ARTICLES

View from the Hot Seat: What Directors and Officers Need to Know about Their Personal Liability

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This week Mark Zuckerberg sat alone at the witness table in the blinding glare of news cameras, as senators and members of Congress took their best shots, hurling questions at him about Facebook's failure to protect its user data, grilling him on what he did and didn't do to stop it, and what he's going to do to amend the errors of his ways. There was no lawyer who could deflect for him, no corporate shield to hide behind, nor any tolerance among the lawmakers for ambiguity or obfuscation. Facebook had done America wrong, and Zuckerberg had a bit of explaining to do.

It's a familiar moment in the narrative of any big business scandal, when a company's founders, executives and directors are brought before Congress or the courts to answer for their alleged wrongdoings. What's different today is that the law is no longer on their side.

Thanks in part to a 2015 policy known as the Yates Memo, named after its author, former Deputy Attorney General and former Acting Attorney General Sally Yates, the Department of Justice (DOJ) is committed to holding individuals, *not just their corporations*, who perpetrate wrongdoing and fraud accountable.

One of the trends we're seeing in the executive liability practice is a spike in the number of public director lawsuits, and not just against corporate behemoths like Facebook's Zuckerberg. In fact, Deputy AG Rod Rosenstein cited some startling statistics in a recent speech in which he discussed the future of the Yates Memo, also known as the Individual Accountability Act. He said that in 2016, there were 132 organizations convicted of federal offenses, nine-tenths of which employed fewer than 1,000 people. Of those, more than half included the separate conviction of at least one individual, and of those 40 percent were board members or owners. It's worth noting, as Rosenstein did, that many of the cases involved relatively unknown companies with executives who are not among the wealthiest in the country.

What's interesting about the Yates Memo, too, is that it incentivizes companies to throw their executives under the bus. The memo states, "To be eligible for any cooperation credit, corporations must provide the Department all relevant facts about individuals involved in corporate misconduct." In other words, if a company wishes to seek credit for cooperating with the DOJ and not be punished, it must conduct its own investigation and call out the guilty parties. It has to name names.

Chances are, if you're a director or officer, you already know about the DOJ's new guidelines for pursuing individuals in white-collar crime, but it reinforces the importance of knowing how your Director & Officer policy is structured. With the crackdown in individual accountability, as well as the regulatory and personnel uncertainties of the DOJ, officers and directors are facing more scrutiny than ever before. Even the most sophisticated executive might not be aware of some of the hidden liabilities lurking around every corner. Proper coverage is likely the only thing that will save you from the massive costs and hassle associated with making a mistake.

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