

Corporate Gatekeepers: Continuing "Gatekeeper Anxiety"

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Multiple recent developments suggest that governing boards will continue to be called upon to address the [personal liability concerns of corporate gatekeepers](#) and other executives. These new developments indicate that the “pipeline effect” of investigations commenced after the Yates memo was issued in September 2015 will be felt for the foreseeable future.

The likelihood of a Yates carryover effect was first referenced by former Deputy Attorney General Sally Yates in her [November 30, 2016, speech](#). She noted that a significant number of corporate investigations that began after issuance of the Yates memo will not result in public filings until well into the new administration.

In those investigations, prosecutors have been evaluating whether any individuals should be subject to criminal or civil penalties. As Yates said, “I expect that, in coming months and years, when companies enter into high-dollar resolutions with the Justice Department, you’ll see a higher percentage of those cases accompanied by criminal or civil actions against the responsible individuals. It won’t be every case, but the investments we’re making now are likely to yield a real increase in the years ahead.”

As Yates predicted, a flurry of notable DOJ enforcement activity with individual accountability components became public in the early weeks of 2017. This activity is likely to fuel the self-interest tendencies of many key corporate leaders. That, in turn, could enhance the potential for conflict between the board and individual executives across a broad spectrum of organizational initiatives; e.g., the pursuit of strategic projects, compliance with organization policies and cooperation with internal investigations. The board will be expected to mollify these concerns, as it has since the Yates memo was issued. Yet, if not planned for, that task could easily become an unwanted distraction from more pressing board responsibilities.

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National Law Review, Volume VII, Number 41

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