Uncle Sam Wants You: How the "Yates Memo" Affects Company Investigations

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§ 1.01 Introduction

In October 2001, the Wall Street Journal broke a front page story about accounting practices at Houston-based Enron Corp. Enron had long worried about the "Wall Street Journal" risk that these practices created. Sure enough, the SEC soon started an investigation; press stories continued; banks and counterparties pulled back; … and Enron filed bankruptcy in December.

Aware of the investigation, but not yet "served" with a subpoena, Enron's accountants at Arthur Andersen Co. "reinvigorated" a dormant "document retention" policy to destroy various files relating to their work for the energy company. Andersen was at that time one of the "big five" global accounting firms and arguably the most prestigious. But it had faced recent scrutiny over irregularities at another client, Sunbeam, and before long the SEC sent a subpoena for Enron documents to the firm. Upon receipt, Anderson "stopped the shredding: we've been served."

Even before anyone was charged at Enron, DOJ indicted Arthur Anderson as a firm in 2002 for obstruction of justice. The consequences were fatal, and now the "big five" became the "big four."

Anderson went to trial and was convicted; the conviction was affirmed in the Fifth Circuit; but a unanimous Supreme Court reversed because the district court gave a flawed jury instruction on the elements of obstruction. But the damage was done, and the firm could not rise from the ashes.

Even before the Supreme Court reversal, many pundits criticized prosecuting the entire firm for the sins of a few. On one hand, this was not Anderson's first run-in with regulators, and

our law generally provides corporate liability for the crimes of employees acting within their employment and for the entity's benefit, and Enron was a large Anderson account … but was it right that thousands of innocent employees lost their jobs and savings? And what about the vendors and landlords that failed or suffered because they relied on Anderson for their business?

DOJ has struggled openly with this question – when to prosecute a corporation for the crimes of its employees – ever since. So we've had the "Thompson Memo," the "McNulty Memo," the "Filip Memo" … and now the "Yates Memo," which describes expectations for companies to expose wrongdoing by employees to qualify for "cooperation" credit or leniency from DOJ. This article describes the effect of the Yates Memo on advising companies and individuals and dealing with government investigations and your ethical obligations.

§ 1.02 The Yates Memo focuses on individual accountability, but places more stringent requirements on corporations

Following a period of harsh criticism of DOJ's perceived leniency in the white collar arena – in particular with respect to individuals responsible for the mortgage-backed securities crisis – on September 9, 2015, Deputy Attorney General Sally Yates released a policy memorandum entitled "Individual Accountability for Corporate Wrongdoing."[1] The memorandum aims to combat corporate misconduct by holding accountable those individuals who "perpetrated the wrongdoing." The memorandum touts individual accountability as a means of deterring future illegal activity and incentivizing changes in corporate behavior. But Yates has also expressed that, "as a matter of basic fairness," the Department "cannot allow the flesh-and-blood people responsible for misconduct to walk away."[2] The latter is particularly salient at a time when corporations have paid multi-billion dollar fines based on the conduct of individuals who were neither charged nor convicted.

As with similar policy statements issued by her predecessors, Yates directed that the memorandum's contents be incorporated into the United States Attorneys Manual ("USAM") as part of the "Principles of Federal Prosecution of Organizations."[3] That section elaborates the various factors prosecutors are to consider when deciding whether to bring criminal charges against a corporation, including any "cooperation credit" the corporation should receive for assisting the government in its investigation.[4] As is tradition, those in the legal community immediately dubbed the memorandum the "Yates Memo," and it has since generated significant attention and critique.

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[1] Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter Yates Memo], *available at* http://www.justice.gov/dag/file/769036/download.

[2] Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks at New York University School of Law (Sept. 10, 2015) [hereinafter Yates NYU Remarks], *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

[3] Yates Memo at 3; *see* U.S. Dep't of Justice, U.S. Attorneys' Manual §§ 9-28.000 *et seq.* [hereinafter USAM], *available at* https://www.justice.gov/usam/united-states-attorneys-manual.

[4] *See* USAM §§ 9-28.700-.750.

The Yates Memo enumerates six policy statements, each focused on holding individuals accountable for corporate crimes:

(1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct;

(2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation;

(3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another;

(4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;

(5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases;

(6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

The Yates Memo is only the latest in a long line of policy memos on prosecuting corporations, and DOJ's overall guidance has not changed – cooperation and voluntary disclosure are still just two of ten factors prosecutors are to consider, and the Memo's focus on individual accountability reflects practices already in effect in many U.S. Attorneys' offices. Furthermore, as many have pointed out, the Yates Memo follows a series of public statements by DOJ officials in which the importance of individual accountability has been emphasized. As one commentator put it, "[s]enior executives and other individuals have always been in DOJ's crosshairs."[5]

However, the Yates Memo purports to create a "threshold cooperation credit requirement,"[6] with potentially far-reaching consequences for internal investigations and corporate cooperation: previously, corporations could receive "partial" cooperation credit even if they did not implicate individual employees. While officials always emphasized the importance of identifying individuals, "mistakes were made" presentations were often enough to secure at

[5] James L. McGinnis, Individual Accountability for Corporate Wrongdoing*: A Sea Change or No?*, JDSUPRA BUSINESS ADVISOR (Sept. 15, 2015), http://www.jdsupra.com/legalnews/individual-accountability-for-corporate-31466/

[6] Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks at the New York City Bar Assocaition White Collar Crime Conference (May 10, 2016) [hereinafter Yates NYCBA Remarks], *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association.

least some credit.[7] Yates says that, in order to receive *any* cooperation credit, corporations must identify *all* individuals involved in or responsible for the misconduct at issue, and the corporation must provide DOJ with *all facts* relating to that misconduct. As Yates put it, this is an "all or nothing" proposition.[8] Whether corporations will choose all, or nothing, remains to be seen.

The extent of cooperation credit earned still depends on multiple factors, including the timeliness of cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation.[9] But implicating individuals is now said to be a threshold requirement for any credit. As discussed in greater detail below, for those that choose to cooperate, this policy places a substantial onus on the corporation to investigate and reveal misconduct by its own employees, and it has significant ethical implications for both corporate and individual counsel.

Furthermore, this emphasis on targeting and disclosing employee misconduct harkens back to more draconian policies that DOJ slowly abandoned over the course of the last decade. In a series of memos from Deputy Attorneys General dating back even before the Enron scandal struck, DOJ has enumerated the various factors to be considered when deciding whether to charge a corporation – including the extent to which the corporation is expected to cooperate in its own investigation. For a time, DOJ policy arguably required companies to waive attorney-client privilege and work product protections in order to receive cooperation credit. Some prosecutors even penalized corporations for such things as advancing employees' legal fees, entering joint defense agreements, and failing to fire employees who refused to cooperate with internal investigations.[10] Since at least 2008, however, these policies have largely been rolled back.[11] The Yates Memo's focus on full disclosure, and the Department's insistence that "You have got to cough up the individuals,"[12] therefore appears to be somewhat of a retrenchment.

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[7] Yates NYCBA Remarks.

[8] Yates NYU Remarks.

[9] USAM § 9-28.700

[10] *See* Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memo], *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf; Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memo], *available at* https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

[11] *See* Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008) [hereinafter Filip Memo], *available at* https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

[12] Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES, Sept. 9, 2015, https://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html?_r=0 (quoting Deputy Attorney General Yates).

§ 1.03 To qualify for cooperation credit, corporations must actively investigate and report employee misconduct

[1] The Yates Memo leverages corporate knowledge and resources against employees

At its heart, the Yates Memo seeks to leverage the corporation's knowledge and resources against its employees. It is understandable that the government wants help: investigating and proving white collar crime can be hard, especially with respect to individual defendants. The Yates Memo highlights the "substantial challenges" to pursuing individuals in white collar cases: knowledge and intent can be difficult to establish in large corporations, where responsibilities are diffuse and decisions are made at multiple levels; and investigators often must reconstruct what happened based on a review of corporate documents, which can number in the millions.[13] The revised USAM goes into even greater detail:

> In investigating wrongdoing by or within a corporation, a prosecutor may encounter several obstacles resulting from the nature of the corporation itself. It may be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired.[14]

[13] Yates Memo at 2.

[14] USAM § 9-28.700.

The Department has also emphasized the extent to which legal constraints – and the potential absence of legally obtainable evidence – further frustrate government investigations of white collar crime.[15] In particular, legal restrictions may make it difficult to collect the documents investigators want,[16] and even when they do have access to those materials, investigators say they are left "looking for a smoking gun that most financial criminals are far too savvy to leave behind."[17] Furthermore, at a time when corporations operate worldwide, "restrictive foreign data privacy laws" and "a limited ability to compel the testimony of witnesses abroad" can make it challenging for the government to charge individuals.[18] "Accordingly, a corporation's cooperation may be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so expeditiously."[19] That is to say, it is easier for the government to pursue individuals with the help of their employer and its attorneys.

The key to overcoming this hurdle lies in the Yates Memo's conditioning of cooperation credit on corporate investigation and disclosure of individual misconduct:

> In order for a company to receive <u>any</u> consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, **the company must completely disclose to the Department all relevant facts about individual misconduct**. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. **If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor** pursuant to USAM 9-28.700 el seq.[20] Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (e.g., the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).[21]

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[15] *See* Yates NYU Remarks (noting the "variety of legal and practical challenges that can limit access to the evidence we need").

[16] Yates Memo at 2.

[17] Yates NYU Remarks.

[18] *Id.*

[19] USAM § 9-28.700.

[20] Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. Yates Memo at 3 n.2.

[21] *Id.* at 3 (underlining in original, bold emphasis added).

[2] Companies are expected to conduct thorough investigations in cooperation with the government

The Yates Memo imposes an obligation on the corporation to investigate and learn facts about individual misconduct. A corporation that "declines to learn" of such facts will not be entitled to any cooperation credit: "We're not going to let corporations plead ignorance. If they don't know who is responsible, they will need to find out. If they want any cooperation credit, they will need to investigate and identify the responsible parties."[22]

DOJ explains that corporations are not required to "boil the ocean" any time they learn of misconduct. But Yates has said that DOJ expects companies to carry out "a thorough investigation tailored to the scope of wrongdoing" and to provide relevant information to the government. Furthermore, when a company conducts an "appropriately tailored investigation" but still, despite its best efforts, is unable to identify culpable individuals, the company may still be eligible for cooperation credit. "[T]here is always a good faith element to everything the department does and that includes the Individual Accountability Policy."[23]

Nevertheless, DOJ appears to envision a significant role for its prosecutors in determining the length and scope of such "appropriately tailored investigations." As Yates has said, corporations are not expected to know all the facts the first time they speak with the government. "[W]e expect that cooperating companies will continue to turn over the information to the prosecutor as they receive it."[24] Additionally, should corporate counsel have any questions about the scope of an investigation, "they should do what many defense lawyers do now – contact the prosecutor directly and talk about it."[25]

[3] Companies are required to identify culpable individuals and turn over "all relevant non-privileged information"; however, "facts" are not privileged

The "all facts" requirement envisions that cooperating companies will not only identify responsible individuals, but provide all relevant non-privileged information implicating them. As Yates told the New York Times, "We mean it when we say, 'You have got to cough up the individuals.'"[26] In terms of substance, Yates has commended companies that prepare and turn over so-called "Yates Binders," containing emails of subjects who the government intends to interview. Furthermore, while the Yates Memo, USAM, and Yates herself, all indicate that no company is required to waive privilege or work-product protections, Yates has emphasized that "legal advice is privileged . . . [f]acts are not,"[27] and companies need to turn over "all relevant

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[22] Yates NYU Remarks.

[23] Yates NYCBA Remarks.

[24] *Id.*

[25] *Id.*

[26] Apuzzo & Protess, *supra* note 12.

[27] Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks at the American Banking Association and American Bar Association Money Laundering Enforcement Conference (Nov. 16, 2015), *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0.

facts." Of course, the company sometimes only learns those "facts" through otherwise privileged investigations.

§ 1.04 Ethical and Policy Considerations

Deputizing the private bar to act as agents or "private" prosecutors raises ethical and policy considerations, including the proper role of defense attorneys, whether investigations potentially infringe on employees' 5th amendment rights, and whether disclosure of "all facts" to the government is effectively a waiver of privilege. Even more basic: the premise of the Yates Memo is that a company, like an individual, is free to choose whether to cooperate or not. But when the spread between "fighting" and "cooperating" becomes too large – when the punishment at trial is many times the punishment for cooperating – then targets will settle or plead guilty regardless of their guilt. The pressure to do so is often irresistible to public companies. As set out below, this pressure imposes a special duty on criminal defense counsel.

[1] Companies as "private prosecutors"

In comments on the new policies, Yates has compared the corporation to a low-level conspirator who is rolled up on the "cartel boss" against whom it might cooperate to secure leniency.[28] In any other context, Yates argues, a cooperator can only receive leniency if he shares what he knows. Otherwise, "we rip up his cooperating agreement and he serves his full sentence."[29] Under the Yates Memo, white collar cases are no different: "A corporation should get no special treatment as a cooperator simply because the crimes took place behind a desk."[30]

The cartel analogy, however, misses the mark, and it fails to capture the company's true role. To start with, while the cooperator/informant might incriminate co-conspirators to curry favor with the government, he generally doesn't have resources and authority to investigate other defendants. He also cannot compel statements from his co-conspirators or obtain through coercion what the government cannot obtain on its own. In contrast, a corporation generally may insist that employees cooperate in an internal investigation, the facts of which can be produced to the government, or lose their jobs.

[2] The proper role of defense attorneys and corporate counsel

The Yates Memo poses a dilemma for attorneys with both practical and ethical implications. All lawyers have a duty to zealously represent their clients – whether those clients be individuals or corporations. Criminal defense lawyers in particular have a duty to hold the government to its burden of proving guilt beyond a reasonable doubt. Those accused of a crime have a right to require the prosecution's case to "survive the crucible of meaningful adversarial testing."[31] When this process loses its character as a "confrontation between adversaries,"

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[28] Yates NYU Remarks.
[29] *Id.*
[30] *Id.*
[31] *United States v. Cronic*, 166 U.S. 648, 656 (1984).

constitutional guarantees are at risk.[32] How then should attorneys balance their clients' interests in cooperation with their duty to ward off wrongful accusations and potential government overreach?

Recognizing the corporation's interest in cooperating, this author has seen a wide disparity in approaches. Often, defense counsel want to project that they are "better cops than the cops," like William Roper in A Man for All Seasons, willing to cut down every tree in the forest just to make sure nobody is hiding behind one. Many companies have seen their investigations swell far beyond the scope of the original inquiry – sometimes with good reason but sometimes not.

It is difficult to generalize about conducting the required investigation other than this: counsel must develop credibility with the government investigators and devise an investigative plan that is tailored to the unique circumstances of the case. Each company is different; each investigation poses different risks and scope. Counsel has an opportunity not merely to "cooperate" but to educate the government about the company and the appropriate scope of any investigation and remedy.

[3] Compelling statements under threat of termination may have 5th Amendment implications

As others have argued, by conditioning cooperation credit on complete disclosure of information about individual culpability – and by threatening to charge companies that "decline to learn" of it – the Yates Memo arguably enlists corporations to procure information from employees on behalf of the government.[33] Given that most employees are required by their companies to cooperate in internal investigations, any resulting "confessions" are arguably obtained under threat of termination. To the extent that corporate attorneys are acting at the direction of prosecutors, this practice may have key Fifth Amendment implications.

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[32] *Id.*

[33] *See, e.g.*, Paul Monnin & Eric D. Stolze, *Everything Old is New Again: Why the Yates Memo is Constitutionally Suspect*, https://www.paulhastings.com/docs/default-source/PDFs/monnin-stolze-corporate-counsel-yates-jan2015.pdf.

The Fifth Amendment protects individuals from coercive interrogation by "state actors." The Supreme Court has held that, at least with respect to public employees under state investigation, offering employees a choice between incriminating themselves and losing their jobs is inherently coercive.[34] With respect to private entities, state action can be found where the government "commands or significantly encourages" the entity to take specific action alleged to violate the Fifth Amendment, as well as where the government is "entwined" in the management or control of the conduct at issue.

Under prior DOJ policies articulated in the "Thompson Memo," prosecutors could consider as relevant to cooperation credit factors such as a corporation's advancement of employee legal fees, the sharing of information through JDAs, and the failure to terminate employees known to have engaged in wrongdoing.[35] However, in a series of rulings in 2006-07, prosecutors in the Southern District of New York were found to have pressured KPMG to condition payment of employees' legal fees – not to mention their continued employment with the firm – on those employees' submission to interviews with the government. *See generally United States v. Stein*, 541 F.3d 130, 135 (2d Cir. 2008). Concluding that KPMG had functioned as a "state actor," and that employees' statements were coerced in violation of their Fifth Amendment rights, the court suppressed those statements. *Stein*, 440 F. Supp. 2d at 332-33, 338. (Ultimately, the court – later affirmed on appeal – dismissed 13 employees' indictments on the separate ground that KPMG, at the direction of prosecutors, had interfered with the employees' Sixth Amendment right to counsel. *Stein*, 541 F.3d at 136.).

The rulings in *Stein* were notable but unique. More recently, the Second Circuit held in *Gilman v. Marsh & McLennan Co., Inc.*, 826 F.3d 69, 72-73 (2d Cir. 2016), that a corporation's demand that its employees submit to interviews with counsel during the pendency of a government investigation was reasonable "as a matter of law" – and the employees' subsequent termination for refusing to do so was properly "for cause" – even though the company had agreed to waive privilege and work product protections, and the attorney general had made clear that it would forgo criminal charges against the corporation but intended to prosecute the two individual employees. While *Gilman* primarily applied ERISA and contract law – the employees sought deferred compensation and severance – it also rejected the employees' argument that the corporation violated their Fifth Amendment rights. *Id.* at 76. The court reasoned that, even though one goal may have been to obtain better treatment for the corporation, government compulsion was not a "but for" cause of the interview requests. *Id.* at 77. Furthermore, because there was no evidence that the government "forced" the company to demand interviews, "intervened" in the company's decision making, or "supervised" the interview requests, the corporation was not functioning as a "state actor" under the circumstances. *Id.* at 76. The court saw no Fifth Amendment violation.

Policies under the Yates Memo fall somewhere in the middle. The policies primarily at issue in *Stein* were repealed by the 2009 "Filip Memo." However, the Yates Memo's "all facts" requirement, and DOJ's endorsement of "Yates binder"-style reporting contemplates companies,

[34] *Garrity v. New Jersey*, 385 U.S. 493, 496, 500 (1967).

[35] *See* Thompson Memo at 11; McNulty Memo at 7-8.

and their attorneys, actively collecting information on behalf of the government. It is unresolved whether such requirements are "but-for" causes of interview requests and other investigative actions. Furthermore, the Yates Memo appears to contemplate some level of "intervention" and "supervision" by the government. Yates has encouraged defense attorneys: "If you are representing a corporation and there's a question about the scope of what's required, you can do what many defense attorneys do now – pick up the phone and discuss it with the prosecutor."[36]

The government notes that each company must decide for itself whether to cooperate based on its own interests. And courts have held that the benefits of cooperation are … benefits of cooperation rather than a burden on asserting one's constitutional right to trial. But just as the "trial penalty" may cause "innocent" clients to settle, it also makes defense attorneys consider how to conduct themselves in obtaining information from employees. Employees new to criminal investigation may (wrongly) think that the "company's" lawyer is their lawyer or that they must submit to interviews that would incriminate them. If the company lawyer "wants" to get information from the employee, what is his "ethical" duty to disabuse the individual from giving it?

[4] Privilege waiver by another name?

One difficult implication of the Yates Memo is the effect on attorney-client privilege in the investigation context. Generally speaking, the statements of employees during the course of an investigation, as well as the thoughts, opinions, and impressions of counsel and investigators, are protected under the attorney-client privilege and work product doctrines, belonging to the company. The Yates Memo and USAM state repeatedly that waiving privilege is not required to receive cooperation credit.[37] However, as Yates stated in November 2015, "legal advice is privileged . . . [f]acts are not," and companies need to turn over "all relevant facts." As implemented, this may function as a privilege waiver by another name.

As guidance, the USAM provides the following example:

> [C]orporate personnel are usually interviewed during an internal investigation. If the interviews are conducted by counsel for the corporation, certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product. To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the interviews conducted by counsel for the corporation. To earn such credit, however, the corporation does need to produce, and prosecutors may request, relevant factual information—including relevant factual information acquired through those interviews, unless the identical information has otherwise been provided—as well as relevant non-privileged evidence such as accounting and business records and emails between non-attorney employees or agents.

[36] Yates NYU Remarks.

[37] *E.g.* USAM § 9-28.720 n.3

But if prosecutors cannot make their case against individuals on the basis of non-privileged documents alone – accounting records for example – and the inculpatory nature of those records only becomes evident in light of explanations obtained through privileged conversations – interviews of individual accounting personnel for example – and the company is called on to reiterate those same explanations to the government while also implicating the individual personnel involved, what remains of the attorney-client privilege?

Again, company counsel have to decide, as a matter of personal ethics, how to warn employees about the risk of giving interviews. Frankly, the extent to which the witness is at risk is a factor, as set out below.

§ 1.04 Practice Points

The Yates Memo has several implications for both corporate and individual counsel in the course of an internal investigation, namely, what warnings must be given to employees, when to get individual counsel, whether and on what terms to enter into joint defense agreements, and a full consideration of charging factors other than cooperation.

[1] Handling interviews

When faced with potential wrongdoing, a company may hire counsel to defend the company or to investigate for the board, and either or both lawyers may conduct an internal investigation. The law allows a privilege for such an investigation, but the privilege is owned by the company (or board committee) itself, rather than by any individual employee. That privilege extends as well to interviews of employees, but the investigator must warn the employee that he represents the company rather than any individual. These so-called *Upjohn* warnings, named after *Upjohn Co. v. United States*, 449 U.S. 383 (1983) (which dealt with issues of corporate privilege but did not in fact address the nature or content of any warnings by counsel), generally must convey that anything the employee and attorney discuss is privileged, but such privilege belongs to the company, not the employee, and may therefore be waived by the company without the employee's consent.

Given the likelihood that the corporation will provide the government with "facts" learned in employee interviews, attorneys and investigators must give proper *Upjohn* warnings when interviewing employees. Nevertheless, when a company investigator conducts an employee interview, a potential for conflict can arise. The investigator wants to know the facts; the individual may have something to hide; and the company may have an interest to tell DOJ what it learns from the individual, even if that information incriminates the employee.

How then, should the investigator or attorney "warn" the employee about the risks of an interview? Consider the following alternatives. A company investigator wants to interview an individual employee, should he advise the employee:

a) I represent the company and am investigating the Brazil contract. The government has started a federal, criminal, grand jury investigation. They are looking for evidence on who to prosecute and put in jail. This talk is privileged, but the company controls that privilege. That means that anything you say to me, the company can and will turn over to

the government if that would help the company get a better deal. Moreover, DOJ tells us that a company like ours can only get any leniency if we turn in all the bad facts we learn about you. And, if DOJ sues you, DOJ can call me as a witness against you, to repeat what you told me that incriminates you. So, will you talk with me?

Or …

b) The company has hired me to respond to some questions from the government about the Brazil contract. My job is to gather facts and then help the company decide how to respond. I don't represent you, I don't represent any of the employees, just the company, but I've been talking with lots of employees, not just you – I'm not singling you out. The law gives us something called attorney-client privilege, which you've heard of, that says we can talk, but you have to keep the conversation private. Please don't tell others the questions I ask. I mean, if I ask you who started the Brazil project, and you tell me, well then who started the project doesn't become secret. But you shouldn't go out and tell people: here is what the lawyer asked me. OK? And privilege means that the company will decide how to answer the government's questions, what information from our interviews and work to turn over to the government, that sort of thing. OK?

In other words, the investigator can give the warning in different ways, one more likely to elicit cooperation, one not.

[2] Getting Individual Counsel

Following the Yates Memo, employees who may become targets of government action may obtain individual counsel earlier in their companies' investigations. First, the Yates Memo's focus on individuals, and the pressure on companies to disclose "all facts" mean that the individual's interests and those of the company may be adverse sooner than before. Second, the Yates Memo emphasizes that prosecutors should not wait until they have resolved potential charges against the company before seeking to indict individuals. Employees may need to respond to government process and potential enforcement before the company has even completed its investigation.

Some prosecutors may suspect that individual counsel impede rather than advance the investigative process. At times, counsel will advise individual clients *not* to cooperate in the company's investigation, under pain of firing. But often, securing counsel for employees can benefit the investigation and also the employee and the company. First, represented employees may actually be more cooperative and forthcoming once they have spoken with their attorneys and feel more confident about the process and their role in it. Second, if individuals through counsel are able to review documents and records before they are interviewed, they may provide more useful and fulsome statements than if they were confronted with records for the first time at an interview. No party has an interest in the witness making mistake in an interrogation – except for agents seeking to leverage the threat of prosecution for "false statements" to pressure potential witnesses.

[3] Joint Defense Agreements

Faced with the knowledge that whatever they disclose to the company may be relayed directly the government, employees are more likely to request Joint Defense Agreements ("JDAs"). They will argue to corporate counsel that JDAs no longer count against the company in terms of getting cooperation credit: "[T]he mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements."[38]

Yet companies will resist JDAs when they restrict the company's ability to reveal information to the government, that is, to disclose "all facts." As a result, some JDAs now include a provision that the company has the right to reveal to the government whatever it learns from the employee. Indeed, the USAM even recommends that corporations ensure such "flexibility" in their agreements.[39] It observes that "the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit."[40] While the new policy does not purport to penalize corporations for entering into JDAs, it hints at drafting agreements that allow for greater disclosure: "Corporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate" – i.e., allowing the company to disclose information to the government.

[4] Step back and consider all of the charging factors

For all the recent focus on cooperation credit and individual accountability, it is easy to miss the forest for the trees. Even after the Yates Memo, the USAM still enumerates ten factors that prosecutors are to consider when deciding whether to charge a corporation.[41] While the corporation's willingness to cooperate and its timely and voluntary disclosure of wrongdoing are two of those factors, prosecutors still must consider other factors, such as the nature and seriousness of the offense, the pervasiveness of wrongdoing, the corporation's history of similar misconduct, its remedial actions, and the collateral consequences to innocent shareholders and employees. In most cases "no single factor will be dispositive."[42] And failure to cooperate – without more – is not a legitimate basis by itself for charging a corporation:

> Cooperation is a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution. Of course, the decision not to cooperate by a corporation (or individual) is not itself evidence of misconduct, at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt (*e.g.*, suborning perjury or false statements, or refusing to comply with lawful discovery requests). Thus, failure to cooperate, in

[38] § 9-28.730
[39] *Id.*
[40] *Id.*
[41] § 9-28.300
[42] § 9.28.300(B).

> and of itself, does not support or require the filing of charges with respect to a corporation any more than with respect to an individual.[43]

Under the USAM, the decision to charge a corporation must turn, as it does in any case, on the sufficiency of the evidence, the likelihood of success at trial, and all of the other factors identified in Section 9-28.300. Public companies will continue to determine that "cooperation" is either required or in their interest. But their attorneys should consider all of the charging factors when determining how to cooperate. It remains possible – and necessary – to "cooperate" while educating or pushing the government against unreasonable expansion of the investigation, waivers of privilege, or other demands. And there will be cases where "cooperation," in a climate where corporate criminal prosecutions are still rare, will lead to *more* grounds for prosecuting the corporation rather than *fewer*.[44] Attorneys must also be mindful that employees, themselves seeking to curry favor with the government, can embellish information that implicates more senior executives.

The revised USAM addresses some of these considerations and argues that, on balance, cooperation benefits both the company and the government:

> [B]ecause of corporate attribution principles concerning actions of corporate officers and employees, *see* USAM 9.28-210, uncertainty about who authorized or directed apparent corporate misconduct can inure to the detriment of a corporation. For example, it may not matter under the law which of several possible executives or leaders in a chain of command approved of or authorized criminal conduct; however, that information if known might bear on the propriety of a particular disposition short of indictment of the corporation. It may not be in the interest of a corporation or the government for a charging decision to be made in the absence of such information, which might occur if, for example, a statute of limitations were relevant and authorization by any one of the officials were enough to justify a charge under the law. Moreover, a protracted government investigation of such an issue could disrupt the corporation's business operations or even depress its stock price.
>
> For these reasons and more, cooperation can be a favorable course for both the government and the corporation. Cooperation benefits the government by allowing prosecutors and federal agents, for example, to avoid protracted delays, which compromise their ability to quickly uncover and address the full extent of widespread corporate crimes. With cooperation by the corporation, the government may be able to reduce tangible losses, limit damage to reputation, and preserve assets for restitution. At the same time, cooperation may benefit the corporation – and ultimately shareholders, employees, and other often blameless victims – by enabling the government to focus its investigative resources in a manner that will not unduly disrupt the corporation's legitimate business

[43] USAM § 9-28.700

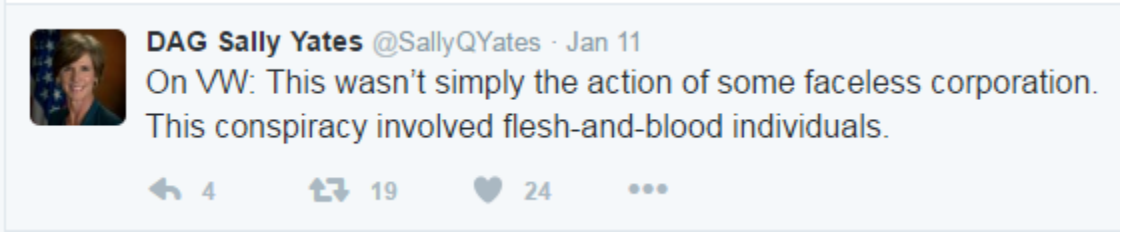
[44] *See* Elizabeth E. Joh and Thomas W. Joo, *The Corporation as Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 VA. L. REV. ONLINE 51, 56 (2015).

operations. In addition, cooperation may benefit the corporation by presenting it with the opportunity to earn credit for its efforts.[45]

§ 1.05 How this Will Play Out

At the time of her now-famous memo – one week before DOJ's settlement with GM over its ignition switch crisis – Ms. Yates noted that, "while these policy shifts are effective immediately, the public won't see the impact of these steps over night."[46] Indeed, DOJ settled with GM without charging individuals.[47]

Around the same time, the Volkswagen emissions scandal broke. VW's then-CEO Martin Winterkown stated that the misconduct was a result of "grave errors of very few [employees]," and he promised to cooperate in an investigation of how his company's cars were programmed to evade emissions tests.[48] In the year since, one executive pleaded guilty; Volkswagen agreed to plead guilty and pay U.S. authorities $4.3 billion;[49] and DOJ charged six additional executives with conspiracy to defraud the United States, defraud customers, and violate the Clean Air Act.[50] Notably, however, five of the executives appear to be based in Germany, a country that does not normally extradite its own citizens. Regardless of whether any of the executives responsible for the fraud will ever stand trial in United States courts, the DOJ has touted the indictments as a win for the new Yates policy:



Whether this trend will continue under the new administration is not yet clear. Jeff Sessions has said that no company is too big to fail: "I was taught, if they violated the law, you

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[45] USAM § 9-28.700

[46] Yates NYU Remarks.

[47] U.S. DEP'T OF JUSTICE, Press Release, *U.S. Attorney of the Southern District of New York Announces Criminal Charges Against General Motors and Deferred Prosecution Agreement with $900 Million Forfeiture*, https://www.justice.gov/opa/pr/us-attorney-southern-district-new-york-announces-criminal-charges-against-general-motors-and.

[48] Jack Ewing, *Volkswagen Says 11 Million Cars Worldwide Are Affected in Diesel Deception*, N.Y. TIMES, Sept. 22, 2015, https://www.nytimes.com/2015/09/23/business/international/volkswagen-diesel-car-scandal.html?smid=pl-share&_r=0

[49] Hiroko Tabuchi, Jack Ewing & Matt Apuzzo, *6 Volkswagen Executives Charged as Company Pleads Guilty in Emissions Case*, N.Y. TIMES, Jan. 11, 2017, https://www.nytimes.com/2017/01/11/business/volkswagen-diesel-vw-settlement-charges-criminal.html.

[50] U.S. DEP'T OF JUSTICE, Press Release, *Volkswagen AG Agrees to Plead Guilty and Pay $4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests*, https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six.

charge them. If they did not violate the law, you do not charge them."[51] And he has also indicated that the Yates Memo is here to stay[52] (even if she was sacked for failing to enforce President Trump's immigration orders). This author believes that expectations of corporate cooperation will remain for the foreseeable future.

[51] Tom Schoenberg, *Trump's Pick for Attorney General Scoffed at 'Too Big to Fail'*, BLOOMBERGPOLITICS (November 18, 2016, 4:41 PM CST), https://www.bloomberg.com/politics/articles/2016-11-18/trump-s-pick-for-attorney-general-scoffed-at-too-big-to-fail

[52] Jody Godoy, *Sessions Hints Yates memo, Fraud to Stay on DOJ Radar*, LAW360 (January 11, 2017, 8:51 PM EST), https://www.law360.com/articles/879816/sessions-hints-yates-memo-fraud-to-stay-on-doj-radar.