Insuring Against *Yates*: The Impact on D&O Insurance

The Yates Memo has many landscape-changing implications for corporate investigations, including the need for enhanced *Upjohn* warnings and the potential suppression of joint-defense agreements between corporations and their constituents (officers, directors, employees, shareholders). This new terrain exists because in order to receive cooperation credit from the government, companies must investigate and disclose all facts about corporate wrongdoers. With the spotlight shining on corporate actors from the outset, there will be an inevitable increase in individuals seeking to have independent counsel represent them early in the investigatory process. Defense costs will surely escalate under the new Yates directive. This has several important implications for D&O liability insurance coverage.

A robust D&O insurance program is often critical to attracting top talent at the executive level. Concerns about personal liability can be an unnecessary distraction from the day-to-day tasks of running an organization. These concerns are likely to be amplified by the Yates Memo. As of September 2015, the US Department of Justice will only consider a company eligible for cooperation credit if it discloses ***all*** relevant facts about individuals involved in corporate misconduct. This is an "all or nothing" policy. If the company wants cooperation credit, it must tell the government everything it knows about culpable constituents. This policy emerged from the government's perceived failure to prosecute high-level executives responsible for the financial crisis.

The Yates Memo's greater focus on corporate individuals should cause companies to rethink their D&O liability insurance coverage on several levels:

1. *Is the Coverage Broad Enough?* The standard definitions of "claim," "loss" and "defense costs" may not cover legal expenses related to government investigations where a formal charge or notice of charge has not been issued. Obtaining "pre-claim inquiry" coverage fills this potential gap.

2. *Are there Sufficient Policy Limits/Layers of Coverage?* Typically, D&O coverage is a "burning limits" policy, which means that defense costs paid by a D&O policy reduce the amount of coverage available under the policy's limit. With more potential mouths to feed, policy limits will erode faster, thereby necessitating more coverage.

3. *Should Side A/DIC Coverage be Obtained?* "Side A" insurance covers directors and officers for expenses incurred for non-indemnified and non-indemnifiable claims. One type of Side A coverage is a "Difference in Conditions" (DIC) policy. This type of coverage usually applies to officers and directors exclusively, contains fewer exclusions, cannot be rescinded and is not depleted by costs expended by the company as a co-insured. Many Yates-related scenarios may be non-indemnified and/or non-indemnifiable. Side A/DIC coverage may be used to fill this coverage gap.

4. *Is the Exclusion Trigger Clear?* D&O policies regularly exclude intentional dishonesty, fraud, criminal conduct and other intentional violations of law. Government investigations are likely to involve allegations of excluded conduct. Pegging the exclusion trigger to a final, non-appealable court adjudication of guilt or a formal admission of guilt maximizes the protection for directors and officers by guaranteeing that they have coverage to mount a competent defense for the entire duration of the investigation.

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