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The Yates Memo and Antitrust Enforcement

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On March 1, 2016 a memorandum prepared by Department of Justice Deputy Attorney General Sally Quillian Yates as part of the Department's revamping of its overall corporate cooperation credit program took on a whole new meaning for antitrust enforcement in the oil and gas industry. Her memo dealt with the topic of "Individual Accountability for Corporate Wrongdoing." The memo was issued in part to deal with the public perception that the Department was not doing enough to investigate and prosecute senior corporate executives. Deputy Attorney General Yates stated in her Memo that: "One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing."

The Yates Memo is intended to govern the prosecutorial endeavors of all of the Divisions of the Department of Justice. The Antitrust Division adopted new internal operating procedures to guarantee that at the outset of criminal antitrust investigations prosecutors identified at the earliest time possible "all potentially culpable individuals" to minimize the risk of evidence getting stale or the running of the statute of limitations.

This focus on prosecuting individuals is not new for the Division. Indeed over the past five years the Division has prosecuted nearly three times as many individuals as corporations with a significant number of those individuals receiving jail terms. These prosecutions took place in the LCD, marine hose, coastal shipping, automotive parts, ocean shipping investigations.

On March 1, 2016, a federal grand jury indicted Aubrey K. McClendon, former CEO of Chesapeake Energy Corporation and a highly respected oil and gas entrepreneur, charging him with conspiring to rig bids for the purchase of oil and natural gas leases in northwest Oklahoma. The conspiracy was alleged in the indictment to have run from 2007 to 2012 and included allegations that Mr. McClendon personally instructed his subordinates on how the bid rigging was to be conducted. The company was not indicted nor was the alleged co-conspirator, but they were subsequently named in a class action filed in the Western District of Oklahoma. In a sad twist of fate, Mr. McClendon was involved in a single car accident the following day and lost his life. The Antitrust Division is withdrawing the indictment.

The Division's Press Release announcing the indictment stressed the FBI's focus on investigating individuals who engage in alleged criminal conduct. It noted that the maximum penalties for each count of the indictment that Mr. McClendon faced 10 years in prison and a $1 million fine.

In a recent speech, Brent Snyder, the Division's Deputy Assistant Attorney General in charge of the Criminal Section, discussed the limits of the deterrent value of assessing large fines against alleged corporate wrongdoers. He commented that each alleged instance of corporate wrongdoing was necessarily initiated and executed by individuals. He quoted his immediate predecessor Scott Hammond to the effect that "[i]t is indisputable that the most effective deterrent to cartel offenses is to impose jail sentences on the individuals who commit them."

And these are not the low-level employees that have oft-times been the scapegoats for antitrust violations. Mr. Snyder made it clear that the Antitrust Division is committed to "holding accountable the highest-level culpable executives at conspirator companies." Not only is the Division pursuing these executives but is seeking prison terms, which have increased three times over the past three decades, from an average of 8 months to a current average of 24 months.

The Yates Memo focuses on strengthening the Department's ability to investigate and prosecute alleged criminal behavior through six key steps:

1. corporations must provide the Department with "all relevant facts relating to the individuals responsible for the misconduct" in order to qualify for cooperation credit;
2. civil and criminal investigations shall focus on the individuals involved from the outset;
3. civil and criminal attorneys involved in the investigations shall be in routine communication;
4. culpable individuals shall not be released from civil or criminal liability absent extraordinary circumstances;
5. Department attorneys shall not resolve corporate matters without clear plans as to culpable individuals; and
6. Department civil attorneys shall focus on culpable individuals regardless of their ability to pay.

For the Antitrust Division which has a first-in Leniency Program, the Yates Memo has at least two direct impacts. First, in order to qualify for the Program individual applicants must admit to the illegal conduct and testify truthfully before a grand jury or at trial. Now the focus of such cooperation will be on identifying and substantiating claims against other involved executives. For those corporations who lose the Leniency Program race, the United States Sentencing Guidelines allow for a "substantial assistance departure." Under the Yates Memo such assistance will require early, truthful and full cooperation with the Division in its pursuit of culpable individuals. Failure to make such timely and fulsome disclosure may result in diminished or eliminated substantial assistance departures. Deputy Attorney General Yates states very specifically that:

> 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.

If a company seeking "cooperation credit" declines to inquire such facts or withholds complete factual information from the Department, then the company risks losing its own cooperation credit.

The level of cooperation and disclosure contemplated by the Yates Memo necessarily raises substantial privilege and corporate disclosure issues. In the six months since issuance of the Yates Memo, these issues have not come fully to bear on ongoing investigations due in part to continuing refinement of its policies. However this interregnum should not cause companies that become aware of possible antitrust violations from immediately initiating and actively pursuing investigations. And unfortunately these investigations will require the company to fully and substantially expose company executives who are responsible for antitrust violations where uncovered.

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