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## Professional

STEVEN R. BARRETT

CHATTANOOGA:

423.757.5905

STEVE.BARRETT@

HUSCHBLACKWELL.COM

# Managing Risk Through D&O Insurance in Light of the Yates Memo

A recent memorandum from Deputy U.S. Attorney General Sally Quillian Yates reinforces the Department of Justice policy on pursuing individuals responsible for corporate wrongdoing. The Department's renewed focus on corporate executives could result in higher costs for director and officer liability insurance (D&O insurance) and could force a separation between executives and their firms in defending such actions.

## Six 'Key Steps'

The memorandum, dubbed the Yates Memo, establishes six "key steps" intended to enhance the Justice Department's efforts in identifying culpable corporate insiders:

1. To qualify for any cooperation credit in criminal and civil cases, corporations under investigation must provide the Justice Department with all relevant facts about the individuals involved in corporate misconduct.
2. Criminal and civil corporate investigations should focus on potentially culpable individuals from the very beginning.
3. Criminal and civil attorneys handling corporate investigations are encouraged to be in routine communication with one another.
4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.
5. Corporate cases should not be resolved without a clear plan to also resolve related individual cases before the statute of limitations expires. Decisions not to prosecute such individuals must be memorialized in writing.

6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to sue an individual based on considerations other than the individual's ability to pay.

The Yates Memo and the increased government enforcement activity it suggests should prompt directors and officers to review their company's D&O insurance policies and indemnification obligations, as standard policy limits may be inadequate to cover the increased cost of defense in government investigations. Additionally, severability provisions that limit knowledge to individual insureds are increasingly important in determining the appropriate level and type of coverage. D&O policyholders should also take note of the policy's definition of "claim" for purposes of giving notice to the insurance company, as increased attention on individuals could trigger a claim under the policy sooner than expected.

### **Coverage Considerations**

A D&O policy generally contains three types of coverage – Side A, which provides coverage for claims against individuals; Side B, which provides coverage for the corporation's indemnification obligation to individuals; and Side C, which provides coverage for claims against the corporation. Of particular importance in light of the Yates Memo are Side A and Side B coverage.

Side A coverage provides protection in situations when an individual is not indemnified by an organization. To ensure adequate protection for directors and officers, it is important to ensure the scope of Side A coverage encompasses liability resulting from a Justice Department investigation. Additionally, companies should ensure that policy limits are sufficient to cover any expenses and damages resulting from an investigation, particularly if the company itself is part of the investigation, as the combined policy limit may not provide sufficient coverage for the company and the director or officer. For added protection, companies may consider Side A Difference in Conditions coverage, a form of excess D&O insurance that provides coverage when standard Side A limits are exceeded or when standard Side A coverage is not available due to an exclusion, usually without a deductible amount or retention.

Companies should also review their Side B coverage. Most companies offer very broad indemnification for officers and directors. But as officers and directors increasingly become the target of government investigations, the indemnification obligations of companies could significantly increase. Having adequate Side B coverage will ensure the company can satisfy its indemnification obligations, as well as attract and retain key executives and outside directors.

Finally, companies should review their governing documents to determine whether changes are needed to indemnification provisions. Should the indemnification obligation be expanded to ensure that directors and officers receive adequate protection from liability in an investigation? If so, the company should consider increasing its Side B coverage. Conversely, should the indemnification

obligation be narrowed to ensure the company is not on the hook for individual wrongdoing? If so, the company should consider increasing its Side A coverage to ensure directors and officers receive adequate protection.

### **What This Means to You**

Finding the right balance of indemnification and insurance coverage will be critical to ensuring that companies and their directors and officers are adequately protected in the wake of increased government enforcement actions against individuals accused of wrongdoing. The appropriate balance will depend on the relevant circumstances of each company and its directors and officers. Proactively analyzing these factors and rebalancing coverage as appropriate will permit companies to be well positioned if the company or its directors or officers become the subject of a Justice Department investigation.

Husch Blackwell's White Collar, Internal Investigations & Compliance team provides more detail on the ramifications of the Yates Memo in a companion alert titled "Justice Department Targets Individuals in Corporate Wrongdoing."

### **Contact Us**

For more information on D&O insurance or the implications to coverage resulting from the Yates Memo, contact Jeff Haughey, Steve Barrett or Chauncey Lane, members of Husch Blackwell's Securities & Corporate Governance team.