys' involvement and the lawyers' investigative and analytical efforts. This may entail limiting access by the compliance personnel to matters that have been transferred to the lawyers due to the presence of law-related issues that raise concerns for potential legal liability of some significance.
- Review the warnings provided to employees who are interviewed by compliance personnel or the lawyers in the course of the company's investigation. These ''Miranda-type'' warnings, while highlighting the dichotomy of interest described above, are designed to shield the organization from a later claim by the interviewee that he or she did not waive any rights under the law during the interview. This purpose of those warnings will occupy a more critical position as a result of the DOJ's expressed policy.
- Make it clear to all employees that the compliance program is designed to ensure consistent treatment (with respect to discipline) of all violators of the law or the organization's internal policies.
- Review and strengthen the organization's policies and procedures regarding whether and how it would provide legal defense to employees ensnared (as witnesses or more) in corporate investigations.
- Corporate executives should review the directions that they provide to their direct reports and others below them in the hierarchy. Those executives should mirror the organization's advice vis-a-vis its compliance efforts and ensure that their respective staffs understand and appreciate the company's posture in that regard.
- The distinction between the organization's interests as a potential defendant and those of its employees and agents has become more significant and all employees, particularly executives, must understand that while appreciating the need to cooperate in any compliance investigation. When those interests diverge in fact (and not merely in theory), separate representation will become advisable.

Conclusion

The heightened interest in targeting employees as high within the organization as possible, when combined with those other parts of the Yates-based initiative, portend considerable challenges for compliance personnel. How to protect the organization without unduly exposing the actions of individuals to prosecutorial scrutiny will be challenging. Clearly though, doing so will become more important than ever if the compliance personnel are to satisfactorily fulfill their responsibilities.