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by Paul B. Cogswell, JD, CFE, CCEP

The FCPA, the Yates Memo, and the anti-corruption challenge

- » The Yates Memo guides the Department of Justice towards the assignment of personal accountability for corporate wrongdoing as it relates to the Foreign Corrupt Practices Act (FCPA).
- » The Yates Memo can affect internal investigations, especially as they relate to FCPA violations.
- » The application of limited compliance resources may create opportunities in anti-corruption compliance.
- » Preventive efforts can create a better strategy than enforcement-driven tactics, but they require a degree of flexibility and collaboration.
- » Some of the preventive efforts can be chosen, but they require a degree of flexibility and collaboration.

In the 1991 movie “City Slickers”, Billy Crystal plays a New Yorker who heads west to a dude ranch, attempting to sort through his life’s events. Jack Palance (a famous cowboy of the silver screen) plays Curly, a crusty ranch hand guiding Crystal through his first cattle drive. Crystal approaches Palance and asks, “Do you know what the secret of life is?” To which Curly holds up one finger and says, “One thing, just one thing. You stick to that and the rest don’t mean s----.”



Cogswell

To put this into perspective in the confines of this article, what is the one thing (assuming there is one) that the compliance professional can do to counter corruption in the supply chain, while also supporting the international initiatives of an ever-growing commerce palate? The barriers observed as late as five years ago are turning into opportunities, not only for the Fortune 500, but for the entrepreneur as well—some with

little compliance support or cultural sensitivity of the market they may be entering.

What has been dubbed the “Yates Memo” is circulating in the Compliance profession, and we are all grasping with the potential ramifications that it may have to compliance in general.

The Yates Memo

To answer the question, it may be beneficial to look at the recent developments from the Department of Justice (DOJ) in their guidance to their own personnel regarding corporations and corporate wrongdoing. What has been dubbed the “Yates Memo” is circulating in the Compliance profession, and we are all

grasping with the potential ramifications that it may have to compliance in general.

Simply put and well researched by many colleagues, the Yates Memo guides the DOJ towards assignment of personal accountability for corporate wrongdoing at a new level. Let's review some of the salient point of the Memorandum.

"One of the most effective ways to combat corporate misconduct is by seeking accountability for the individuals who perpetrated the wrongdoing."¹ Under the Principles of Federal Prosecutions of Business

Organizations,² this statement on its own does not depart from prior positions; however, the Memorandum goes on to state a change in the way we address individual wrongdoing in the corporation, adding emphasis to resolving individual wrongdoing concurrently with the corporate wrongdoing.

"These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases."³ So while not changing philosophical position, they are increasing a tactical level of effort on resolving both corporate and individual accountability at the same time.

"In order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct."⁴ In other words, the corporation must fully disclose those responsible individuals in order to be considered as cooperative.

Simply put and well researched by many colleagues, the Yates Memo guides the DOJ towards assignment of personal accountability for corporate wrongdoing at a new level.

"Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation."⁵ This I believe has been a long standing position of the Justice Department in that they recognize the importance of parallel development of civil and criminal proceedings. It is not a new

stance; however, it does have an effect in conducting thorough internal investigations and the potential that early disclosures may deter efficiency.

Another point extracted from the Memo that does have an effect on internal investigations,

especially as they relate to Foreign Corrupt Practices Act (FCPA) violations, is as follows: "Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized."⁶

This statement, made in light of the FCPA investigation, seems to present a challenge to the compliance professional. On one hand, prior violations of FCPA practices seem to have generated revenue for the Justice Department and, at the same time, guided corporations and companies into effective compliance programs to prevent similar situations from occurring. Penalties for FCPA violations are generally levied against corporations. Individuals (other than the internal bad actor who sometimes may be a "victim" of an overzealous consultant) are not usually subject to punishment beyond a dismissal, unless clear and convincing culpability can be established. The corporation usually ends up paying a fine and adjusting policies and procedures to avoid further

incidents. With the focus increasing on the individual, could this promulgate a scenario where (as the *New York Times*⁷ puts it) “The emphasis on delivering evidence to allow the prosecution of individual employees sounds like an effort to have corporations throw them under the proverbial bus to secure lenient treatment.”?

FCPA violations rarely involve individual prosecutions and, in cases of foreign officials acting as the recipients of these bribes, it may not even be in the scope or jurisdiction of the Justice Department to address individual culpability on them at all.

Perhaps the most interesting aspect of the Memo in light of FCPA violations is the statement that Department of Justice attorneys are precluded from entering into any agreement or resolution that “agrees to dismiss charges against, or provide immunity for, individual officers or employees.”⁸ It goes on to state that no resolution at all can be achieved unless all aspects for the investigation are completed.

As it relates to the FCPA, there have been many cases ending in Deferred Prosecution Agreements or other types of voluntary arrangements. According to Mike Koehler, the FCPA issue has only gone to trial twice since its inception and the Government was unable to meet its burden of proof either time.⁹

Because experience shows that individual prosecutions of rogue employees are difficult if not impossible to resolve, the Yates Memo may put us in a precarious position as it relates to FCPA internal investigations.

This leads us back to what is referred to in the introductory paragraph—“do one thing.” Allowing the writer some license with the

metaphor, what is that one thing that can work and has worked better than other initiatives when it comes to FCPA compliance?

Prevention. Obviously failing at the adage that “brevity is the soul of wit,” we have tried to provide the reader some background in light of the recent changes at the DOJ as it relates to FCPA compliance that could shift compliance resources towards preventive efforts.

Conclusion

If we arrive at the conclusion that shifting resources towards prevention can bring about pragmatic and actionable changes, how would

it take shape? In the author’s opinion, an ounce of prevention is worth a pound of cure. Compliance education, training, diligence, and analysis can bring about a worthy preventive effort that will stand the test of time and even the new challenges

in light of the Justice Department changes. Prevention of FCPA violations can come from a combinations of efforts in training, risk analysis, and ongoing monitoring. All will result in the one thing that could result in success—prevention. *

Prevention of FCPA violations can come from a combinations of efforts in training, risk analysis, and ongoing monitoring.

1. Yates, Memorandum re: Individual Accountability for Corporate Wrongdoing. September 9, 2015. Available at <http://www.justice.gov/dag/file/769036/download>
2. Offices of the United States Attorneys: U.S. Attorneys Manual, 9-28.000. Available at <http://bit.ly/attorneys-manual>
3. *Ibid.*, Ref #1
4. *Idem.*
5. *Idem.*
6. *Idem.*
7. Peter J. Henning: “Pursuit of Individuals in Corporate Misconduct Still Arduous” *New York Times* September 22, 2014. Available at <http://bit.ly/pursuit-of-ind>
8. *Ibid.*, Ref #1
9. Michael Koehler: (2014) *The Foreign Corrupt Practices Act in a New Era*. Northampton, MA: Edward Elgar Publishing, Inc.; 2014, p32-35

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