



UNITED STATES

Liability of individuals in the wake of the Yates memo: the oil and gas probe

Recent developments demonstrate the DOJ's renewed focus on prosecuting individuals when the DOJ suspects corporate wrongdoing. On March, 1, 2016, the DOJ announced an indictment against former CEO of Chesapeake Energy Corporation, Mr. Aubrey K. McClendon. The indictment, styled as part of an ongoing probe into the oil and gas industry, accused Mr. McClendon, who denied the charge, of conspiring with another company to predetermine the winner of leasehold bidding contests.¹ The indictment, which the DOJ moved to dismiss following Mr. McClendon's death,² confirmed the DOJ's commitment to increase deterrence by holding individuals accountable for antitrust violations.

On February 18, 2016, Brent Snyder, Deputy Assistant Attorney General for Criminal Enforcement, announced that the Antitrust Division, which he claimed already had a track record of pursuing individual charges, would increase its efforts following the Yates Memo.³ The memorandum, issued by Deputy Attorney General Sally Yates on September 9, 2015, announced a renewed focus on "*combat[ing] corporate misconduct*" by pursuing charges against individuals.⁴ The memorandum outlined steps it would take to achieve its goals, directing the DOJ, in

particular, to withhold credit for cooperation unless the corporation provides "*all relevant facts*" on the individuals involved in the alleged misconduct, to focus on individuals in its investigations, and to avoid corporate resolutions featuring agreements to "*dismiss charges against, or provide immunity for, individual officers or employees.*"⁵

Importantly, however, that directive does not apply to the Antitrust Division's Corporate Leniency Program.⁶ That exception may encourage corporations that learn of possible wrongdoing to seek leniency from the DOJ. The Leniency Program, notably, protects current directors, officers, and employees from prosecution, but corporations that wish to participate in the Program may also negotiate to extend that umbrella to cover *former* executives.⁷ In that regard, however, Chesapeake Energy, which received conditional leniency,⁸ apparently did not apply for, or did not obtain, that protection for its former CEO.

Corporations may increasingly face a reality in which antitrust charges mean not only fines for the corporation, but criminal charges and possible prison terms for executives. This development should underscore the importance of enhanced compliance programs. If some wrongdoing is suspected, serious consideration should be given to using the leniency program to protect not only the corporation, but also its current and, to the extent possible, former directors and employees.

¹ Erien Ailworth and Bradely Olson, *McClendon's Death Casts Cloud Over Probe*, WALL ST. J., Mar. 3, 2016, <http://www.wsj.com/articles/mcclendons-death-casts-cloud-over-probe-1457055700>

² Ailworth and Olson, *supra* note 2.

³ Jeff Zalesin, *DOJ Official Says Antitrust Division Upping Exec Scrutiny*, LAW360.COM, Feb 19, 2016, <http://www.law360.com/articles/761245/doj-official-says-antitrust-division-upping-exec-scrutiny>

⁴ Memorandum from Deputy Attorney General Salley Quillian Yates to All United States Attorneys 1 (Sept. 9, 2015) (on file with author) [hereinafter Yates Memo].

⁵ *Id.*

⁶ Yates Memo at 5.

⁷ U.S. Dep't of Justice Antitrust Division Model Corporate Conditional Leniency Letter at 2 n. 2 (on file with author).

⁸ Ailworth and Olson, *supra* note 4.