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RISK & COMPLIANCE JOURNAL.

## FCPA Criminal Prosecutions One Year After the Yates Memo

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*(This is a quarterly analysis of trends in anti-bribery enforcement by The Foreign Corrupt Practices Act Clearinghouse, a database operated by Stanford Law School. The views presented here are those of the author alone, not those of Dow Jones or the Wall Street Journal.)*

**By Kristen Savelle**

It has been just over a year since Deputy Attorney General Sally Yates issued new guidance to Department of Justice attorneys emphasizing individual accountability in all investigations of corporate misconduct. Many people may be wondering whether the guidance has resulted in more criminal charges being filed against individuals who commit Foreign Corrupt Practices Act violations on behalf of companies. The short answer is not yet, but that doesn't mean that changes are not forthcoming.

Released on Sept. 9, 2015, the "Yates memo" identifies six "key steps" prosecutors should take in investigations of corporate wrongdoing. The most significant step requires companies to provide to the Department all relevant facts relating to the individuals responsible for corporate misconduct in order to qualify for any cooperation credit. The DOJ has since clarified that a company can be eligible for cooperation credit even if it is "unable to identify the culpable individuals following an appropriately

tailored and thorough investigation,” so long as it “provides the government with the facts and otherwise assists [the government] in obtaining evidence.”

Since the release of the Yates memo, the DOJ has charged seven individual defendants (44%) and nine company defendants (56%) with FCPA-related violations. These numbers are relatively consistent with the rate of individual criminal prosecutions during the 12 months preceding the Yates memo’s announcement (47%). While the numbers suggest a relatively even split among company and individual defendants, a closer look at the record reveals that individuals responsible for corporate misconduct continue to escape criminal prosecution.

Of the seven individual defendants criminally prosecuted since September 2015, three were foreign officials who accepted bribes. Two individuals acted as agents or consultants for companies that made unlawful payments to foreign officials. The remaining two individual defendants controlled several closely-held companies and paid bribes to foreign officials in order to secure lucrative contracts for their companies (i.e. themselves).

During that same time period, the DOJ prosecuted nine entities in seven separate enforcement actions. The DOJ also declined to prosecute at least five companies despite alleged antibribery violations. The declinations were based on factors enumerated in the DOJ’s new Pilot Program, which is intended to provide transparency in charging decisions and to encourage disclosure of foreign bribery.

To date, the DOJ has charged only one individual with FCPA-related violations in connection with any of these corporate enforcement actions or declinations. That individual, a Gabonese national, was charged with conspiring to bribe foreign government officials to obtain mining rights in Africa for an Och-Ziff Capital Management joint venture for which he acted as a consultant. The Gabonese national, Samuel Mebiame, couldn’t be reached for comment by the Wall Street Journal. Och-Ziff last week settled FCPA charges related to bribery in Africa, while the case against Mr. Mebiame is ongoing.

The dearth of follow-on individual prosecutions is puzzling for several reasons. All of the companies cooperated to some degree with U.S. authorities, and most provided information about individuals involved in the FCPA misconduct to the government in connection with the government’s investigation. High-level executives employed by several of these companies were alleged to have authorized or actively participated in the misconduct. Additionally, the Securities and Exchange Commission has sued at least five of the individuals responsible for these corporate misdeeds.

What, then, accounts for the paucity of individual criminal prosecutions in the FCPA space? There are a number of possible explanations.

First, the DOJ may have declined to criminally prosecute individuals who were subject to ongoing or imminent SEC civil litigation. In fact, the vast majority of individuals charged with FCPA-related misconduct have been sued by only one agency or the other. However, the prospect of parallel enforcement has not stayed all criminal prosecutions. Since the FCPA's enactment, 28 individuals have been charged by both the SEC and the DOJ for FCPA-related offenses.

Second, companies that resolved FCPA claims with the DOJ in the past year may have been "unable to identify the culpable individuals following an appropriately tailored and thorough investigation." These companies might have received cooperation credit if they coughed up all available information about individuals implicated in the alleged wrongdoing, even if it wasn't enough to support filing charges against those individuals. Given the number of corporate prosecutions and declinations and the involvement of high-level executives in several of the companies' bribery schemes, this explanation seems far-fetched.

A final explanation is that the Yates memo is having an impact behind the scenes, but that prosecutors require additional time to incorporate the memo's directives into their policies and procedures and to translate those directives into new enforcement actions. If that is the case, then investigations initiated before the Yates memo was announced may not be affected by the memo's directives. We could expect, however, to see more individual prosecutions in the coming years. This would be consistent with the terms of the resolutions and declinations announced since the memo's release, which were predicated in part on each company's continued cooperation with the DOJ in any investigation of individuals relating to violations of the FCPA.

Only time will reveal whether the Yates memo has truly shifted the focus of criminal investigations from corporations to individual wrongdoers. At the very least, the demonstrated willingness of companies investigated for FCPA-related misconduct to share information about culpable individuals with the government suggests that white-collar criminal investigations may be moving in the right direction.

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*The Foreign Corrupt Practices Act Clearinghouse is a free public database. The FCPAC was developed by researchers at Stanford Law School in collaboration with attorneys at*

*Sullivan & Cromwell LLP. The FCPAC is a free, searchable database of FCPA-related enforcement actions, resources and analytics. The database is available at <http://fcpa.stanford.edu>.*

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