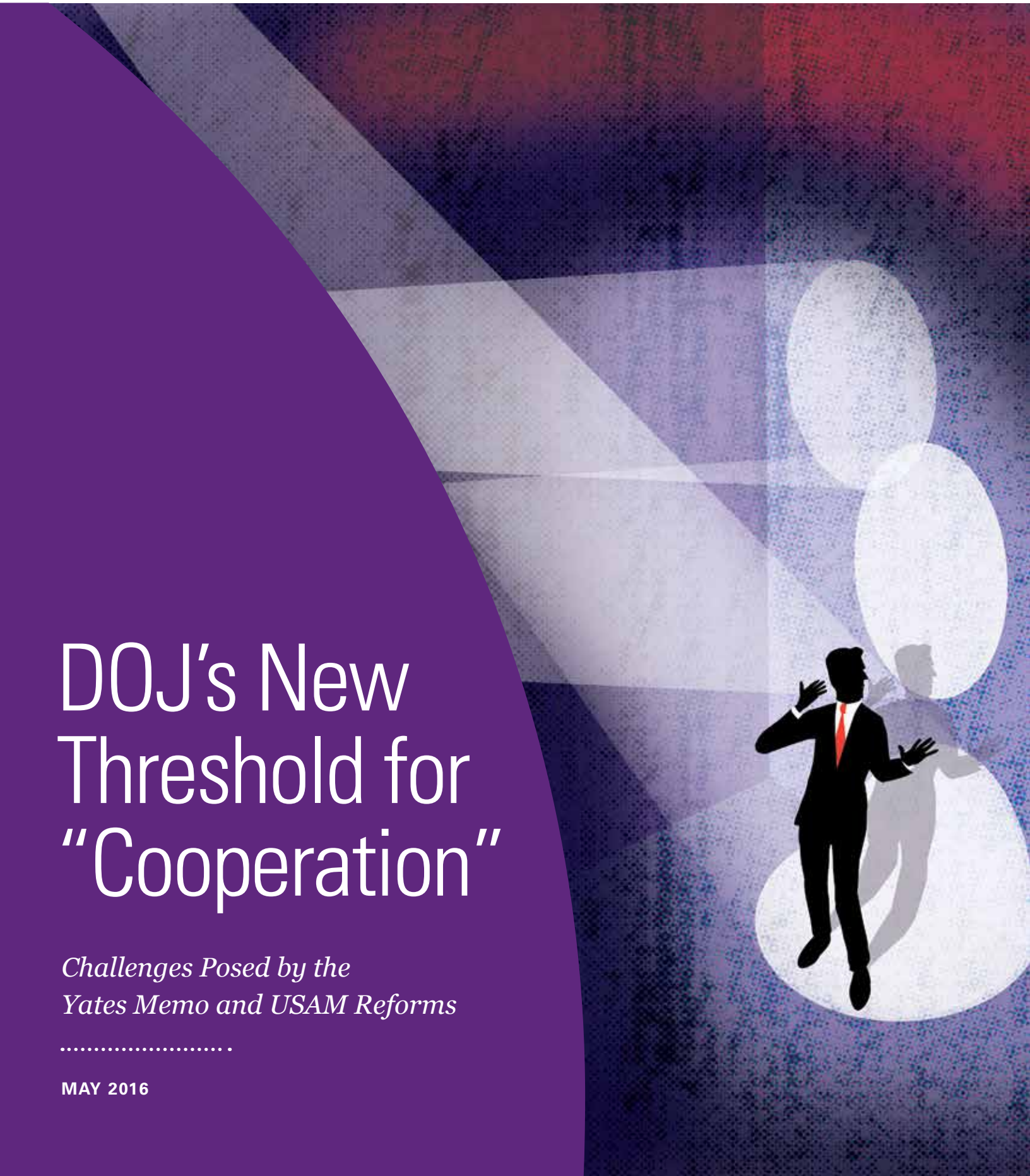
U.S. CHAMBER
Institute for Legal Reform



DOJ's New Threshold for "Cooperation"

Challenges Posed by the Yates Memo and USAM Reforms

MAY 2016

U.S. CHAMBER
Institute for Legal Reform

An Affiliate of the U.S. Chamber of Commerce

Table of Contents

Prepared for the U.S. Chamber Institute for Legal Reform by

Matthew S. Miner, Morgan, Lewis & Bockius LLP[i]

Executive Summary

In September 2015, Deputy Attorney General Sally Yates issued a policy memorandum to Department of Justice (the Department, or DOJ) attorneys, directing them to focus enforcement efforts on holding individuals accountable for corporate malfeasance. Recognizing the challenge of doing so, the Department's new policy seeks to leverage a corporate entity's knowledge and access to information to bring cases against their own employees by making corporate cooperation credit conditional on the disclosure of all relevant facts as to any individuals involved in the misconduct.

Although it is too soon to measure the full impact of the Department's new policy, it is nonetheless clear that the new threshold for cooperation credit has upset the expectations of businesses historically inclined to cooperate with the government. The new policy is likely to have a number of unintended consequences that will muddy what was traditionally a straightforward decision—whether to cooperate with a government investigation. By focusing so much attention on identifying culpable individuals, the new policy risks alienating personnel whose cooperation and knowledge of facts are essential to any corporate internal investigation. It may also complicate compliance. For example, if company employees become reluctant to raise their hands to report transgressions for fear of drawing too much attention to themselves, the company has a greatly reduced ability to assess whether controls or existing compliance programs work, or how to improve them.

The "all-or-nothing" nature of the new cooperation standard also risks creating even more uncertainty for corporate decisions regarding the benefits of voluntary self-disclosure of suspected unlawful conduct. The new policy has also renewed concerns about the pressure to waive attorney-client privilege. Paradoxically, in seeking to make it easier to bring cases against culpable individuals in corporate investigations, the Department has complicated the mix for individuals, the corporate community—and ultimately, for the Department itself.

Introduction

Corporate criminal investigations are an accepted reality for businesses operating in today's landscape. Businesses face a plethora of regulations, many of which carry criminal penalties and fines. Although corporations have been a target of federal prosecution since the Supreme Court's 1909 landmark decision in *New York Central and Hudson River Railroad v. United States,* which established broad corporate criminal liability principles for the actions of employees, the frequency of such prosecutions did not reach current levels for many decades, until the aftermath of the corporate accounting scandals of the early 2000s.[1]

The prosecution climate now is very different. Corporate investigations and prosecutions are so common that former Deputy Attorney General Larry D. Thompson has remarked, "[n]o matter how gold-plated your corporate compliance efforts, no matter how upstanding your workforce, no matter how hard one tries, large corporations are walking targets for criminal liability."[2]

Despite the increased scrutiny faced by corporations in recent years, the interests of the Department and companies are generally aligned in seeking to prevent criminal misconduct and detect and remediate such conduct when it occurs. This is especially true since the passage of the Sarbanes-Oxley Act, which imposed compliance and control requirements on corporations, boards of directors, and top executives. For this reason, among others, companies have dedicated greater resources to compliance and, when facing investigations, have cooperated fully in the government's efforts.[3] After all, corporations are incentivized, like the government, to prevent malfeasance from occurring and to detect it early when it does to protect the interests of their principals, reduce unnecessary costs, and maximize efficiency and competitiveness in the marketplace.

> *"Although each version of the Department's policy guidance described factors and considerations that should guide a prosecutor's evaluation of cooperation and cooperation credit, at no point through any of these policy changes did the Department establish a minimum disclosure threshold for cooperation credit."*

Department Policy Shifts

The Department has, for nearly two decades, maintained and publicized policies intended to foster corporate compliance efforts and cooperation with government investigations. These policies, which originated with non-binding guidance issued in a June 1999 Memorandum from then-Deputy Attorney General Eric H. Holder, Jr., entitled "Bringing Criminal Charges Against Corporations," have evolved over time into mandatory directives to all federal prosecutors regarding the types of cooperation and compliance efforts expected from the business community as criminal charges are evaluated. Over time, the expectations for businesses facing investigation have also shifted.

The first set of changes to these policies occurred in January 2003, when then-Deputy Attorney General Larry D. Thompson expanded upon the 1999 guidance by issuing an updated policy Memorandum to Department attorneys regarding the Principles of Federal Prosecution of Business Organizations.[4] Although the new Memorandum made clear that "it will be a minority of cases in which a corporation or partnership is itself subjected to criminal charges," the revised guidance altered the expectations and considerations applied to corporate cooperation efforts to provide "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation" as well as greater attention to the efficacy of corporate governance and compliance programs.[5]

The Department's policy guidance subsequently changed through amendments made by former Deputy Attorney Generals Paul McNulty in 2006 and Mark Filip in 2008. Similar to the guidance issued by their predecessors, the updated policy guidance set forth a number of factors to be considered by federal prosecutors in determining whether criminal charges against a corporation are appropriate, including "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."[6] Although each version of the Department's policy guidance described factors and considerations that should guide a prosecutor's evaluation of cooperation and cooperation credit, at no point through any of these policy changes did the Department establish a minimum disclosure threshold for cooperation credit.

The Yates Memo and the Potential Impact on Cooperation and Compliance

In recent months, the Department's expectations regarding corporate cooperation has undergone a dramatic sea change. On September 9, 2015, current Deputy Attorney General Sally Quillian Yates issued a Memorandum to various DOJ divisions announcing policy regarding "Individual Accountability for Corporate Wrongdoing" (the Yates Memo), emphasizing the Department's focus on prosecuting individuals in cases of corporate malfeasance. Making good on promises made in the Yates Memo, on November 16, 2015, the Department unveiled a series of amendments to the United States Attorneys' Manual (USAM) to provide further guidance on how Department attorneys should implement the Yates Memo's new policy pronouncements.

As a whole, the Yates Memo and USAM amendments alter Department policies and practices by: (1) placing a greater focus on investigating and prosecuting individuals suspected of involvement in corporate wrongdoing; and (2) defining what level of cooperation by corporate targets is sufficient to trigger credit in charging or settlement decisions. In particular, the Yates Memo and USAM revisions make clear that cooperation credit is now largely an "all or nothing" proposition for corporations. Under the new policy, for a corporation to receive any cooperation credit, it will be expected to identify all individuals involved in potential wrongdoing and provide the Department with all relevant facts relating to the misconduct. The USAM makes clear that this new policy establishes a "threshold requirement" for companies to be eligible to be considered for cooperation credit.[7]

"Under the new policy, for a corporation to receive any cooperation credit, it will be expected to identify all individuals involved in potential wrongdoing and provide the Department with all relevant facts relating to the misconduct."

The Department's stated objective in issuing the Yates Memo is to help "combat corporate misconduct … by seeking accountability from the individuals who perpetuated the wrongdoing."[8] Accountability for individual wrongdoers has always rightly been part of the Department's mission. Incentivizing companies to detect and prevent fraud is also important to reduce the inefficiencies inherently caused by corporate malfeasance. In recent remarks made before the New York Bar Association, Deputy Attorney General Yates noted that the Yates Memo is designed, in large part, to leverage information available to companies to hold individuals accountable:

> It is not easy to disentangle who did what within a huge corporate structure —to discern whether anyone had the requisite knowledge and intent. Blurred lines of authority make it hard to identify who is responsible for individual business decisions and it can be difficult to determine whether high-ranking executives, who appear to be removed from day-to-day operations, were part of a particular scheme. There are often massive numbers of electronic documents and for corporations that operate worldwide, there are restrictive foreign data privacy laws and a limited ability to compel the testimony of witnesses abroad …. The goal was to ensure that we're doing everything we can to overcome the barriers that I just mentioned and hold accountable those who are responsible for corporate wrongs.[9]

However, the policy changes announced in the Yates Memo and enacted in the subsequent USAM revisions seek to leverage corporate investigations to aid the Department in its task to an unprecedented degree. In so doing, the policy threatens to undermine the ability of corporations to fully cooperate with the Department in the manner prescribed by the Yates Memo. As James Cole, Ms. Yates' predecessor at the Department, recognized in remarks before the American Bar Association in November 2015, the decision on whether a corporation should self-report and/or cooperate with the government has been made much more complicated. "When you play it out, it is not necessarily better for the government and it's certainly not better for corporations and counsel."[10]

As recognized by Mr. Cole and other commentators, the Department's pivot to requiring full disclosure on individuals in order for corporations to receive any cooperation credit will likely yield a number of unintended consequences and may ultimately prove counterproductive. In many pre-Memo cases, it was a foregone conclusion that corporations would cooperate with the Department in an attempt to reach a timely and favorable resolution of the matter. The way in which the Department has now conditioned cooperation undermines the settled expectations of businesses facing government enforcement. Companies no longer know what "cooperation" means, and accordingly the decision to cooperate may no longer be an easy one for corporations to make.

"[T]he Department's pivot to requiring full disclosure on individuals in order for corporations to receive any cooperation credit will likely yield a number of unintended consequences and may ultimately prove counterproductive."

The new paradigm will also force corporate counsel to make a commitment to cooperation in the early stages of an investigation, without a full understanding of the nature and scope of potential liability the company may face. This calculus will be further complicated due to the policy's chilling effect on the company's ability to fully investigate and develop the factual record necessary for cooperation as officers, directors, and other employees will feel at odds with corporate interests and may be unwilling to cooperate in internal inquiries. This effect may also be felt on the company's compliance program, dissuading employees from voluntarily reporting non-compliant behavior of which they are aware for fear of unwanted attention and scrutiny.

Finally, consideration of collateral risks relating to costs, attorney-client privilege, and data privacy must all be factored into the analysis at a time of uncertainty and legal risk to the company, especially when the baseline expectation for cooperation is that *all* facts will be turned over as to *any* potentially culpable individual. The ultimate result may well be that rather than encouraging corporations to provide full disclosure and cooperation with government investigations, the Department's policy will impact a corporation's willingness to come forward and cooperate in a criminal or civil enforcement action. After all, what benefit is there to boiling the ocean in search of facts and turning employees against one another if there is no guarantee the end result will be some form of favorable credit?

Both the government and the business community benefit from legally compliant companies, which promote investor trust and public confidence in the markets.[11] As Mr. Thompson observed shortly before leaving the Department, "[a] strong regime of criminal enforcement leaves the honest business people free to compete while weeding out those few—and I emphasize few—who break the law."[12] The Department's all-or-nothing approach is not the way to marshal the resources of corporations to root out malfeasance in their midst.

This paper explores these perhaps unintended effects of the Yates Memo. First, it discusses the policy directive to federal prosecutors in the Yates Memo and addresses how that directive is implemented in the USAM, which guides federal prosecutors and Department attorneys in their day-to-day practice. Second, it addresses how corporations may find themselves at odds with their employees' interests in the course of internal investigations, to a larger degree than in the past, and the new realities faced by corporate counsel conducting internal investigations in a post-Memo world: what does self-disclosure mean when cooperation is conditioned on the disclosure of "all" facts?; what obligation does the corporation have to overturn and examine every stone and detail?; to what degree is the business entity now an instrumentality of the government for criminal investigation purposes; and, what issues arise for multi-national corporations dealing with data privacy restrictions in foreign jurisdictions? Finally, what is the potential impact of "all-or-nothing" cooperation on the attorney-client privilege?

"All-or-Nothing": The Focus on Individuals in Corporate Government Enforcement Actions

The critical change for corporations impacted by the Yates Memo and the USAM revisions is the requirement to fully disclose all information related to culpable individuals as a condition of receiving any cooperation credit.[13]

Leslie Caldwell, the Assistant Attorney General for the Department's Criminal Division, explained DOJ's expectations regarding what level of disclosure and cooperation is required in a speech late last year:

> Companies cannot just disclose facts relating to general corporate misconduct and withhold facts about the individuals involved. And internal investigations cannot end with a conclusion of corporate liability, while stopping short of identifying those who committed the underlying conduct.
>
> In addition to identifying the individuals involved, full cooperation includes providing timely updates on the status of the internal investigation, making officers and employees available for interviews—to the extent that is within the company's control—and proactive document production, especially for evidence located in foreign countries.[14]

This section discusses the policy implemented by the Yates Memo and USAM in greater detail.

The Yates Memo's Six Points of Guidance

Although it has always been Department policy to hold individuals accountable for their wrongdoing, the Yates Memo lays out six points of guidance for federal prosecutors to establish and reinforce a policy of gathering evidence and bringing enforcement actions against individual actors, whenever possible, in corporate investigations. The November 2015 USAM revisions provide further guidance regarding how these six points will be applied by federal prosecutors.

"ALL OR NOTHING" APPROACH TO COOPERATION CREDIT

Department attorneys are not to consider any cooperation credit in pursuing corporations unless the company has provided *all* relevant information about the individuals involved in potential misconduct.

"[T]o 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."[15] The Yates Memo commands prosecutors to "vigorously review" the information a company provides to ensure it is complete and fully reflects the behavior and role of all parties involved.

Moreover, Department attorneys must ensure that any plea or settlement with a corporation requires continued corporate cooperation in individual investigations. The failure to cooperate following such an agreement could result in stipulated penalties or a material breach of the agreement. Notably, this approach appears to increase the government's already significant leverage vis-à-vis corporations seeking cooperation credit. Of note, the Yates Memo makes clear that "[c]ompanies cannot pick and choose what facts to disclose[,]" meaning that disclosure will be dictated either by the government's demands or absolute full disclosure and transparency.

INDIVIDUAL FOCUS

Department lawyers are now required to build cases against individuals from the outset. The goal of this strategy is to lead individuals to provide information against higher-level corporate employees, echoing federal counter-narcotics strategies of "flipping" lower-level informants. The government envisions that this requirement will also ensure the accumulation of adequate, specific facts related to misconduct and the ability to bring civil and criminal charges against individuals rather than the corporation alone.

"Department lawyers are now required to build cases against individuals from the outset. The goal of this strategy is to lead individuals to provide information against higher-level corporate employees, echoing federal counter-narcotics strategies of 'flipping' lower-level informants."

BROADENING REMEDIES

DOJ's criminal and civil attorneys are now expected to immediately share information relevant to parallel (or potential) investigations to maximize avenues for the government to seek charges against individuals and/or achieve broader penalties.

NO PROTECTION FOR INDIVIDUALS

The government is responsible for protecting its ability to pursue individuals for wrongdoing, even when resolving a case with a corporate entity. Outside of narrow exceptions, the Yates Memo states that DOJ attorneys are not to provide immunity to individual officers or employees, dismiss charges against them, or release claims as part of any resolutions with corporations. Moreover, the written, personal approval of the relevant Assistant Attorney General or United States Attorney is required for such a release.

> *DOJ attorneys are not to provide immunity to individual officers or employees, dismiss charges against them, or release claims as part of any resolutions with corporations.*

CLEAR PLAN FOR INDIVIDUAL RESOLUTION

Where an investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against a corporation, Department attorneys will be required as part of that authorization to specifically discuss potentially liable individuals, the status of any investigation related to such individuals, and a plan to resolve the matter prior to the end of any statute of limitations. If a Department attorney declines to prosecute or bring civil suit against an individual when the investigation concludes, the attorney must memorialize the basis for that determination and the United States Attorney or Assistant Attorney General (or their designee) must approve that decision.

DETERRENCE AND RETRIBUTION

Rather than deciding to pursue cases based merely on a potential defendant's ability to pay large sums, the Yates Memo instructs civil attorneys to pursue individuals in order to hold them accountable for wrongs and to deter future misconduct. Considerations for such decisions include, but are not limited to: the seriousness of the misconduct; whether sufficient evidence to reach judgment exists; whether important federal interests are implicated; the "needs of the communities we serve;" and the potential defendant's past history.

Implementation of the Yates Memo through the USAM

On November 16, 2015, the Department quietly launched substantial revisions to the USAM to implement the new policies announced in the Yates Memo. These revisions were primarily to Title 9, Chapter 28 of its United States Attorneys' Manual (Principles of Federal Prosecution Of Business Organizations), but also included a new section focused on civil liability for individuals in Title 4, Chapter 3.100, entitled "Pursuit of Claims Against Individuals."

These revisions incorporate in a straightforward way many of the concepts and suggestions contained in the Yates Memo. Although many of the revisions are more cosmetic in nature, serving to highlight or elevate the new emphasis on individual culpability, some of the more substantive changes to the cooperation credit regime have immediate implications for the way companies manage internal investigations and potential cooperation with the federal government.

Deputy Attorney General Yates summarized the impact and import of these policy changes in a speech at a joint American Bankers Association/American Bar

> *Although many of the revisions are more cosmetic in nature, serving to highlight or elevate the new emphasis on individual culpability, some of the more substantive changes to the cooperation credit regime have immediate implications for the way companies manage internal investigations and potential cooperation with the federal government.*

Association event last November, making clear that the Department now views the sharing of all relevant information as a threshold factor for the consideration of cooperation credit:

> The new rule in the revised factors is exactly how I laid it out two months ago: if a company wants credit for cooperating—any credit at all—it must provide all non-privileged information about individual wrongdoing. Companies seeking cooperation credit are expected to do investigations that are timely, appropriately thorough and independent and report to the government all relevant facts about all individuals involved, no matter where they fall in the corporate hierarchy.
>
> I would note that this concept—that corporate cooperation includes giving all non-privileged information about the conduct of individuals—is nothing new. It was in the Filip factors long before this most recent policy shift and it is a point that has been repeatedly emphasized by Department officials, particularly Leslie Caldwell, our terrific Assistant Attorney General of the Criminal Division.
>
> What is new is the consequence of not doing it. In the past, cooperation credit was a sliding scale of sorts and companies could still receive at least some credit for cooperation, even if they failed to fully disclose all facts about individuals. That's changed now. As the policy makes clear, providing complete information about individuals' involvement in wrongdoing is a threshold hurdle that must be crossed before we'll consider any cooperation credit.[16]

INDIVIDUAL FOCUS

In the USAM revisions, the Department created an entirely new section setting forth what it views as the "Foundational Principles of Corporate Prosecution."[17] Although the section references corporate prosecution in its title, it notably devotes two full paragraphs to the importance of holding culpable individuals accountable and makes clear that prosecutors should focus on individuals from the very outset of any investigation.

> *"The USAM makes clear that no corporate resolution should provide protection from criminal or civil liability for individuals 'absent extraordinary circumstances' and the written approval of the Assistant Attorney General or United States Attorney."*

This heightened emphasis on individual behavior is made clear in a newly-added section unambiguously titled, "Focus on Individual Wrongdoers."[18] While the revisions pull to the fore of this section language focusing on individuals that previously existed in comments sections, the USAM also incorporates, nearly verbatim, sections of the Yates Memo.[19] As a general principle it emphasizes that provable individual culpability should be pursued. The relevant comment section of the USAM incorporates the Yates Memo's requirement that prosecutors, should they decline to bring civil or criminal charges against individuals, must first seek approval from the United States Attorney or Assistant Attorney General (or their designees).[20]

Finally, a new section was added regarding the "Adequacy of the Prosecution of Individuals."[21] This section guides prosecutors to make determinations about whether prosecuting individuals is sufficient to "satisfy the goals of federal prosecution," and whether charging a corporation is necessary. Thus, the Department instructs prosecutors that in making decisions about the disposition of any case against the corporation—whether indictment, a deferred or non-prosecution agreement, or other options—they must contemplate the actions taken against individuals. The USAM makes clear that no corporate resolution should provide protection from criminal or civil liability for individuals "absent extraordinary circumstances" and the written approval of the Assistant Attorney General or United States Attorney.[22]

While the USAM revisions appear to shift the Department's focus regarding white collar crime towards individuals as opposed to corporations, prosecutors' ability to successfully pursue such actions are still heavily dependent upon the facts available. To that end, the Department has taken clear steps to ensure it can gather as many facts as possible to inform decisions about potential individual malfeasance, and it has significantly altered the USAM's corporate cooperation credit regime to do so.

COOPERATION CREDIT

Much like the Yates Memo, the USAM articulates the general principle that the "company must identify all individuals involved in or responsible for the misconduct

at issue …"[23] Full cooperation requires the provision of "all facts relating to that misconduct," but the Department also notes that a "'prime test of whether the organization has disclosed all pertinent information' necessary to receive a cooperation-related reduction in its offense level calculation 'is whether the information is sufficient … to identify … the individual(s) responsible for the criminal conduct.'"[24]

VOLUNTARY DISCLOSURES

The USAM revisions also include a new section entitled "Voluntary Disclosures." Although the title suggests that guidance will be provided on the benefits of corporate voluntary disclosure and how prosecutors will treat such disclosures, the section unfortunately adds little to current knowledge and practice. Rather, it simply states that prosecutors *may* consider such disclosures "both as an independent factor and in evaluating the company's overall cooperation and the adequacy of the corporation's compliance program and its management's commitment to the compliance program." In a separate section, notably, the USAM does recognizes that early voluntary disclosures may occur before all facts are known to a company, but that the company should move in a timely way to investigate and update the Department when new facts are learned.[25] The USAM also directs prosecutors to vigorously review information to ensure a company has not sought to minimize the behavior or role of an individual. Ultimately, this guidance intensifies the pressure on companies to perform exhaustive investigations.

New Expectations and Evaluation Process for Compliance Programs

On November 3, 2015, shortly after the publication of the Yates Memo and just days before the USAM was revised, the Department announced the hiring of veteran federal prosecutor and in-house compliance expert, Hui Chen, to serve as a full-time compliance expert within the Fraud Section of the Department's Criminal Division. Although this new post and its role are not specifically connected to the Yates Memo and considerations of cooperation, it is important to note that the USAM requires federal prosecutors to consider the existence and effectiveness of corporate compliance programs as part of the factors set forth in the Principles of Prosecution of Business Organizations by then-Deputy Attorney General Mark Filip (Filip factors) to guide Department attorneys in prosecution decisions regarding business entities.[26] Accordingly, Department prosecutors will likely review questions of compliance, including in consultation with the new in-house expert, at the same time they are evaluating the adequacy of a company's cooperation.

The compliance expert's role was described as follows in the Department's press release announcing the creation of the position:

> Among her duties as a consulting expert, Chen will provide expert guidance to Fraud Section prosecutors as they consider the enumerated factors in the United States Attorneys' Manual concerning the prosecution of business entities, including the

existence and effectiveness of any compliance program that a company had in place at the time of the conduct giving rise to the prospect of criminal charges, and whether the corporation has taken meaningful remedial action, such as the implementation of new compliance measures to detect and prevent future wrongdoing. Chen will help prosecutors develop appropriate benchmarks for evaluating corporate compliance and remediation measures and communicating with stakeholders in setting those benchmarks. Relatedly, after a corporate resolution is reached requiring on-going Fraud Section assessments of a company's compliance and remediation efforts, Chen will provide expert guidance to help prosecutors and monitors evaluate whether the implementation of such measures is effective and in keeping with the terms and purposes of Fraud Section resolutions.[27]

> *"[A]lthough the Department has announced that it would publish guidance on the questions companies should expect to be asked about compliance, no such guidance has yet been issued."*

The Department has not to date announced the new benchmarks by which corporate compliance programs will be evaluated. Additionally, although the Department has announced that it would publish guidance on the questions companies should expect to be asked about compliance, no such guidance has yet been issued.

Nonetheless, at a November 2015 roundtable discussion, Ms. Chen hinted at the type of questions and scrutiny she would likely apply to compliance programs under review. For example, she explained that existing compliance guidelines—whether stated in the U.S. Sentencing Guidelines Manual or the USAM—were, in her view, "very high-level" and that she intended to review programs in more depth, examining the program's design, the stakeholders at issue, the owners of various functions, and the resources provided to compliance. She even listed a number of categories of questions DOJ would now ask, including, for example, how often a Board of Directors received briefings from the compliance function.[28] Thus, based on this guidance, although a business entity cannot effectively engage in or measure cooperation prior to an incident of wrongdoing, it can improve its compliance function and be prepared to address the types of questions that are likely to come during an investigation if a problem does arise.

Internal Investigation and Self-Disclosure in a Post-Memo World

The DOJ policy shift sounded by the Yates Memo and revisions to the USAM changes a number of the practical considerations facing corporate counsel as they evaluate how best to manage internal investigations and weigh the benefits of disclosure and cooperation with the government. No longer can it be assumed that it will be in the best interests of the corporation to cooperate.

This section considers some of the challenges now faced by corporate counsel and how those issues may adversely affect the cooperation sought by the Yates Memo.

The Costs and Benefits of Self-Disclosure and Cooperation in a World of "All-or-Nothing" Credit

By establishing an "all-or-nothing" approach to corporate cooperation credit, the Yates Memo has effectively created a super factor that trumps other considerations that have historically guided corporate charging decisions since the issuance of then-Deputy Attorney General Holder's 1999 Memorandum. While these factors are still considered important (and time will tell just how broadly the cooperation requirements will be applied), there is potential for aggressive prosecutors to use them to extract comprehensive and resource-intensive investigatory steps from corporations.

With this new standard in place, it may be challenging for a business to evaluate whether to commit to cooperation, especially where the degree of criminal exposure—and the benefit derived from cooperation—are uncertain. After all, companies often evaluate decisions based on risk, and it is difficult to gauge the relative risks and rewards of cooperation under the Yates Memo when the ultimate outcome is determined by a post-hoc evaluation of the steps the company took to develop the factual record and share it with the government.

Recognizing the difficulty in assessing the precise risks and rewards of cooperation on the front end, there are certain baseline expectations that can be communicated by corporate counsel to the business organization's stakeholders as part of the decision-making process. As a threshold matter, it is important to keep in mind that the Department has tied its decisions on declinations and recommendations for lenity to the requirement of full cooperation. Consequently, the degree of risk of criminal exposure an enterprise faces will necessarily influence how that company views the importance and need of cooperation credit.

Although there are variables regarding what cooperation will entail, there are also standard expectations that can and should be considered and conveyed. For example, to report on all relevant facts, a corporation will be required to investigate facts large and small and make determinations as to relevance. This will inevitably encourage lengthy and costly investigations of the sort that are frequently criticized for "boiling the ocean" in pursuit of facts. Notwithstanding Deputy Attorney General Yates's statement that corporations are merely required to carry out a "thorough investigation tailored to the scope of the wrongdoing"—as determined by Department attorneys—rather than "boiling the ocean,"[29] this type of prolonged investigation will elevate the exposure individuals face in being interviewed and subjected to proffer and lead to the earlier involvement of individual criminal defense counsel, whose fees may need to be indemnified by the corporation. All of this will come at an increased cost to corporations under investigation in terms of resources, internal distractions, and delays. As a result of such delays, companies may also be expected to consent to tolling agreements with the Department during investigations.

"Although there are variables regarding what cooperation will entail, there are also standard expectations that can and should be considered and conveyed."

"Us vs. Them": Conducting a Thorough Investigation Without Pitting Corporate Interests Against Employees

By conditioning corporate cooperation credit on the disclosure of facts related to individual actors, the revised USAM seeks to leverage corporate internal investigations to build cases against individual actors, such as employees, officers, and directors.

Corporate and in-house counsel will therefore find themselves at the intersection of competing interests. On the one hand, corporations—which have always been incentivized to root out misconduct and engage in their own internal investigations

> *A recent survey of corporate compliance officers conducted by DLA Piper found that 81 percent of respondents were at least somewhat concerned that they would face increased personal liability as a result of the Yates Memo. Nearly a third of respondents (32 percent) stated their perceived increased liability was 'extremely concerning.'*

to ensure efficient and legal operations in the best interest of their principals and shareholders—also face the added pressure of providing to the government a complete dossier on individual employees, directors, and officers engaged in culpable conduct in order to better the company's position for settlement. On the other, individual actors may find their own legal interests to be at odds with those of the company's. A recent survey of corporate compliance officers conducted by DLA Piper found that 81 percent of respondents were at least somewhat concerned that they would face increased personal liability as a result of the Yates Memo.[30] Nearly a third of respondents (32 percent) stated their perceived increased liability was "extremely concerning."[31]

In-house attorneys will be particularly challenged in striking an appropriate balance in cases where the targeted individuals include control personnel, such as directors or C-suite executives. Ethical issues may arise to the extent that corporate attorneys—whose only client is the corporation itself—are nevertheless required to advocate, as a practical matter, on behalf of the constituents of the corporate entity, such as individual directors, officers, executives, and employees.[32] This tension can be exacerbated in a government enforcement action under normal circumstances, and doubly so when the corporation is expected to report on the conduct of these employees in order to gain cooperation credit.

Deputy Attorney General Yates explained, in her remarks before the joint ABA conference on November 16, 2015, that the Yates Memo, together with the USAM provisions related to corporate cooperation, represent a revised policy focus which "now emphasize[s] the primacy in any corporate case of holding wrongdoers accountable and list[s] a variety of steps that prosecutors are expected to take to maximize the opportunity to achieve that goal."[33] Indeed, the Yates Memo commands prosecutors to "vigorously review" the information a company provides to ensure it is complete and fully reflects the behavior and role of all parties involved. The Yates Memo further makes clear that "[c]ompanies cannot pick and choose what facts to disclose" with respect to individual actors.

> *"With these new Department policies regarding cooperation, it is likely that businesses will struggle to avoid having a wedge develop between executives and corporate counsel during investigations."*

With these new Department policies regarding cooperation, it is likely that businesses will struggle to avoid having a wedge develop between executives and corporate counsel during investigations. The Department's increased focus on individuals, when paired with the new expectation that corporations must disclose *all* facts as to *all* individuals to receive *any* cooperation credit, is likely to raise questions about potential conflicts between companies and executives early in investigations.

Similarly, questions will necessarily arise regarding indemnification and the applicability of Directors and Officers insurance coverage. Although the Yates Memo and USAM revisions are still relatively new, executives close to investigation matters may question their own legal exposure in light of the Department's policy that incentivizes reporting on the behavior of culpable individuals. These individuals may determine that it is in their own interests to turn to the government early to self-report or to point to culpable parties in ongoing investigations before the corporation itself is in a position to self-disclose or fully report on its findings, thus undermining the corporation's ability to be first in the door.

These issues may be further exacerbated by individuals farther down the chain of command refusing to cooperate fully in a corporate investigation, at least without their own legal representation. While it is common for corporations to agree to indemnify individuals for their counsel under certain circumstances, individual employees may increasingly feel their legal interests do not align with those of the corporation, particularly in the context of an internal investigation in which the corporation is now explicitly required to turn over to government agents as much information on as many individuals as possible. Junior personnel may decide to secure their own attorneys early, without going through corporate channels, thus complicating an internal investigation to degrees typically only seen in the most extreme cases of criminal misconduct.

At the end of the day, corporations do not have the investigative authority that the federal government does. Yet the Yates Memo's efforts to leverage corporate investigation resources, including internal corporate records, potentially incriminating emails sent on corporate computers or over corporate networks, and access to witnesses with knowledge of potential wrongdoing, may implicate a number of

questions related to the constitutional protections of the business organization's individual employees. Such questions have been raised for some time, often in a more academic way, but the greater degree of control the government exercises over a company's investigation and the more individuals who are prosecuted as a result, the more likely it will be that such questions will find their way before judges. For example, to what degree is a corporation now "deputized" pursuant to the Yates Memo's cooperation standard to search for and disclose files and information implicating particular individuals? How does a corporation navigate an internal interview in which an individual invokes his Fifth Amendment privilege, or his Sixth Amendment right to counsel based on the government's actual or perceived involvement in the investigation?[34] As Dennis Boyle, a partner at Fox Rothschild, recently observed, "[b]y making the internal investigation an instrumentality of the government, the Yates memo fundamentally alters the purpose of the internal investigation. It undermines the traditional and constitutional rights associated with criminal prosecution."[35]

> *"Yet the Yates Memo's efforts to leverage corporate investigation resources, including internal corporate records, potentially incriminating emails sent on corporate computers or over corporate networks, and access to witnesses with knowledge of potential wrongdoing, may implicate a number of questions related to the constitutional protections of the business organization's individual employees."*

These dynamics could fracture internal support for the investigation and lead to an "every man for himself" mindset within the company, which could complicate and impede the corporation's ability to perform what is intended by the Yates Memo—to gather facts and report to the Department any individuals engaged in wrongdoing. In addition, compliance may be compromised if employees become reluctant to engage and speak candidly in after-action assessments of whether or how the company's existing compliance program fell short, if there is a reported violation, as well as in responding to proactive risk assessments. Rather than successfully leveraging a corporation's access to testimonial and documentary evidence as intended, the Yates Memo's impact is likely to have the opposite effect.

> *A footnote in the revised USAM suggests that companies are not only required to provide the information they do find, but to report to the prosecutor any information they are not able to find.*

A Return of the "Known Unknowns"—Bearing the Burden of Identifying Facts That Can't be Discovered

Although the Department's new standard requiring the disclosure of "all facts relating to [the] misconduct" is burdensome, it sounds straightforward enough. Unfortunately, that condition of cooperation is only part of the story, and the USAM adds additional burdensome requirements that go beyond the disclosure of known facts and delve into issues of investigatory limitations and even investigation strategy.

A footnote in the revised USAM suggests that companies are not only required to provide the information they do find, but to report to the prosecutor any information they are not able to find. The USAM now states if the company cannot obtain certain evidence, it bears the burden of "explaining the restrictions it is facing to the prosecutor."[36] The manner of satisfying this requirement has been a source of confusion, and the Department's leadership has been unclear and, at times, inconsistent regarding how a company will be expected to meet this requirement. In February 2016, the *Wall Street Journal* reported that the Department's Fraud Section would require companies to submit a "certification … that they fully disclosed all information about individuals involved in wrongdoing before finalizing a settlement agreement."[37] Less than a month later, Assistant Attorney General Caldwell "publicly refuted the media claims, denying that any certification is in the works."[38]

Even without a formal certification requirement, companies seeking cooperation credit will be put in a difficult position every time they have to attest to what they were unable to find and why. Former Secretary of Defense Donald Rumsfeld once famously said, "there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know." How can a company adequately satisfy its burden of disclosing what it cannot find if it does not know what it is looking for? This problem is only compounded when a company's employees are afraid or unwilling to talk based on their own concerns about exposure.

The Department's new burden on cooperating companies will likely result in disclosure and discussion of the company's investigation methodology, including an assessment of whether the methodology was extensive or aggressive enough to find all relevant facts. Such a dialogue may also have the unintended effect of inviting

input from Department attorneys into the general counsel's office and boardroom discussions related to the company's risk preference and allocation of resources for internal investigations, access which many corporations may determine is not justified.

Allowing the Department to scrutinize a corporation's investigative steps simply adds to the difficult assessment a company must make at the outset regarding the burden and potential benefits of cooperation. At the very least, corporations will need to assess how much time, corporate energy, and money they are willing to spend on an internal investigation in order to adequately answer the question inherent to Department's analysis of this issue: Has the company done enough?

The Tension Between Data Privacy Laws and Cooperation Credit

One of the "known unknowns" a corporation may face pertains to documents and information maintained overseas. Data privacy issues often arise in cross-border criminal investigations, especially where European business entities or activities are at issue. Although the United States does not have laws resembling the restrictive data privacy protections that exist within the European Union, federal prosecutors are aware of the robust European data privacy protections and acknowledge that legal restraints may limit the transfer of emails and other protected data.

Despite being aware of these restrictions, the Department often encourages cooperating corporations to obtain employee consents for the transfer of data, to produce correspondence in redacted form,[39] and to work through various exceptions that exist for disclosure. The USAM suggests that any burdens faced by the corporation with respect to foreign data privacy restrictions rest with the corporation to prove, and to overcome, for the sake of satisfying the Department's cooperation requirements.[40]

"The USAM suggests that any burdens faced by the corporation with respect to foreign data privacy restrictions rest with the corporation to prove, and to overcome, for the sake of satisfying the Department's cooperation requirements."

These data privacy considerations are likely compounded by the expectations set in the Yates Memo and revised USAM. As explained above, the USAM provides that "'the prime test of whether the organization has disclosed all pertinent information' necessary to receive a cooperation-related reduction in its offense level calculation 'is whether the information is sufficient … to identify … the individual(s) responsible for the criminal conduct.'"[41] It is unclear how a company can satisfy these standards when the law of a foreign jurisdiction prohibits the transfer of personal data, including emails

and other documents that contain personally identifiable information. A company may find itself caught in tension between the Department's expectation of full cooperation and separate legal obligations regarding data privacy. These tensions will likely be confronted via a dialogue between Department attorneys and the corporation to see if the company is willing to consider potential exceptions to the laws at issue and whether data can be produced with some level of redaction.

Preserving Privilege When DOJ Regards One Side of an *Upjohn*[42] Interview as Non-Privileged

The Department's policy purports to stop short of conditioning cooperation credit on waiver of attorney-client privilege.[43] However, by conditioning cooperation credit on full disclosure of all facts learned in the course of an investigation regarding individuals' misconduct, companies may be forced to disclose their own investigative processes and resource allocation decisions, which may be privileged. Furthermore, the Department's requirement that companies disclose all factual information does not take into account whether information was learned in the course of a privileged investigation conducted by the corporation's counsel.[44]

The revised USAM does assert that a company need not waive attorney-client privilege or work product protections in order to satisfy the cooperation credit threshold,[45] even though it also requires that full disclosure is the standard by which cooperation will be evaluated.[46] A footnote in the text recognizes that a company may learn of facts through privileged interviews by company counsel and states that the company need not necessarily provide the memoranda or notes from such interviews.[47] Nonetheless, the same footnote makes crystal clear that the Department expects full disclosure of all relevant facts learned in the interview:

> By way of example, corporate 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.[48]

Although the prior version of the USAM contained a similar footnote, it did not call for the disclosure of *all* facts as a precondition for cooperation credit nor place the burden on the corporate target to explain why all facts cannot be disclosed.

> *Thus, while claiming not to require waiver, the Department conditions cooperation credit on the disclosure of a corporation's investigative procedures—which may be privileged in their own right—as well as factual information learned in the course of a privileged investigation.*

Thus, while claiming not to require waiver, the Department conditions cooperation credit on the disclosure of a corporation's investigative procedures—which may be privileged in their own right—as well as factual information learned in the course of a privileged investigation. As Deputy Attorney General Yates's predecessor, James Cole recently noted, "Although the Yates Memo says you are not actually required to waive the attorney-client privilege to satisfy the Yates Memo, the practical impact of how you give information to the government is really, at the end of the day, going to require in many instances that you waive privilege."[49] Thus, although DOJ may still claim and point to text within the USAM to assert that privilege waiver is not a precondition for cooperation credit, in reality, companies are increasingly likely to be pressed to disclose factual details learned through privileged processes and memorialized in privileged documents.

A hypothetical may illustrate the point. Suppose the common scenario in which, in the course of a witness interview conducted during an internal investigation regarding suspected violations of the Foreign Corrupt Practices Act, outside counsel for the company is interviewing the company's regional sales manager for Eastern Europe. At the outset of the interview, counsel gives a standard *Upjohn* warning, which includes notice that the company may, in its discretion, disclose facts learned in the course of the investigation to government regulators, including the Department of Justice. In the course of the interview, which is not recorded or transcribed, discussion turns to whether the manager was aware that a customs forwarder retained by the company for the purpose of importing consumer goods into the Ukraine had provided approximately $78,000 in gifts and lavish entertainment to the head of the Port of Odessa, on the Black Sea. The manager becomes visibly disturbed during the course of questioning, and when asked if she was aware of the gifts, she simply responds "I'm done" and leaves the room. There are no documentary records tying the manager to the gifts, and the only record of the interview is counsel's privileged work product.

During settlement discussions with the Department, the company is required to explain what it knows, and what it does not know, with respect to the manager's involvement. Without an independent factual record, the only way to do this is to

either disclose to the government privileged communications with the manager, or turn over privileged work product in the form of a memorandum memorializing the interview. Neither option is ideal, and both create risk of waiver of the attorney-client privilege.

The Department's policies make clear that prosecutors should view the information conveyed by company employees during privileged interviews as factual information that must be shared by a company as a condition of cooperation. Although the company may choose the form in which it shares that information, the Department nonetheless expects any relevant factual information to be disclosed. In situations such as the one suggested above, disclosure of the manager's conduct during the interview cannot be properly conveyed without disclosing privileged information and subjecting the issue to subject-matter waiver. Cooperation that is tantamount to subject-matter waiver will not encourage corporations to cooperate in a manner helpful to the government.

Conclusion

The Yates Memo and related USAM revisions fundamentally alter the balance of factors prosecutors consider when evaluating how to treat a business at the conclusion of an investigation. This altered state of play goes beyond an increased focus on the accountability of individual actors to a complete change in the expectations applied to businesses that self-disclose suspected wrongdoing.

Under the new "all-or-nothing" approach to cooperation credit, businesses must decide at the very outset to commit to a fulsome investigation and disclosure of all relevant facts in the hope of receiving credit for its efforts at the end. This decision is more than just a commitment to pass along facts, but also to a level of dialogue and transparency with the government that was not a threshold factor for cooperation credit just a few months ago.

The changes created by the Department's new policy put businesses and in-house lawyers in the difficult position of knowing that questions of investigation methodology and control, attorney-client privilege, and even data privacy management will be subject to discussion and negotiation with the Department lawyers who will ultimately decide what, if any, credit the company deserves. These considerations will need to be managed with awareness that the Department's new focus on individual

"The changes created by the Department's new policy put businesses and in-house lawyers in the difficult position of knowing that questions of investigation methodology and control, attorney-client privilege, and even data privacy management will be subject to discussion and negotiation with the Department lawyers who will ultimately decide what, if any, credit the company deserves."

culpability may create internal tensions among executives and employees. While the target may be individuals more so than corporations in the post-Yates Memo world, the potential adverse effects of cooperation may no longer make corporate cooperation the foregone conclusion it once was.

Time will tell what the parameters of the "all-or-nothing" approach to individual enforcement and corporate cooperation credit will look like. Perhaps due to reaction to the new policy, the Department has signaled that the policy may not be as great a change as originally thought. The Department has attempted to clarify what is required for cooperation credit under the Yates Memo in recent weeks and provide better assurance of the benefit of cooperation. Deputy Attorney General Yates, in her May 10, 2016, speech before the New York Bar Association White Collar Crime Conference explained, "[o]ur goal is not to collect corporate heads. Our goal is to get to the bottom of who did what and if there are culpable individuals, hold them accountable."[50] The Department has also announced that it intends to provide further guidance and examples regarding its declinations decisions, perhaps recognizing the difficulties faced by corporate counsel.

Additionally, it announced on April 5, 2016, a new "FCPA enforcement pilot program" to help encourage companies to voluntarily disclose, cooperate, and remediate corporate wrongdoing.[51] In exchange for satisfactory completion of these steps in cases where criminal resolution is nonetheless warranted, "mitigation credit" can include "up to a 50% reduction off the bottom end of the Sentencing Guidelines" range were a fine sought, and the avoidance of a third-party compliance monitor.[52] In other appropriate cases, the Department will consider a full declination.

Some commentators, such as Mr. Cole, are already predicting that the Yates Memo and its policy shift will be scrapped outright.[53] The Department's objective of encouraging corporate cooperation to help prevent and deter corporate malfeasance is an important one, and one that the business community shares. However, compelling cooperation in the manner articulated by the Yates Memo and USAM revisions may, in the end, have the counterproductive effect of driving the two sides further apart, not closer together.

Perhaps a return to the pre-Yates Memo status quo will yield one of the goals of effective criminal enforcement expressed by Larry Thompson, namely "allow[ing] corporations that are attempting to obey the law to have a little more certainty in carrying out their responsibilities and protecting the innocent shareholders and communities[] which depend on these organizations."[54]

Endnotes

i Mr. Miner is a partner in the Washington, DC office of Morgan, Lewis & Bockius LLP, where he is a member of the White Collar Litigation& Government Investigations Practice Group and serves as co-leader of the firm's Strategic Government Relations & Counseling Practice. He previously served as a federal prosecutor and as the Minority Staff Director for the United States Senate Committee on the Judiciary. He would like to thank Dallas Kaplan, an associate at the firm, for his contributions to this paper.

1 *See* Pamela H. Bucy, Trends in Corporate Criminal Prosecutions, 44 Am. Crim. L. Rev. 1287, 1292 (2007).

2 Larry D. Thompson, Keynote Speech: The Reality of Overcriminalization, 7 J.L. Econ. Pol'y 577, 578 (2011) (reproducing the comments delivered by former Deputy Attorney General Thompson at an October 21, 2010 overcriminalization symposium hosted by George Mason University and the National Association of Criminal Defense Lawyers).

3 Pursuant to Department policy, the extent to which a corporation cooperates with a government investigation can impact critical issues in addressing allegations of corporate criminality, including whether charges should be filed against the corporation in the first instance, and if so, whether the corporation is eligible for reduced penalties under the U.S. Sentencing Guidelines or for pre-trial diversion alternatives, such as non- or deferred prosecution agreements.

4 Memorandum from Larry D. Thompson, Deputy AG, to Heads of Dep't Components and U.S. Att'ys (Jan. 20, 2003) (Thompson Memo). The policy guidelines set forth in the Thompson Memo were eventually memorialized, in modified form, in the United States Attorney's Manual (USAM) (hereafter referred to only by specific chapter and provision reference), at section 9-28.000, *et seq.*

5 *Id.* at 1.

6 The Thompson Memo originally required consideration of a corporation's willingness to waive attorney-client privilege in evaluating its degree of cooperation. This requirement was reversed by the McNulty Memo in July 2005, in order to address concerns expressed by the corporate legal community that DOJ practices were "discouraging full and candid communications between corporate employees and legal counsel." Memorandum from Paul J. McNulty, Deputy AG, regarding Principles of Fed. Prosecution of Bus. Orgs. (July 2005).

7 USAM § 9-28-700 ("If a company meets the *threshold requirement* of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit" (emphasis added)).

8 *See* Department of Justice: Sally Quillian Yates, *Memorandum Re Individual Accountability for Corporate Wrongdoing,* Sept. 9, 2015, https://www.justice.gov/dag/file/769036/download.

9 Sally Quillian Yates, Deputy AG, Remarks at the NYC Bar Ass'n White Collar Crime Conf. (May 10, 2016).

10 *Former deputy AG James Cole says DOJ's new white-collar crime policy is 'impractical,'* Am. Bar Ass'n (Nov. 24, 2015), http://www.americanbar.org/news/abanews/aba-news-archives/2015/11/former_deputy_agjam.html.

11 *See* Michael Elston, *The Challenge of Cooperation: Cooperation with the Government is Good for Companies, Investors, and the Economy*, 44 Am. Crim. L. Rev. 1435, 1436 (2007).

12 Larry D. Thompson, Deputy AG, Remarks at the U. Mich. (Jan. 31, 2003).

13 *See* USAM § 9-28.700(A). DOJ's policy makes clear that a corporation's cooperation is evaluated, in large part, on the corporation's willingness to disclose relevant facts related to individual wrongdoers within the company. *Id.* ("In order for a company to receive any consideration for cooperation under this section, 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 DOJ all facts relating to that misconduct.").

14 Leslie R. Caldwell, Remarks at Am. Conf. Inst.'s 32nd Annual International Conference on Foreign Corrupt Practices Act (November 17, 2015), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-american-conference.

15 *Supra* note 8, at 3.

16 Sally Quillian Yates, Deputy AG., U.S. Dep't of Justice, Address at Am. Bankers Ass'n and Am. Bar Ass'n Money Laundering Enforcement Conf. (Nov. 16, 2015) (hereinafter Yates Remarks).

17 USAM § 9-28.210.

18 *Id.*

19 *See* "Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation[,]" which was previously located in the comment section on *corporate liability*, but which now serves as the General Principle. *See* 9-28.210(A).

20 USAM § 9-28.210(B).

21 USAM § 9-28.1300.

22 USAM § 9-28.1500.

23 USAM § 9-28.700(A).

24 *Id.*

25 USAM § 9-28.700(A) n. 1.

26 USAM § 9-28.800 ("Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. Prosecutors also should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents or to mitigate charges or sanctions against the corporation.").

27 Press Release, U.S. Dep't of Justice, New Compliance Couns. Expert Retained By the DOJ Fraud Section (Nov. 3, 2015).

28 *See generally*, Andrew Weissman & Hui Chen, Nov. 2015 Roundtable, NYU Program on Corp. Compliance and Enforcement (Nov. 13, 2015), http://www.law.nyu.edu/corporatecompliance/events/roundtable-discussion.

29 Yates Remarks, *supra* note 9.

30 *DLA Piper's 2016 Compliance & Risk Report: CCOs Under Scrutiny*, DLA Piper (April 19, 2016), https://www.dlapiper.com/en/us/news/2016/04/2016-compliance-and-risk-report/.

31 *Id.*

32 For a general discussion of the ethical issues faced by in-house counsel, *see* Renato Pontello, *Practicing In-house: Navigating Potential Internal Conflicts of Interest*, Thompson Reuters Legal Executive Inst. (May 14, 2015), http://legalexecutiveinstitute.com/practicing-in-house-navigating-potential-internal-conflicts-of-interest/.

33 Yates Remarks, *supra* note 4.

34 *See generally* Jarno J. Vanto, et al., *Employee Expectation of Privacy with Respect to Use of Employer-Owned Workplace Computers and Other Electronic Devices and Files Stored on Such Devices – Global Cases*, 19 No.4 Int'l HR J. Art 2 (Fall 2010); Glenn Gerena and Adalberto Jordan, cmt., *United States v. Doe and its Progeny: A Reevaluation of the Fifth Amendment's Application to Custodians of Corporate Records*, 40 U. Miami L. Rev. 793 (March 1983); Sarah Plotkin Paul, *Dawn Raids Here at Home? The Danger of Vanishing Privacy Expectations for Corporate Employees*, 17 St. Thomas L. Rev. 265, 266 (Winter 2004) ("Employees are particularly vulnerable in this present heyday of corporate criminal investigations, in which American law enforcement officials have an incentive to take advantage of instances when the Fourth Amendment does not apply."); *cf.* David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. Marshall L. Rev. 643 (Spring 2011).

35 Dennis E. Boyle, *Viewpoint: DOJ edict muddies roles*, Wash. Bus. J. (Jan. 8, 2016), http://www.bizjournals.com/washington/print-edition/2016/01/08/viewpoint-doj-edict-muddies-roles.html.

36 USAM § 9-28.700 n. 1 ("There may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is actually prohibited from disclosing it to the government. Under such circumstances, the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor.").

37 Stephen Dockery, *U.S. Justice Dept to Require Certification of Cooperation in Investigations*, Wall St. J. Risk & Compliance Journal (Feb. 4, 2016), http://blogs.wsj.com/riskandcompliance/2016/02/04/u-s-justice-dept-to-require-certification-of-cooperation-in-investigations/.

38 Chelsea Curfman, *AAG Caldwell Dispels Rumors of "Yates Certification" Requirement*, Perkins Coie (March 4, 2016), https://www.whitecollarbriefly.com/2016/03/04/aag-caldwell-dispels-rumors-of-yates-certification-requirement/.

39 Producing such redacted versions can often result in significant costs, especially if the review of the underlying data must occur in Europe, but also involve oversight and involvement with U.S. counsel.

40 *See* USAM § 9-28.700(A) ("If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals involved, its cooperation will not be considered a mitigating factor under this section. . . . If a company meets the threshold requirement of providing all relevant facts with respects to individuals, it will be eligible for consideration for cooperation credit.").

41 *Id.*

42 *Upjohn v. U.S.*, 449 U.S. 383 (1981). The Supreme Court held in *Upjohn* that communications by a corporation's employees to the company's counsel were privileged insofar as they concerned issues within the employee's corporate responsibilities, and the employee was aware he was being questioned in order that the corporation could obtain legal advice. *Id.* at 394-96.

43 *Id.* at §§ 9-28.710, 9-28.720.

44 *See id.* at § 9-28.720 (observing that, regardless of whether a corporation conducts a privileged investigation, "the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—not whether the corporation discloses attorney-client or work product materials. Accordingly, a corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected.").

45 USAM § 9-28.700(A).

46 USAM § 9-28.720(a).

47 USAM § 9-28.720 n. 2.

48 *Id.*

49 Stewart Bishop, *'Yates Memo' Author Defends Policy, Says Shift is in Effect*, Law360 (May 10, 2016), http://www.law360.com/whitecollar/articles/794679?nl_pk=f5ba7d08-3da8-4b6b-8110-9ea85e9ed2e2&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar.

50 Yates Remarks, *supra* note 9.

51 Memorandum from Andrew Weissman, U.S. Dep't of Justice, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" (April 5, 2016). This latest memorandum sets forth nearly a dozen requirements for companies seeking cooperation credit under the pilot program, including broadly, disclosure of relevant facts, preservation and disclosure of documents, making individuals available for DOJ interviews, and conducting transparent and coordinated internal investigations.

52 Kelly A. Moore and Eric W. Sitarchuk, *DOJ Issues New FCPA Guidance and Launches Self-Reporting Pilot Program*, Morgan Lewis (April 6, 2016), https://www.morganlewis.com/pubs/doj-issues-new-fcpa-guidance-and-launches-self-reporting-pilot-program.

53 Cole, *supra* note 10.

54 Thompson, *supra* note 2.

Notes

Notes

U.S. CHAMBER
Institute for Legal Reform

202.463.5724 main
202.463.5302 fax

1615 H Street, NW
Washington, DC 20062

instituteforlegalreform.com