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The dog did it

By Neill May

Assigning responsibility for corporate wrongdoing is a complex matter. In theory, of course, corporations themselves should be responsible for, and should bear the consequences of, their actions. This is consistent with a foundational principle of our commercial law, that corporations have a separate legal personality. But anyone passingly socially familiar with lawyers knows that, with some exceptions, "legal personality" is a striking oxymoron (even in a profession rife with oxymora, like "wise counsel," "attorney's privilege," and "civil litigation"). Equally, the matter of responsibility for corporate misconduct is challenging and problematic.

The issue was highlighted in a recent U.S. Department of Justice memorandum entitled "Individual Accountability for Corporate Wrongdoing," issued by Deputy Attorney General Sally Yates, widely referred to as the "Yates Memorandum." The purpose of the Yates Memorandum is to provide guidance to federal prosecutors in assessing the responsibility of individuals for misconduct by corporations.

Identifying the complexities in assigning responsibility for corporate wrongdoing is the easy part. The core issue, of course, is that corporations, while able to take certain actions, do not have brains that are able to form motives or make decisions. Motives and decisions lie in the minds of the human beings who manage those corporations: their directors, officers, and employees. The flip side of this is that the punishments available against corporations are limited (jail terms are not effective deterrents for, and cannot be imposed on, the inchoate). Consequently, penalties against corporations are typically in the form of fines. The effect of imposing a financial penalty on a corporation may simply have the effect of compounding the adverse consequences for the corporation's innocent stakeholders. Lenders, shareholders, employees, and other stakeholders — who may already be suffering from reputational damage, business restrictions, or costs imposed on the corporation as a result of the transgression — may find themselves also bearing the economic cost of any fines imposed. Further, there are meaningful practical issues in assigning individual responsibility for corporate malfeasance, as individual responsibility can be very difficult to identify or assess in large, complex organizations.

The Yates Memorandum attempts to direct the focus of the Department of Justice toward those "guiding minds" that oversaw, initiated, or facilitated the corporate misconduct. It does so by, among other things, requiring prosecutors to focus on individual wrongdoing from the beginning of any investigation, and making any credit for co-operating with prosecutors in an investigation entirely contingent on the corporation itself identifying "all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provid[ing] to the Department all facts relating to that misconduct."

In other words, the Yates Memorandum seeks to firmly expand the focus of investigations from the corporation itself to the individuals behind it. The document could just as easily have been called the "Yikes Memorandum."

The Yates Memorandum has generated significant discussion. While it did not create new law, its approach to the prosecution of white collar crime, particularly given its source, warrants careful consideration in corporate corridors. The potential need to identify individual involvement, and the broad concept of responsibility generally that applies in organizational hierarchies, may be expected to result in enhanced internal reporting, systems, and policies (to establish processes that minimize the risk of misdeeds and maximize relevant parties' defences), reinforcing the process-oriented trends from the corporate governance reforms of the past decade.

Process considerations will also abound in the face of a potential prosecution. Most obviously, there is significant potential for conflicts of interest between a corporation (which will be incentivized to hand over the names of involved employees) and its employees, as well as between the employees themselves (one might expect a reduction in internal corporate harmony in the face of an advanced investigation of corporate misconduct). The further requirement that corporations provide "all relevant facts" in exchange for co-operation credit will, as a practical matter, require corporations to undertake thorough, appropriate, and well-documented internal investigations.

The Yates Memorandum, though it naturally doesn't apply in Canada, is notable for Canadians because of the level of Canadian business activity south of the border, the expansive (and often extra-territorial) reach of some American laws, and the general influence of our neighbour's legal trends.

A clear challenge for prosecutors applying the recommended approach, of course, will be to ensure that they are getting to the truly responsible individuals and not just to the apparent targets. Otherwise, the initiative might simply spawn a phenomenon of sacrificial lambs, or scapegoats (the farm animal descriptions seem more innocent than the potentially complicit, and in any event non-gender-neutral, "fall guy"). In this new environment, corporate employees will need to more carefully scrutinize clever e-mails such as: "Thank you sincerely for not having denied that you were absolutely not uninvolved in our recent endeavours that would never feature in any list of non-illegal activities." **CL**

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