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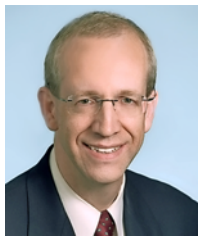
JUSTICE DEPARTMENT

Two Jenner & Block LLP attorneys take stock of the Justice Department's Yates Memo, in which federal prosecutors engaged in investigations of corporate misconduct are directed to hold individuals in the organization accountable for their misdeeds. The authors discuss several questions that have been triggered by the policy and provide a unique take on answers to those questions.

Twenty Questions Raised by the Justice Department's Yates Memorandum



BY ROBERT R. STAUFFER AND WILLIAM C. PERICAK

On Sept. 9, 2015, Deputy Attorney General (DAG) Sally Quillian Yates issued a memo on individual accountability, now known ubiquitously as the ''Yates Memo,'' describing a renewed emphasis on prosecution of individual culpable employees in the context of corporate white collar crime. The Yates Memo triggered an immediate wave of client alerts and blog posts musing about its implications. Reactions ranged the gamut, from those who said the Yates Memo is nothing new—just a reflection of long-standing policies and practices, with no practical implications for the white collar defense bar—to those who detected a sea change in how both corporations and individuals will react to government criminal investigations. The truth, as usual, is probably somewhere in the middle. The Yates Memo also prompted many questions from clients asking whether it changes how they should deal with pending investigations and how they should modify existing compliance programs in anticipation of potential future investigations.

The practical impact of the memo remains to be determined. But now that we have passed the memo's six-month anniversary and the dust has settled a bit, it seems an appropriate time to step back, take stock of what has been said about the memo in the interim, compile a list of questions that have been triggered, and venture presumptuously to add to the literature on the topic by providing our own take on some of those questions.

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Context

First, some context. In today's world, practitioners have consistently bemoaned the perceived inability of corporations faced with significant criminal prosecutions to seek exoneration from a jury. Particularly for highly-regulated companies, but to some extent for all corporate organizations, the price of a drawn-out investigation and the possibility of a criminal conviction are often seen as simply too steep. The corporation must contend not only with whatever criminal fine and restitution may be imposed, but with a variety of collateral consequences, including public relations issues and significant restrictions or prohibitions on future business, such as exclusion from participation in government health-care programs or debarment from doing business with the government. Many believe the corpora-

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tion's only alternative is to simply cut the best deal it can, which means in turn investigating its own affairs and cooperating completely with prosecutors, even when doing so results in criminal exposure for individual employees.

The implications for involved corporate employees are dramatic. Although they arguably have more at stake than does the corporation, as they may face the risk of significant jail time, their calculus may be different and they may be willing to run the risk of conviction and contest the allegations at trial. However, during the investigative phase, they are faced with difficult choices. If the corporation's attorneys wish to interview them, should they accede? What they tell the corporation may be properly conveyed to prosecutors. At the same time, if they do not cooperate with the corporation, they may lose their job. Will the firm provide and pay for counsel? And, of course, there is then the tension between the employees themselves, as employees may implicate others in order to provide a complete picture, or perhaps to shift blame or attention from themselves.

With this backdrop of competing pressures, incentives, and ethical issues, the Department of Justice has long provided guidance, in a series of memos and updates to the U.S. Attorney's Manual, outlining how it approaches prosecutorial decisions in the context of corporate criminal wrongdoing.

In 1991, the Federal Sentencing Guidelines for Organizations quantified, in mathematical terms, the benefits to corporations of maintaining effective compliance programs and voluntarily disclosing wrongdoing to the government. Other agencies quickly followed, with the Environmental Protection Agency and the Office of Inspector General of Health and Human Services, for example, taking steps to encourage self-policing and reward cooperation and disclosure.

1999 brought the issuance of a memo by Deputy Attorney General Eric Holder, ''Bringing Criminal Charges against Corporations,'' or more commonly the ''Holder Memo,'' which provided a list of eight principles for prosecutors to consider in deciding whether to prosecute a corporate wrongdoer. Among those factors were timely and voluntary disclosure and a willingness to cooperate with the government's investigation.

The DOJ guidance evolved through the 2003 memo by Deputy Attorney General Larry Thompson, ''Principles of Federal Prosecution of Business Organizations,'' or more commonly the ''Thompson Memo;'' the 2006 memo by Deputy Attorney General Paul McNulty (McNulty Memo); and the 2008 memo by Deputy Attorney General Mark Filip (Filip Memo). The Filip Memo's articulation of the factors to be considered in determining whether to prosecute a corporation continues to include ''the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.'' Along the way, these guidance memos have also evolved in their approach to the relationships between corporations and their employees on such issues as privilege waivers, advancement of fees, and joint defense agreements.

The Yates Memo is the latest in this series of pronouncements. Likely in response to criticisms of significant investigations that resulted in high-profile settlements with corporations but relatively few prosecutions of top-level employees, the memo emphasizes that ''one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.'' The memo outlines a series of steps designed to further that goal:

(1) In order to qualify for any cooperation credit, corporations must provide to the DOJ 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 DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;

(5) DOJ 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; and

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

Much of the literature and discussion by the defense bar is focused in particular on the first of these principles and whether it has immediate implications for how corporations prepare for and respond to government investigations. We proceed to identify a number of questions we have seen raised in the wake of the Yates Memo and offer our observations.

Differences From Prior Policy

1. How does the Yates Memo's approach to cooperation credit differ from prior policy?

As DAG Yates has stated in public appearances, the concept of holding individuals accountable for their role in corporate wrongdoing is nothing new. The idea of providing a benefit to corporations in terms of credit for their cooperation in providing facts relevant to individual wrongdoing is also not new. What is new is the stated policy that a corporation must provide *all* relevant factual information concerning individuals to even be *considered* for cooperation credit. In previous guidance, this was just one of several factors for determining whether, and to what extent, such credit would be provided. Now, it is the ticket that gets you in the door before the other factors even become relevant. This elevates in importance the corporation's ability and willingness to cooperate with the DOJ and provide all relevant factual information, and heightens issues surrounding the corporation's zeal for protecting its employees.

With respect to FCPA cases, the DOJ has recently released additional guidance on cooperation. In *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance*, issued April 5, 2016 (FCPA Enforcement Plan), the DOJ announced a one-year pilot program for FCPA cases and, among other things, listed a series of requirements that must be satisfied in order for a corporation to receive ''full cooperation

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credit.'' One of those requirements is, as set forth in the Yates Memo, ''disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including all facts related to involvement in the criminal activity the corporation's officers, employees, or agents.''

Thus, for FCPA cases, provision of all relevant facts relating to individual culpability is necessary not only to be considered for any cooperation credit at all, but also to be considered for ''full cooperation credit.''

2. Will the Yates Memo really change how the DOJ pursues individual wrongdoers?

The answer to this question is difficult to predict. Certainly there is a tonal difference, and internal DOJ procedures and practices have evolved. Prosecutors may well turn up the heat on corporations as they press for information relating to individuals. However, translating this new tone and these new procedures into an increase in prosecutions of individuals will be difficult. There has always been a focus on pursuing individual wrongdoers in the corporate context, but that pursuit can be challenging for a variety of reasons. It can be more difficult for prosecutors to put together a prosecutable case against an individual, knowing that they may have to ultimately convince a jury of that individual's guilt beyond a reasonable doubt. It can be much easier to put together a case against a corporation when the knowledge and acts of its employees may be imputed to it, especially if the corporation is likely to settle before trial anyway. Indeed, in large organizations, when responsibilities are diffused, or when there is no available evidence showing that a particular individual met all of the elements of the crime, it can be difficult to identify specific individuals responsible for the criminal conduct in which the corporation engaged. The Yates Memo does not diminish these hurdles, so whether the memo results in an uptick in individual prosecutions remains to be seen.

Corporations' Interactions With Prosecutors

3. Will prosecutors become more heavy-handed in overseeing internal investigations?

There has been speculation among the defense bar that this will be the case. Knowing that corporations now must be seen as providing complete cooperation with respect to individuals in order even to be considered for getting cooperation credit, prosecutors may lean on corporations more heavily, demanding that they dig deeper or cast the net more broadly in their search for relevant documents, information, and employee admissions. Some anecdotal evidence suggests that prosecutors under the Yates Memo are already doing more to direct corporations with respect to their conduct of internal investigations.

How much of this reaction is bluster, however, and how much reflects a true shift in practice is difficult to say. Even before the Yates Memo, a corporation that was concerned about its potential liability had a significant incentive to cooperate fully and openly with prosecutors as the company was investigating and to unearth facts in which prosecutors were interested. It is possible that the Yates Memo will increase the pressure corporations feel in this regard and may embolden prosecutors to insist that corporations investigate and produce specific relevant facts, but any difference will likely be incremental rather than a dramatic departure from prior practices.

4. Will the Yates Memo change what corporations share with prosecutors about individual employees?

Prosecutors have long complained about ''passive voice'' self-reporting, that is, self-reporting done in a way that shielded the identities of wrongdoers (''It was known . . .'' instead of ''corporate manager 'x' knew . . .''). Prosecutors likely will point to the Yates Memo for further leverage to obtain specifics, and corporations may well feel obliged to search out specific factual information about individuals relevant to corporate wrongdoing. However, corporations felt that pressure before the Yates Memo was issued. Corporations seeking cooperation credit were hardly in a position prior to the Yates Memo to conduct an investigation that ignored relevant facts concerning individuals or, once having unearthed those facts, to withhold them from the government, and the government had no qualms about ''pushing back'' on passive voice reporting. The Yates Memo certainly can increase the pressure to exhaustively search for factual information relating to individual employees' knowledge and intent, but again the difference is likely to be incremental and not dramatic.

5. Will corporations now feel compelled to waive the attorney-client privilege or the work-product protection?

An immediate question raised in the wake of the Yates Memo was whether, in order to obtain cooperation credit, corporations would now be subjected to, or would perceive, pressure to provide information relating to employees even if that information is inherently privileged or was gathered during the course of privileged communications. This issue has a significant history, with the Thompson Memo's recommendation that prosecutors evaluate a corporation's willingness to waive privileges in deciding whether to reward cooperation, a subsequent backlash by the defense bar, and a retrenchment from that position. The Filip Memo clearly states that ''eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection.'' It also expressly prohibits prosecutorial requests for non-factual attorney-client privileged materials.

DAG Yates has clearly stated that nothing in her memo changes that policy and that prosecutors will seek non-privileged facts rather than the substance of privileged communications. The reality may not be quite so simple. In practice, prosecutors may simply ask, ''do you intend to maintain the privilege?'' during discussions about factual information to be provided by the corporation. Or, as one practitioner recently recounted to us, a prosecutor said, ''we're not asking you to waive the privilege, but if you do your client will be in a better position.'' It is questionable whether, consistent with DOJ policy, a prosecutor can suggest that waiver will put a corporation in a better position, but even in the absence of such a prosecutorial suggestion, the corporation will certainly be asking itself whether a waiver of privilege, with a resulting more fulsome set of facts to be disclosed, will put the corporation in a better position to advocate that it should receive substantial credit for cooperation.

The impact of the Yates Memo in this respect may again be marginal, as these incentives, whether explicit or implicit, existed before the Yates Memo as well. And DAG Yates does have a point when she says that what the DOJ is interested in is the facts themselves, and facts are not privileged. The corporation may learn about the relevant facts through interviews of employees that are conducted in a privileged context, but the facts that it learns as a result of those interviews are not themselves normally privileged. However, given that cooperation against individuals is now the price of admission, the pressure to be perceived as cooperating fully—which may be perceived as including the production of privileged materials—has certainly increased.

6. Will corporations now have to concede that criminal wrongdoing occurred?

The question has been raised as to whether the Yates Memo deprives corporations of the opportunity to argue that the facts revealed by the investigation do not amount to a crime. DAG Yates has disavowed any such inference, and we see nothing in the Yates Memo that leads to that conclusion. There is nothing inconsistent in sharing all relevant facts with prosecutors and arguing that those facts do not amount to criminal wrongdoing.

How Corporations Conduct Internal Investigations

7. Will corporations be more aggressive in their internal investigations?

Many in the defense bar have speculated that the Yates Memo will result in corporations accelerating the timetable for completing internal investigations, increasing the intensity of those investigations, and broadening their scope. There is a concern in some quarters that a failure to unearth every relevant fact may make it more difficult to obtain cooperation credit.

The talk out of the DOJ is different. In her public comments, DAG Yates has emphasized that corporations do not need ''to boil the ocean.'' She has stated that the department will understand there are times when the relevant facts simply cannot be ascertained, and has suggested that when internal investigators have questions about how far they need to go or which facts they need to pursue, they should simply do what they have always done—pick up the phone and call the prosecutors. She has emphasized that an inability to unearth a relevant fact does not put the corporation out of luck, observing that there is a ''good faith element'' to the process.

The reality, of course, is that how this plays out will depend on the interactions between particular corporate counsel and particular prosecutors. We take DAG Yates at her word with respect to the department's policies. At the same time, there is always the danger that individual prosecutors will suspect that a professed inability by a corporation's lawyers to unearth relevant facts instead masks an unwillingness to unearth or share those facts because the facts reflect negatively on the corporation or certain of its employees. Once again, that dynamic has existed regardless of the Yates Memo, but there would seem to be a significant possibility that the Yates Memo will increase that tension in particular instances.

8. Will corporations investigate less aggressively?

Some of the same commentators who speculate that corporations may be more aggressive in their investigations in an attempt to ensure the receipt of cooperation credit at the same time speculate that some corporations will find the Yates Memo to be a disincentive to conduct a full investigation. The theory is that corporations that believe they will not be able to obtain cooperation credit unless they undertake a vast, burdensome and expensive investigative effort, which will lead to finger-pointing at executives and other employees and resulting damage to their executive team and to employee morale, will decide it is simply better to take the risks and not even try to obtain credit for cooperation. In other words, if the DOJ is taking an all-or-nothing approach to cooperation, and the ''all'' alternative seems too burdensome and damaging, perhaps the corporations will opt for the ''nothing'' alternative. This may particularly be true with respect to corporations headquartered abroad, which may operate with a different mindset with respect to employee privacy and find it culturally less palatable to provide prosecutors with detailed factual information implicating employees in potential wrongdoing.

Domestically, our reaction is that this concern is misplaced. Corporations have long had an incentive to investigate misconduct and provide the results of their investigation to prosecutors, and we have not perceived the prosecutors' hunger for facts relating to individuals as disincentivizing corporations from investigating. Indeed, corporations have other incentives to investigate, including their own interests in knowing whether misconduct has occurred, in disciplining bad actors, and in using that experience as a roadmap for preventing future misconduct. Corporations may also have difficulty explaining to shareholders that in the face of alleged wrongdoing and the potential to obtain a better outcome by cooperating, they circled the wagons and ignored the problem.

The concern may be well–taken, however, with respect to organizations whose corporate culture makes them unable to stomach the idea of ''turning in'' their own employees. Although the Yates Memo is not new with respect to providing an incentive to do this, it does represent a tonal change that in some instances could conceivably have the ironic effect of decreasing cooperation.

9. Will corporations be more likely to point the fingers at individuals?

It has been suggested that the Yates Memo will cause cooperating corporations to be more hasty and less cautious in identifying and blaming individuals for conduct that has placed the corporation under investigation.

Based on DAG Yates's remarks, that need not be the case. As she has said, the department is not asking corporations to designate whether individuals are actually culpable or to build a prosecutable case for the government; rather, the department is simply asking for the relevant facts and the department will decide whether those facts suggest criminality.

Academically, DAG Yates certainly has a point. There is a difference between telling the prosecutors, ''this is what the employee said and this is what the employee did,'' and saying ''this employee committed accounting fraud.'' In practical terms, however, a corporation can hardly be excused from thinking that it will be able to

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cut a better deal, and will be seen more favorably by prosecutors, if it can serve up employees on a silver platter. To repeat what has become an ongoing theme here, this incentive existed prior to the Yates Memo as well, and the Yates Memo may increase this incentive only to a degree. However, given the tonal difference in how the Yates Memo ramps up the rhetoric about prosecution of individuals, corporations may well feel increased pressure to blame specific individuals for violating the law even if that approach is not required by official department policy.

10. Will the Yates Memo inhibit corporations from making voluntary disclosures?

There has been some speculation that corporations are now less likely to voluntarily disclose wrongdoing to the government when they know the result will be government pressure to undertake a complete internal investigation that includes the provision of all relevant factual information relating to employees. Many corporations are already concerned that voluntary disclosures may lead to unnecessarily heavy-handed government investigations. A decision to voluntary disclose may be even more likely if the corporation believes it will not be able to unearth sufficient evidence of individual wrongdoing to satisfy prosecutors.

The department has gone to pains to try to separate the issue of cooperation from the issue of voluntary disclosure, and DAG Yates has made clear that those are two separate issues. In practice, it is not so easy to separate the two factors, as voluntary disclosure will almost certainly be accompanied by a government investigation, a government request for an internal investigation, or both, unless the internal investigation has already been done and the prosecution accepts it as complete. That has been true since before the Yates Memo, but the Yates Memo may lead corporations to have additional concerns about the extent and burden of the internal investigation they will be required to pursue. Nonetheless, the decision whether to voluntarily disclose is influenced by many different factors, including the seriousness and recency of the wrongdoing and the overall enforcement context. In light of these case-specific factors and the continued incentives to voluntarily disclose in appropriate cases, we believe it unlikely that the Yates Memo will have a chilling effect on voluntary disclosures in most instances.

Indeed, possibly in light of concerns that it is difficult to confirm or quantify the benefit to be gained from voluntary disclosure, the recent FCPA Enforcement Plan attempts to further incentivize voluntary disclosures by quantifying the benefit that may be obtained by a corporation that has voluntarily self-disclosed FCPA misconduct, has fully cooperated, and has timely and appropriately remediated—up to a 50 percent reduction off the bottom end of the U.S. Sentencing Guidelines fine range, avoidance of a monitor, and consideration of a declination of prosecution.

Skeptics will argue that this program is more about the message than it is about tangible changes, as the government may still back into its calculations in order to receive a desired result, but nonetheless the messaging is important and will not be overlooked by corporations faced with a decision as to whether to disclose misconduct.

Interactions Between Corporations and Employees

11. Will corporations now be more heavy-handed in seeking and conducting interview of employees?

Employees whose cooperation is sought through interviews or otherwise can feel significant pressure to cooperate. Employees may fear loss of employment and in some cases loss of other financial benefits, and they may wonder whether failing to cooperate will result in the corporation deciding to stop providing counsel or to draw adverse inferences from the lack of cooperation and communicate those adverse inferences to prosecutors. Applying these types of pressure at the request of the government may be improper under *United States v. Stein*, 541 F.2d 130 (2d Cir. 2008 (conditioning and ultimately stopping advancement of fees as result of government's ''overwhelming influence'' constituted state action and unconstitutionally interfered with employees' relationship with counsel and ability to mount a defense). However, if the employee is concerned about such factors without receiving express pressure, or if a corporation were to bring these pressures to bear without having been asked by the government to do so, there is likely no legal remedy for the employee. The employee is faced with the unpalatable choice of cooperating, and perhaps providing the very evidence that will be used to prosecute him or her, or losing his or her job and access to counsel.

Corporations are certainly aware of these difficulties, and how they deal with an employee who may be reluctant to cooperate has long been a difficult issue for counsel representing the corporation. Often the corporation will decide that it wants the information from the individual regardless of any interest the employee may have to the contrary, and insist on the employee's cooperation as a condition of the individual's continued employment. Does the Yates Memo increase the likelihood that the corporation will take that position? The case can be made that it would, as corporations have even more incentive now to extract relevant information from employees than they did before. However, even before the Yates Memo was issued, in our experience it would be highly unusual for a corporation to decide not to interview an employee, and forgo the potentially relevant information that the employee may have, simply because the employee was uncomfortable cooperating.

12. Does the Yates Memo affect the approach taken by corporations to providing counsel for individual employees?

One of the difficult decisions often faced by counsel who conduct internal investigations for corporate clients is how to deal with the employee who, when asked for an interview, asks whether he or she needs an attorney (the answer is typically ''we cannot advise you on that issue'') or whether the employee can bring an attorney to the interview. Opinions and practices on this issue are varied. We have heard practitioners opine that if an individual wants to bring a lawyer, the corporation is obligated to let her do so. We have heard other practitioners suggest that an employee has a complete duty to the corporation to cooperate in the investigation and has no right to adjourn or postpone an interview in order to identify and retain a lawyer. A full discussion of the potential legal and ethical implications of this issue

is beyond the scope of this article. However, the Yates Memo would seem to move the needle slightly closer toward the decision to allow an employee to bring counsel to an interview when the employee makes such a request. It has always been the case that an employee being interviewed runs the risk that the statements she makes to the investigator will be later communicated to prosecutors. However, the Yates Memo appears to make the possibility of this scenario more likely. If we assume that all relevant information provided by the employee during the interview will then be communicated directly to prosecutors, a scenario made more likely by the Yates Memo, then the individual has more reason for insisting that counsel should be allowed to attend the interview.

13. Does the Yates Memo change the approach of corporations in paying the fees for attorneys representing individual employees?

The Filip Memo prohibits prosecutors from considering a corporation's decision to advance legal fees to employees when assessing a corporation's cooperation. The DOJ has said that the Yates Memo does not affect that principle. In instances where a corporation is required by its bylaws or by contract to provide attorneys' fees for employees, the Yates Memo should not change anything. But what about instances where the fee decision is within the discretion of the corporation? Suppose the corporation is providing fees, on a discretionary basis, for an individual's counsel and the individual is cooperating less than the corporation would like—refusing to make himself available for an internal interview, refusing to comply with a government interview request, refusing to provide relevant materials, etc. Will the corporation be more likely at that point to decide to stop paying the lawyer's fees?

The corporation cannot tell the lawyer how best to represent the lawyer's client, and even if it did, the lawyer would have an ethical obligation to continue to act in the client's best interests. At the same time, however, a corporation that wants to make sure that prosecutors believe it is providing complete cooperation, such as is necessary to get its foot in the door for a cooperation credit, may legitimately ask why it is paying the legal fees for employees who are impeding the corporation's ability to provide the full cooperation it wants to provide, and may decide to stop paying the legal fees that it is not obligated to pay in the first place. This tension existed before the Yates Memo, and it is probably aggravated by the tonal shift that the Yates Memo brings. The answers are not easy. Different lawyers will probably bring different approaches to this question, and their decisions will vary depending on individual circumstances. Some guidance may be found in *Stein* (*supra*), but that decision on its face applies only where the corporation's decisions are prompted by explicit directions or concerns from prosecutors.

14. Does the Yates Memo affect the manner in which interviews are conducted?

Knowing that a prosecutor is likely now to give enhanced scrutiny to the corporation's efforts to provide relevant information concerning individuals, questions arise as to whether a corporation conducting an internal investigation will want to interview employees more quickly than it otherwise would, or conversely might postpone interviews and defer to the government to conduct those interviews.

There may be some marginal pressure to do interviews more quickly where the corporation knows that prosecutors will be closely scrutinizing the extent of its cooperation with respect to individuals. However, the timing of interviews is driven by factors other than the Yates Memo, and those issues are likely to have a greater impact on timing than the Yates Memo. Those factors include the current state of the investigators' knowledge based on other information at their disposal, such as document review and other interviews; regulatory or prosecutorial pressure to complete the investigation quickly; and the presence or absence of continuing harm resulting from the underlying conduct.

The question also arises whether the manner in which the interviews are conducted will be different in light of the Yates Memo. It does seem likely that corporations will now have a greater incentive to confer with the government during the interview process. A corporation that plans to seek cooperation credit wants to be sure it is gathering the facts that the prosecutors want to know, and thus may have an incentive to confer with the prosecutors before the interviews to make sure it covers all the questions the prosecutors want answered.

15. Does the Yates Memo affect what investigators tell employees at the outset of an interview?

Any attorney who conducts an internal investigation is familiar with the ''*Upjohn* warnings'' stemming from *Upjohn Co. v. United States*, 449 U.S. 383 (1981), in which the U.S. Supreme Court held that communications between a corporation's counsel and its lower level employees were protected where a number of factors were present. *Upjohn* warnings can be given in greater or less degree of detail, but the basic warnings are that:

- the questioners are counsel for the corporate entity and not the individual being interviewed;
- the attorneys are conducting the interview in order to provide legal advice to the corporation;
- the interview is accordingly governed by an attorney-client privilege;
- this privilege is held by the company and not by the individual and it is thus the company's prerogative to decide what to do with the information; and
- the individual is expected to keep the contents of the interview confidential in order to protect the privilege.

The question arises, in light of the Yates Memo, whether it would be prudent to provide more than this. In particular, should employees be told that what they tell investigators is ''likely'' (or in appropriate cases, ''certainly'') to be conveyed to prosecutors, and/or should they be told that the company will be seeking cooperation credit from the government and that the government will not provide credit for cooperation unless the corporation shares all relevant information concerning individuals with prosecutors.

This question of how strong an *Upjohn* warning to give is one that investigating counsel deal with on a regular basis. The *Upjohn* warnings can be given in varying degrees of detail according to the preferences

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and beliefs of the counsel conducting the investigation and according to the facts and circumstances of a particular investigation, but a more fulsome disclosure may now be warranted. However, there is little guidance for answering these kinds of questions and there does not promise to be any definitive or authoritative guidance on these issues any time soon.

16. Does the Yates Memo affect decisions to enter into joint defense agreements?

In a joint defense agreement, multiple parties (such as co-employees, or the corporation and one or more employees) share privileged information with each other under an agreement that the privileged information will not be shared with third parties and will remain governed by the attorney-client privilege. Such agreements can range from a one-sentence understanding on a phone call to an elaborate written agreement. Joint defense agreements between corporations and their employees have become relatively unusual given the interests that corporations now have in providing full cooperation, including information gathered from employees, to prosecutors. Nevertheless, they still sometimes arise, such as when the corporation believes that it may get more fulsome disclosures of information through a joint defense arrangement than it would be able to obtain otherwise.

The question has arisen whether the Yates Memo makes joint defense agreements between corporations and their employees less likely. Under the Filip Memo, the existence of a joint defense agreement should not enter into the government's determination of whether a company has fully cooperated. But the question still remains, as it does with respect to payment of fees or a refusal to waive privilege, whether a joint defense agreement may influence the government's perceptions as to the extent of cooperation. Aside from that perception issue, we are skeptical that the Yates Memo will have much impact on the decision whether to enter into a joint defense agreement. As noted above, joint defense agreements in this context have already diminished in frequency. And the calculus for corporations is probably not much different under the Yates Memo than it was before—they must assess whether, under the facts and circumstances of a particular case, they are likely to learn more with a joint defense agreement in place than they can learn without one, and whether they are better or worse off knowing additional information but not being able to disclose it. Quite often, given the other tools available to it (as noted in question 11 above), a corporation does not need the added incentive of a joint defense agreement in order to obtain information from employees.

17. Will the Yates Memo affect what information and documents the corporation's counsel shares with employees' counsel?

When a corporation and its employees are the subject of a criminal investigation, counsel for the corporation may be faced with requests by employees' counsel for information and documents relevant to the defense of those individuals. For example, counsel for an individual employee may want to see copies of any e-mails that the employee sent or received relating to the topic under investigation—or even copies of e-mails relevant to the topic that the employee did not send or receive. In some instances, corporate counsel may decide that it has no reason to provide such materials to the individual's counsel. In other instances, the corporation may decide that it would be appropriate for counsel to see at least those documents that the employee would have seen in the normal course of business anyway—and may decide that with the benefit of those documents, the individual's counsel may be able to assist the corporation in identifying potential factual or legal defenses.

The question arises whether the Yates Memo, with its emphasis on providing prosecutors with full cooperation concerning individuals, gives corporations more of an incentive to withhold relevant information from counsel for individuals for fear that providing such information will be perceived as inconsistent with full government cooperation, or even perceived as in some way obstructive of the investigation. It can certainly be argued that providing an individual with a copy of a document that the individual already saw at some point in his or her daily work is not inconsistent with government cooperation and indeed is perfectly appropriate. It is also easy to see, however, that an investigator or prosecutor may want to be able to show such a document to an employee during an interview and get an immediate reaction without having given the employee an opportunity to contrive an explanation. Once again, tension between these two competing interests is not new. However, the Yates Memo does call increased attention to this tension given its greater tonal emphasis on full cooperation with respect to information relevant to employees. Whether the Yates Memo will have an impact in practice on how corporations address these issues remains to be seen and will be heavily dependent on the facts of particular cases.

Will the Yates Memo Change The Way Employees Behave?

18. Will the Yates Memo make employees less willing to cooperate with internal investigations?

As noted earlier, individuals can be faced with the difficult decision of whether to submit to an internal investigative interview or risk losing their job. The question arises whether the Yates Memo tips the balance such that employees are more likely to accept the consequences and decline to participate in internal interviews. DAG Yates has observed that this tension has always existed and that her memo does not change the analysis. Many practitioners, however, have expressed concern that the memo will have a chilling effect on cooperation by employees. Indeed, even if the competing interests are similar to what they have always been, just the publicity surrounding the Yates Memo may elevate the sensitivity employees have to the risks involved in an interview. It is one thing to hear the *Upjohn* warnings at the beginning of an interview, treat them as legal boilerplate, and then proceed with an interview; the same *Upjohn* warnings may be perceived very differently by an employee who has heard, or has been advised by counsel, that the Yates Memo increases the incentive for corporations to point the finger at employees. The downside, of course, remains the same—individuals who do not cooperate risk losing their jobs. However, they may decide that losing the job is better than increasing the risk of jail time.

There is some anecdotal evidence that such a chilling effect is already occurring. However, for the most part

this chilling effect appears speculative. We suspect that the chilling effect will be minimal, and that employees will prefer to retain their employment status rather than decline an interview, risk losing their job, and concomitantly risk the perception that they would have incriminated themselves if they had submitted to an interview. Time, of course, will tell.

19. Will the Yates Memo impede the truth seeking process?

The ultimate goal, of course, of both the corporation's internal investigation and any DOJ criminal investigation is to arrive at the truth. One of the fundamental questions that arises is whether the Yates Memo will make this goal more achievable, be an impediment, or have no effect. Ostensibly it is designed to further this goal, by encouraging the full and frank disclosure of relevant facts needed to arrive at the truth. However, there is a contrary view. Individuals who are now more aware of a danger that what they say to corporate investigators will be shared with prosecutors may have an increased incentive to shade their statements, believing it is important to deliver evidence against their superiors or against their peers, and may be less likely to provide information that they believe could be used to incriminate themselves. If employees are less likely to cooperate at all, that will additionally impede the corporation's ability to unearth and disclose relevant facts.

If the Yates Memo indeed prompts employees to risk their jobs rather than submit to interviews, that will certainly impede the truth seeking process. However, we are not convinced that the Yates Memo will have much of an impact on whether employees otherwise tell the truth when interviewed. That people may shade the truth (whether intentionally or not) in order to cast themselves in a better light is a given, and employees interviewed by corporate counsel have always had an incentive to minimize their own culpability. On the other hand, employees who have engaged in wrongdoing intended to benefit the corporation have sometimes been extremely forthcoming when interviewed by corporate counsel out of a belief (notwithstanding the *Upjohn* warnings) that they are confiding in someone ''on the same team.'' An employee who has been made aware of the Yates Memo and its implications may be more likely to stop and think about the fact that not only will that information be considered by the corporation and by its counsel and by the individual's own counsel, if present, but also by a prosecutor, before deciding how candid of an answer to give. Nevertheless, the truth-seeking process during an internal investigation will always be an imperfect one, depending on the skill and experience of the investigators to identify and interpret the relevant documents and make appropriate assessments of the credibility of witnesses. That was the case before the Yates Memo, and will remain the case in the future.

Impact on Compliance Programs

20. Is there anything corporations should be doing, in light of the Yates Memo, in anticipation of potential future investigations?

Many corporations are wondering whether compliance programs or procedures governing internal investigations should be modified in light of the Yates Memo. Since at least the 1991 adoption of the sentencing guidelines for organizations, corporations have had a significant incentive to maintain effective compliance programs. Those incentives have, as discussed above, only increased over time, and most corporations are now fully aware of the benefits of a strong compliance program and have implemented compliance programs that are effective in various degrees. The Yates Memo does not create a new incentive to adopt a strong compliance program—that incentive is significant already. Nor does the Yates Memo change what a compliance program should include, and there is a plethora of guidance in the sentencing guidelines—in agency promulgations, in industry literature, and in advice from consultants and attorneys—as to what a compliance program should contain and how it can be made effective. Many companies now also have internal procedures for conducting internal investigations, in varying degrees of detail. The Yates Memo does not, in our view, typically necessitate changes to those procedures, which should retain flexibility to allow investigations to be tailored to the needs of individual facts and circumstances.

However, one of the hallmarks of an effective compliance program is that it is continually reevaluated. As the Sentencing Guidelines say, an organization should take reasonable steps to ''evaluate periodically the effectiveness of the organization's compliance and ethics program'' and should ''periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify'' its program to reduce the risk of criminal conduct.

The attention the Yates Memo has received in the corporate community provides an excellent opportunity and incentive for corporations to take this advice to heart and evaluate their compliance programs to ensure that they reflect current best practices and adequately address the particular risks that an individual organization faces. Thus the Yates Memo provides not so much a reason to change an existing program as a useful reminder of the importance of ongoing reevaluation of a corporation's compliance program.

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