THE YATES MEMORANDUM

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Introduction

One of the harshest and most common critiques of the federal government's response to the subprime mortgage crisis of 2007-09 has been that the Department of Justice (DOJ) pursued enforcement actions against financial institutions but failed to prosecute any senior officers employed by those organizations.[1] Likely in response to this critique, in September 2015 then-DOJ Deputy Attorney General Sally Yates issued a document entitled "Individual Accountability for Corporate Wrongdoing,"[2] commonly referred to as the Yates Memorandum, that was designed to reaffirm the DOJ's commitment to hold executives and other individuals accountable for corporate misconduct.[3]

This Article examines a spectrum of issues raised by the Yates Memorandum, many of which are ethical and many of which concern the international application of the document. The Article proceeds in four parts. Part I examines the background of the Yates Memorandum, including its five predecessor memoranda and its prospects in the Donald Trump era. Part II analyzes the DOJ's historical failure to prosecute individuals employed by business organizations engaged in misconduct. Part III examines the impact of the Yates Memorandum with respect to four ethical issues: (A) waiver of attorney-client privilege, (B) the conduct of internal investigations, including the provision of *Upjohn* warnings and the retention of separate counsel, (C) the use of joint representation and defense agreements, and (D) civil enforcement by the DOJ. Part IV analyzes the application of the Yates Memorandum in four specific subject areas, three of which are international in scope: (A) foreign corruption (Foreign Corrupt Practices Act), (B) export controls and economic sanctions, (C) antitrust (international cartels), and (D) health care fraud (False Claims Act). The Article concludes that the adoption of the Yates Memorandum has been a positive development with unintended negative consequences, and it proposes some reforms.

I. Adoption of the Yates Memorandum

Part I of this Article examines the background of the Yates Memorandum, including the history of the document's five predecessor memoranda.

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[1] *See, e.g.*, Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1849 (2015) ("The criticisms of federal failures to prosecute top executives and officers after high-profile corporate crimes, particularly after the Global Financial criss, have been unrelenting.")..

[2] U.S. Dep't of Justice, Memorandum from Sally Yates to All Component Heads and U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

[3] *See* Robert R. Stauffer & William C. Pericak, *Twenty Questions Raised by the Justice Department's Yates Memorandum*, 99 BLOOMBERG BNA CRIM. L. REP. 191 (May 18, 2016), https://jenner.com/system/assets/publications/15188/original/Stauffer_Pericak_Bloomberg_May_2016.pdf?1463730304 (stating that the Yates Memorandum likely is a response to criticism of investigations that resulted in high-profile settlements with corporations but relatively few prosecutions of top-level employees).

A. Deputy Attorney General Sally Yates Issues the Memorandum

The Yates Memorandum was issued on September 9, 2015. It was the product of an internal working group of DOJ attorneys who identified policies and practices that could be modified to pursue individual corporate wrongdoers,[4] but does not appear to have drafted in consultation with members of the white collar defense bar. The Yates Memorandum observes that "[o]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing,"[5] and identifies as its purpose the amendment of DOJ policies and procedures to most effectively pursue the foregoing individuals.[6] It then outlines six key steps to strengthen DOJ's pursuit of individual corporate wrongdoing. Those steps are discussed below.

First, to be eligible for any cooperation credit, corporations must provide to the DOJ all relevant facts about the individuals involved in corporate misconduct.[7] Companies cannot selectively choose what facts to disclose. They must identify all individuals involved in or responsible for the misconduct regardless of their position, status, or seniority, and provide all facts relating to that misconduct. Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for cooperation credit. At that point the traditional factors for assessing cooperation will be assessed. These include the timeliness of cooperation, the diligence, thoroughness, and speed of internal investigation, and the proactive nature of cooperation.

In February 2016 the DOJ underscored the necessity of providing all relevant facts by reportedly adopting a certification requirement, pursuant to which no settlement agreement can be finalized until the settling company has certified its full disclosure of all non-privileged information about individuals involved in wrongdoing.[8] The likely purpose of such a requirement would be to permit criminal prosecution of both corporate and individual signatories if the DOJ later determines that the certification was inaccurate.[9] Subsequently, Assistant

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[4] Latham & Watkins, Client Alert Commentary, *DOJ Guidance Prioritizes Individuals in Criminal and Civil Corporate Enforcement Actions* 1 (Sept. 15, 2015), https://www.lw.com/thoughtLeadership/lw-yates-memo-enforcement-actions-prioritize-individuals.

[5] U.S. Dep't of Justice, Memorandum from Sally Yates to All Component Heads and U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* 1 (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

[6] *Id.*

[7] *Id.*

[8] *See* Stephen Dockery, *U.S. Justice Dept to Require Certification of Cooperation in Investigations*, WALL ST. J. WSJ.COM (Feb. 4, 2016, 1:58 AM EST), https://blogs.wsj.com/riskandcompliance/2016/02/04/u-s-justice-dept-to-require-certification-of-cooperation-in-investigations/.

[9] Michael P. Kelly & Ruth K. Mandelbaum, *Are the Yates Memorandum and the Federal Judiciary's Concerns About Over-Criminalization Destined to Collide?*, 53 AM. CRIM. L. REV. 899, 911 (2016).

Attorney General Leslie Caldwell refuted this report,[10] but it remains unclear if certification will be required at some point.

Second, both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.[11] There is some dispute as to whether this item represents a departure. According to some defense counsel, the focus on individuals in both civil and criminal investigations was the standard practice in many areas even before the Yates Memorandum was issued.[12] Others disagree, and assert that the DOJ's standard pre-Yates practice had been to first focus on resolving cases against corporations and then to focus on individuals.[13] In any event, the Yates Memorandum establishes the best practice that both criminal and civil corporate investigations should focus on individuals from the inception.

Third, criminal and civil attorneys handling corporate investigations should be in routine communication with one another.[14] If the DOJ decides not to pursue a criminal action against an individual, its criminal attorneys should confer with their civil counterparts so they can make an assessment under applicable civil statutes. It has long been policy at the DOJ that its prosecutors and civil attorneys handling white-collar matters should timely communicate, coordinate, and cooperate with one another to the fullest extent appropriate to the case and as permissible by law.[15] The Yates Memorandum reinforces this policy and expands it, by providing that criminal attorneys should notify civil attorneys as early as permissible of potential civil liability, and vice versa. This increased cooperation may result in both more civil actions where evidence fails to satisfy the higher criminal burden of proof and more criminal charges stemming from civil investigations.

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[10] *See* Chelsea Curfman, *AAG Caldwell Dispels Rumors of "Yates Certification" Requirement*, Perkins Coie (Mar. 4, 2016), https://www.perkinscoie.com/en/news-insights/aag-caldwell-dispels-rumors-of-yates-certification-requirement.html.

[11] U.S. Dep't of Justice, Memorandum from Sally Yates to All Component Heads and U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

[12] *See* Ropes & Gray, Government Enforcement/White Collar Crime Alert, *The Yates Memo: Have the Rules Really Changed?* 4 (Mar. 29, 2016), https://www.ropesgray.com/newsroom/news/2016/03/Attorneys-Examine-The-Yates-Memo-and-Changes-to-Individual-Prosecutions.aspx; Michael P. Kelly & Ruth K. Mandelbaum, *Are the Yates Memorandum and the Federal Judiciary's Concerns About Over-Criminalization Destined to Collide?*, 53 AM. CRIM. L. REV. 899, 911-12 (2016) ("Prior to the Yates Memorandum, in our experience, nearly every federal prosecutor would evaluate the potential exposure of identifiable individuals at the beginning of the investigation.").

[13] William E. Lawler, III & Jeremy Keeney, *DOJ's Yates Memorandum: Focus Enforcement Efforts on Individuals*, 83 DEFENSE COUNSEL J. 200, 202 (2016).

[14] U.S. Dep't of Justice, Memorandum from Sally Yates to All Component Heads and U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

[15] U.S. Attorneys' Manual, Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings, Title I, Ch. 1-12.000 (Sept. 2008). *See also* Ropes & Gray, Government Enforcement/White Collar Crime Alert, *The Yates Memo: Have the Rules Really Changed?* 5 (Mar. 29, 2016), https://www.ropesgray.com/newsroom/news/2016/03/Attorneys-Examine-The-Yates-Memo-and-Changes-to-Individual-Prosecutions.aspx ("Cooperation between criminal and civil teams at USAOs is already a common practice and does not represent a major policy change.").

Fourth, absent extraordinary circumstances or approved departmental policy, no corporate resolution will provide protection from criminal or civil liability for any individuals.[16] Any such release must be approved in writing by the relevant Assistant Attorney General or U.S. Attorney. This is a departure, inasmuch as pre-Yates Memorandum the release of all individuals was a "fairly common component of corporate resolutions."[17]

Fifth, corporate cases should not be resolved without a clear plan to resolve related individual cases before the statutes of limitations expires and declinations in such cases must be memorialized.[18] If there is a corporate resolution, the prosecution or corporate authorization memorandum should include a discussion of potentially liable individuals, the status of those investigations, and the investigative plan to bring those matters to resolution. Prior to the Yates Memorandum it was not unusual for prosecutors to defer decisions on individual criminal charges until late in an investigation. Because complex criminal investigations can take years to resolve, this delay enabled individuals to run down the statute of limitations.[19]

Sixth, civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay a monetary penalty.[20] This item also reflects a policy change. Previously, an individual's inability to pay deterred civil suits by the DOJ—the rationale was that it would be a poor use of resources to pursue a civil case with minimal prospects of a payout.[21]

B. Predecessor Memoranda

The Yates Memorandum was the sixth iteration of policy documents issued by the DOJ beginning in 1999 concerning the federal prosecution of corporations. The next part of this Article briefly traces the history of the five prior memoranda.

1. The Holder Memorandum

In June 1999 the DOJ issued the Principles of Federal Prosecution of Business Organizations to delineate and standardize the factors to be considered by federal prosecutors

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[16] U.S. Dep't of Justice, Memorandum from Sally Yates to All Component Heads and U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

[17] Ropes & Gray, Government Enforcement/White Collar Crime Alert, *The Yates Memo: Have the Rules Really Changed?* 4 (Mar. 29, 2016), https://www.ropesgray.com/newsroom/news/2016/03/Attorneys-Examine-The-Yates-Memo-and-Changes-to-Individual-Prosecutions.aspx.

[18] U.S. Dep't of Justice, Memorandum from Sally Yates to All Component Heads and U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

[19] Nicolas Bourtin, *Expert Q&A on the DOJ's Yates Memo*, PRACTICAL LAW 16, 18 (Apr./May 2016).

[20] U.S. Dep't of Justice, Memorandum from Sally Yates to All Component Heads and U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

[21] Ropes & Gray, Government Enforcement/White Collar Crime Alert, *The Yates Memo: Have the Rules Really Changed?* 4 (Mar. 29, 2016), https://www.ropesgray.com/newsroom/news/2016/03/Attorneys-Examine-The-Yates-Memo-and-Changes-to-Individual-Prosecutions.aspx.

when making charging decisions against corporations (the Principles).[22] The Principles, which were advisory, have been commonly referred to as the Holder Memorandum because they were authored by then-Deputy Attorney General Eric Holder.

Before the Holder Memorandum was issued the DOJ had no consistent policy and had issued no official guidance concerning prosecution of business organizations. Prosecutors contemplating the filing of charges enjoyed substantial discretion to consider factors they deemed relevant, in addition to considering policies generally governing federal enforcement.[23]

The Holder Memorandum specified that generally corporations should be treated in the same manner as individuals during the course of a criminal investigation, so that prosecutors should consider all of the factors that are outlined in the United States Attorney's Manual (USAM)—which provides guidance to DOJ prosecutors nationwide—and are normally considered during the exercise of prosecutorial discretion. These include the sufficiency of the evidence, the likelihood of success at trial, and the deterrent, rehabilitative, and other consequences of conviction.[24]

The Holder Memorandum identified eight additional factors to be considered. The fourth of these factors generated the most controversy. It was "[t]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigations of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges. . . ."[25] The document authorized prosecutors to request privilege waivers in "appropriate circumstances,"[26] which were left undefined, and it further specified that waiver did not automatically entitle a corporation to immunity from prosecution. According to some critics, the Holder Memorandum led to numerous companies waiving privilege in order to obtain leniency from the DOJ.[27] However, the incidence of waiver under the document was never quantified.

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[22] U.S. Dep't of Justice, Memorandum from Deputy Attorney General Eric H. Holder, Jr. to All Component Heads and U.S. Attorneys, *Bringing Criminal Charges Against Corporations* (June 16, 1999), https://www.justice.gov/sites/ default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

[23] Gideon Mark & Thomas C. Pearson, *Corporate Cooperation During Investigations and Audits*, 13 STAN. J. L. BUS. & FIN. 1, 2 (2007).

[24] U.S. Dep't of Justice, Memorandum from Deputy Attorney General Eric H. Holder, Jr. to All Component Heads and U.S. Attorneys, *Bringing Criminal Charges Against Corporations* Sec. II(A) (June 16, 1999), https://www.justice. gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

[25] *Id.* The additional factors were: "(1) The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any governing the prosecution of corporations for particular categories of crime. . . ; (2) The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, wrongdoing by corporate management. . .; (3) The corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it. . . ; (5) The existence and adequacy of the corporation's compliance program. . .; (6) The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies. . .; (7) Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable. . .; (8) The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions. . . . " *Id.*

[26] *Id.* at Sec. VII(B).

[27] Beth A. Wilkinson & Alex Young K. Oh, *The Principles of Federal Prosecution of Business Organizations: A Ten-Year Anniversary Perspective*, 27 NEW YORK STATE BAR ASS'N INSIDE 8, 8 (Fall 2009).

2. The Thompson Memorandum

The first revision of the Principles was issued in 2003 by then-Deputy Attorney General Larry D. Thompson, in the wake of a string of corporate scandals that ensnared Enron, WorldCom, and other companies.[28] This document, commonly referred to as the Thompson Memorandum, reiterated the Holder Memorandum's eight factors that federal prosecutors should consider in determining whether to charge a business organization—including the contentious fourth factor regarding waiver of privilege[29]—and added a ninth: the adequacy of the prosecution of the individuals responsible for the corporation's malfeasance. The revised guidelines indicate that "[o]nly rarely should provable individual culpability not be pursued, even in the face of offers of corporate guilty pleas."[30] The Thompson Memorandum also highlighted that the main focus of its revisions was "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."[31]

Whereas the Holder Memorandum was discretionary, the Thompson Memorandum was not—it required that its provisions be followed by all federal prosecutors.[32] The latter document retained its predecessor's language about waiver of the attorney-client privilege not being an absolute requirement, but it also "ushered in a new era in which fear of being labeled uncooperative—and the charging and sentencing implications attendant to such a stigma—led to more waivers requested and more waivers obtained."[33] The Thompson Memorandum was widely criticized by defense counsel and other observers.[34]

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[28] U.S. Dep't of Justice, Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and U.S. Attorneys, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf.

[29] *See* Robert Zachary Beasley, Note, *A Legislative Solution: Solving the Contemporary Challenge of Forced Waiver of Privilege*, 86 TEX. L. REV. 385, 398 (2007) ("The culture of waiver is also alive and well at the DOJ. . . . "). *But cf.* George M. Cohen, *Of Coerced Waiver, Government Leverage, and Corporate Loyalty: The Holder, Thompson, and McNulty Memos and Their Critics*, 93 VA. L. REV. IN BRIEF 153, 160 (July 23, 2007) ("[T]he suggestion that the DOJ waiver policy is itself the sole or primary cause of any increase in waivers is flawed. . . .").

[30] U.S. Dep't of Justice, Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and U.S. Attorneys, *Principles of Federal Prosecution of Business Organizations* 3 (Jan. 20, 2003), http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf; Carmen Couden, Note, *The Thompson Memorandum: A Revised Solution or Just a Problem?*, 30 J. CORP. L. 405, 414 (2005) (explaining new ninth factor).

[31] U.S. Dep't of Justice, Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and U.S. Attorneys, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf.

[32] *Id*. at 2.

[33] Ty E. Howard & Todd Presnell, *Protecting the Privilege in a Post-Yates Memorandum World*, 31 CORPORATE COUNSELOR 1, 10 (June 2016).

[34] *See, e.g.*, Sarah Helene Duggin, *The McNulty Memorandum, the* KPMG *Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341, 353 (2008) ("The Thompson Memorandum ignited an already smoldering debate. . . ."); Mark J. Stein & Joshua A. Levine, Simpson Thacher & Bartlett LLP, *The Filip Memorandum: Does it Go far Enough?* 2 (Sept. 10, 2008), http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub740.pdf?sfvrsn=2 ("The Thompson Memorandum . . . was uniformly reviled by the defense bar and suffered withering criticism from a broad range of organizations and

3. The McCallum Memorandum

The next eponymous policy memorandum in the sequence was issued in October 2006 by then-Acting Deputy Attorney General Robert McCallum.[35] This one-page document made no substantive revision to the Thompson Memorandum. It endorsed the practice of seeking waivers as part of "the prosecutorial discretion necessary . . . to seek timely, complete, and accurate information from business organizations." [36] It also briefly addressed the manner in which the DOJ's waiver policy was to be implemented, by requiring Assistant Attorneys General and U.S. Attorneys to establish (but not publish) written review policies governing privilege waiver requests.[37] However, it established no minimum standards for privilege waiver demands and failed to require consistency among waiver review policies. Indeed, the McCallum Memorandum specifically noted that "[s]uch waiver review processes may vary from district to district (or component to component)."[38] The result was that "companies had no better idea of the DOJ's waiver demand criteria under the McCallum Memorandum than without it."[39]

4. The McNulty Memorandum

The next iteration of the Principles was issued in December 2006 by then-Deputy Attorney General Paul McNulty and since then has been commonly referred to as the McNulty Memorandum. [40] This document expressly superseded and replaced the Thompson and McCallum Memoranda, although it copied verbatim virtually all of the sections in the former, including the list of nine factors. The McNulty Memorandum deviated from the Thompson and Holder Memoranda in the details of the fourth factor, described in the Thompson Memorandum in a section entitled "Cooperation and Voluntary Disclosure" and in the McNulty Memorandum as "The Value of Cooperation." There were two primary changes. The McNulty Memorandum (1) established new procedures that DOJ must follow when seeking waivers and (2) purported to bar prosecutors, except in exceptional circumstances, from considering the advancement of

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individuals in the legal community, including the ABA, the U.S. Chamber of Commerce, the American Civil Liberties Union, former senior DOJ officials and U.S. attorneys, academics and practitioners.").

[35] U.S. Dep't of Justice, Memorandum from Acting Deputy Attorney General Robert D. McCallum, Jr. to Heads of Department Components and U.S. Attorneys, *Waiver of Corporate Attorney-Client* and *Work Product Protection* (Oct. 21, 2005), http://federalevidence.com/pdf/Corp_Prosec/McCallum_Memo_10_21_05.pdf.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] John A. Tancabel, *Reflections on the McNulty Memorandum*, 35 SEC. REG. L.J. 219 (Fall 2007). *Accord* Ty E. Howard & Todd Presnell, *Protecting the Privilege in a Post-Yates Memorandum World*, 31 CORPORATE COUNSELOR 1, 10 (June 2016) ("Whatever the intent, the McCallum Memo did nothing to quell criticism of the DOJ waiver policy.").

[40] U.S. Dep't of Justice, Memorandum from Deputy Attorney General Paul J. McNulty to Heads of Department Components and U.S. Attorneys, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006), https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

attorneys' fees in evaluating cooperation.[41] The new procedures were cumbersome. They included a multi-factor balancing test for line prosecutors to obtain waiver approvals that applied only to formal waiver requests by the DOJ and not to voluntary waivers. The result was that business organizations felt pressured to voluntarily waive privilege in order to appear cooperative,[42] and waivers were prevalent.[43]

5. The Filip Memorandum

The final pre-Yates eponymous revision of the Principles was issued in 2008 by then-Deputy Attorney General Mark Filip.[44] The Filip Memorandum is probably best known for its enumeration of the factors to be considered by the DOJ when exercising prosecutorial discretion in charging decisions (Filip Factors). The document also explicitly prohibited prosecutors from requesting attorney-client communications or non-factual work product, except where defendants asserted an advice-of-counsel defense or counsel-corporation communications were in furtherance of a crime, and it provided that a corporation's cooperation credit no longer depended on privilege waiver. Instead, credit depended on the organization's willingness to disclose relevant facts and the sufficiency of that disclosure. Nevertheless, the consensus of the defense bar was that the Filip Memorandum did not cure the waiver problem created by prior Memoranda, with the result that counsel would often be forced to risk waiver in order to avoid an adverse DOJ action. [45]

Post-Yates the DOJ revised the USAM to align the Filip Memorandum with the Yates Memorandum. The USAM revisions, which formally implement the guidance set forth in the Yates Memorandum, have several key features. First, new USAM Section 9-28.210 for the first time makes it an affirmative requirement that prosecutors pursue individual culpability in corporate criminal cases. The new section repeats almost verbatim the prohibition in the Yates Memorandum against DOJ attorneys releasing individuals upon resolution of charges against the business organization, unless the reason for doing so is memorialized by the Attorney General or other high-level DOJ officials.[46]

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[41] *Id*. at 8-12; Josephine Sandler Nelson & Richard O. Parry, *Protecting Employee Rights and Prosecuting Corporate Crime: A Proposal for Criminal Cumis Counsel*, 10 BERKELEY BUS. L.J. 115, 148 (2013) (noting that the DOJ "caved" in response to opposition to its prior policies).

[42] Mark J. Stein & Joshua A. Levine, Simpson Thacher & Bartlett LLP, *The Filip Memorandum: Does it Go far Enough?* 3 (Sept. 10, 2008), http://www.stblaw.com/docs/default-source/cold-fusion-existingcontent/publications/pub740.pdf?sfvrsn=2.

[43] *See* Michael J. Shepard, Samuel Welch & Beau Shaw, *The Future of Internal Investigations After the Yates Memorandum*, 12 BLOOMBERG BNA WHITE COLLAR CRIME REPORT 39 (Jan. 6, 2017).

[44] U.S. Dep't of Justice, Memorandum from Deputy Attorney General Mark Filip to Heads of Department Components and U.S. Attorneys, *Principles of Federal Prosecution of Business Organizations* (Aug. 28, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

[45] Abbe David Lowell & Christopher D. Mann, *Federalizing Corporate Internal Investigations and the Erosion of Employees' Fifth Amendment Rights*, 40 GEO. L.J. ANN. REV. CRIM. PROC. iii (2011).

[46] United States Attorneys' Manual § 9.28.210 (Dec. 2015).

Second, the revised USAM requires that a company seeking credit for cooperation "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."[47] This requirement mandates disclosure before cooperation credit will be considered.

Third, when determining an appropriate resolution, the updated USAM instructs prosecutors to consider separately the extent of a company's cooperation and the company's timely and voluntary disclosure of wrongdoing.[48] Previously the two factors were considered together. By separating them the DOJ has directed its prosecutors to specifically consider the timing of disclosures. Now, the timing of when a company learns relevant facts and when it makes voluntary disclosures is of increased significance.

Fourth, the revised USAM addresses concerns that the Yates Memorandum effectively requires companies to waive attorney-client privilege and attorney work product protection in order to provide all relevant facts with respect to individuals. The USAM states that waiver is not required in order to meet the Yates threshold. Rather, a company "may be eligible for cooperation credit regardless of whether it chooses to waive privilege or work product protection in the process, if it provides all relevant facts about the individuals who were involved the misconduct."[49]

Fifth, the revised USAM addresses restrictions on the production of foreign documents. The USAM notes that in circumstances in which "a company genuinely cannot get access to certain evidence or is actually prohibited from disclosing it to the government . . . the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor."[50] This requirement is primarily directed at foreign data privacy and bank secrecy laws, which often require business organizations to choose between responding fully to evidence requests from DOJ and adhering to the laws of nations in which they operate.[51]

Sixth, the revised USAM specifies that when deciding whether to charge a corporation, prosecutors should "consider whether charges against the individuals responsible for the corporation's malfeasance will adequately satisfy the goals of federal prosecution."[52] The clear implication is that, in certain cases, the prosecution of individuals will suffice in lieu of prosecution of the business organization. Similarly, where a company has been charged, the case may be resolved by agreement to plead to "an appropriate offense."[53] This revision relaxes the

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[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] Sullivan & Cromwell LLP, *Justice Department Releases New Prosecution Policies: United States Attorneys' Manual Revised to Incorporate Recently Announced Policies on Individual Liability and Cooperation in Corporate Prosecutions* 2 (Nov. 18, 2015), https://www.sullcrom.com/new-justice-department-policies-on-corporate-prosecutions.
[52] United States Attorneys' Manual § 9.28.210 (Dec. 2015).
[53] *Id.*

prior requirement that a business organization plead to "the most serious, readily provable offense."[54]

C. The Future of the Yates Memorandum in the Trump Administration

Following the election of Donald Trump as President there has been considerable speculation concerning his administration's approach to regulation and enforcement. This speculation has encompassed the fate of the Yates Memorandum in the DOJ under new Attorney General Jeff Sessions. However, during his confirmation hearings Sessions suggested that he expects to retain the Yates Memorandum,[55] and statements by other DOJ officials also support retention.[56] As noted by Yates in a post-election speech, "individual accountability isn't a democratic or republican principal, but instead is a core value of our criminal justice system that perseveres regardless of which party is in power."[57]

II. The DOJ's Historical Failure to Prosecute High-Level Individuals Employed by Corporations Engaged in Misconduct

There is widespread agreement that, historically, the DOJ has failed to prosecute high-level individuals employed by corporations engaged in misconduct. This concern has not been limited to federal criminal practice related to banks or the causes of the 2007-09 financial crisis. One stark example is provided by the Foreign Corrupt Practices Act (FCPA). During the period 2000 to 2016 the DOJ charged 150 individuals with FCPA criminal offenses.[58] But many of these prosecutions were clustered in a handful of cases. Forty-four percent of the individuals charged by the DOJ with criminal offenses during the period 2006 to 2016 were in just six cases, and 63% were in just 12 cases.[59] Of the 94 corporate DOJ FCPA actions during the period 2006

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[54] Akin Gump Strauss Hauer & Feld LLP, Litigation Alert, *Justice Department Updates United States Attorneys' Manual to Emphasize Priority on Prosecuting Individuals in Corporate Criminal Cases* 4 (Nov. 19, 2015), https://www.akingump.com/en/news-insights/justice-department-updates-u-s-attorney-s-manual-to-emphasize.html.

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

[56] *See*, *e.g.*, Hunton & Williams, Client Alert, *Senior Justice Department Official Reaffirms Yates Memorandum, Will 'Reevaluate' FCPA Declination Program* (Feb. 2017), https://www.hunton.com/files/News/b883da63-5163-48c0-942b-b4c3ad68bead/Presentation/NewsAttachment/ce545f8d-4ad5-42da-ae15-b5dfd5cca54e/senior-justice-department-official-reaffirms-yates-memorandum.pdf (citing comments by new Deputy Assistant Attorney General Trevor McFadden for proposition that Yates Memorandum remains DOJ policy).

[57] U.S. Dep't of Justice, Justice News, *Deputy Attorney General Sally Q. Yates Delivers Remarks at the 33rd Annual International Conference on Foreign Corrupt Practices Act* (Nov. 30, 2016), https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-33rd-annual-international.

[58] Mike Koehler, *A Focus on DOJ Individual Actions*, FCPA PROFESSOR (Jan. 26, 2017), http://fcpaprofessor.com/focus-doj-individual-actions/.

[59] *Id.*

to 2016, 73 (or 77%) had not resulted in any DOJ charges against company employees by January 2017.[60]

Some of the most compelling empirical evidence concerning the DOJ's failure to prosecute high-level individuals employed by corporations engaged in misconduct has been reported by Professor Brandon Garrett. Garrett examined all 306 deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) entered into with companies from 2001 to 2014. He found that among those, 34%, or 104 companies, had offices or employees prosecuted, with 414 total individuals prosecuted.[61] Most of these were middle managers.[62] Of the 414 individuals, 266, or 65%, pleaded guilty and 42 were convicted at trial.[63] The average sentence, including those who received probation but no jail time, was eighteen months.[64] Only 42% of the 308 individuals convicted received any jail time.[65] As noted by Professor Garrett, "t]his is a low imprisonment rate."[66] Garrett also found that only thirteen of the 70 DPAs and NPAs during the period 2001 to 2014 that involved FCPA violations included individual prosecutions.[67]

A broad spectrum of explanations has been offered to explain the DOJ's historical failure. These explanations range from lack of political will to proof problems. With respect to the latter, former Attorney General Eric Holder has noted that "[r]esponsibility remains so diffuse, and top executives so insulated, that any misconduct could again be considered more a symptom of the institution's culture than a result of the willful actions of any single individual."[68] The diffusion of responsibility has been underscored by many observers to explain the proof problem.[69]

III. The Impact of the Yates Memorandum

The next part of this Article examines the impact of the Yates Memorandum in four areas that raise ethical issues: waiver of the attorney-client privilege, the conduct of internal investigations, the use of joint representation and joint defense agreements, and civil enforcement by the DOJ.

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[60] *Id*.
[61] Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1791 (2015).
[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] *Id*. at 1792.
[66] *Id*.
[67] *Id*. at 1819.
[68] Press Release, U.S. Dep't of Justice, Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law.
[69] *See*, *e.g*., Robert R. Stauffer & William C. Pericak, *Twenty Questions Raised by the Justice Department's Yates Memorandum*, 99 BLOOMBERG BNA CRIM. L. REP. 191 (May 18, 2016), https://jenner.com/system/assets/publications/15188/original/Stauffer_Pericak_Bloomberg_May_2016.pdf?1463730304 ("In large organizations, where 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.").

A. Waiver of the Attorney-Client Privilege

Neither the Yates Memorandum nor the subsequent USAM revisions modify the DOJ's policy that, in providing all relevant facts concerning culpable employees, companies are not required to waive attorney-client privilege or the protection of the work product doctrine. Indeed, the only mention of privilege in the Yates Memorandum is an indirect reference that organizations seeking cooperation credit must cooperate completely "within the bounds of the law and legal privileges."[70]

In this regard the Yates Memorandum is fully consistent with the Filip Memorandum, which repudiated the Thompson Memorandum's admonition that companies should waive privilege in order to establish their cooperation with a government investigation. The Filip Memorandum established that DOJ attorneys should not request waivers. In a speech she delivered two months after the Yates Memorandum was issued Yates noted that "there is nothing in the new policy that requires companies to waive attorney-client privilege or in any way rolls back protections that were built into the prior factors."[71] However, Yates also emphasized that while legal advice is privileged, facts are not.[72]

After the Yates Memorandum was issued and Yates delivered her remarks a number of observers predicted that, notwithstanding the new policy's continuation of the Filip Memorandum's prohibition on seeking waivers, as a practical matter the Yates Memorandum, in combination with the USAM revisions, will induce companies to surrender privilege.[73] This prediction may prove accurate for multiple reasons.

First, a company may be unable to provide the DOJ with the requisite "all relevant facts" absent a waiver.[74] Yates stated that facts are not privileged, but it is often difficult and sometimes impossible to separate facts from non-factual work product and attorney-client communications. As noted by one set of critics, "separating pure facts from employees' communications to corporate counsel is, at best, difficult. As a result, it appears that the Yates Memo effectively requires a *de facto* waiver."[75] Second, even if the DOJ neither requests nor

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[70] U.S. Dep't of Justice, Memorandum from Sally Yates to All Component Heads and U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

[71] Deputy Attorney General Sally Quillian Yates Delivers Remarks at American Banking Ass'n and American Bar Ass'n Money Laundering Enforcement Conference (Nov. 16, 2015), https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0.

[72] *Id*.

[73] *See*, *e.g*., Scott R. Grubman & Samuel M. Shapiro, *The 'Yates Era' in Full Force*, CRIMINAL JUSTICE 17, 19 (Summer 2016) ("As a practical matter, though, the Yates Memo and USAM revisions will likely induce many companies to waive attorney-client privilege in the course of conducting an internal investigation.").

[74] Joseph W. Martini & Robert S. Hoff, *Individuals Face New Challenges Following Yates Memo*, N.Y. L.J. (Apr. 25, 2016) ("Although the Yates memo does not explicitly ask companies under investigation to waive attorney-client privilege, the 'all or nothing' nature of the directive puts immense pressure on companies to serve up implicated employees to the government, regardless of whether the relevant evidence is privileged."

[75] Ty E. Howard & Todd Presnell, *Protecting the Privilege in a Post-Yates Memorandum World*, 31 CORPORATE COUNSELOR 1, 12 (June 2016). But cf. U.S. Dep't of Justice, Justice News, *Deputy Attorney General Sally Q. Yates Delivers Remarks at the 33rd Annual International Conference on Foreign Corrupt Practices Act* (Nov. 30, 2016),

requires waivers, prosecutors "will certainly view such waivers positively should companies be inclined to curry favor."[76] Both the Thompson Memorandum and McNulty Memorandum left no doubt that regardless of whether waiver was requested, a corporation's waiver could always be favorably considered by prosecutors in determining whether the corporation had cooperated in the government investigation. This issue is not specifically addressed in the Yates Memorandum, but "it is reasonable to assume that the preference for a full waiver remains in effect, with companies that waive the privilege doing better with the DOJ"[77] when it determine the extent of cooperation credit. Third, any potential defense in parallel or subsequent private litigation that a waiver has been selective—waiving only to the DOJ—is very likely foreclosed, because most courts reject the selective waiver doctrine.[78] Indeed, waiver of the privilege in response to an inquiry by the DOJ or SEC "almost always results in waiver regarding the same subject matter in any other litigation, whether it is an investigation by another government agency, civil enforcement based on the investigation, or litigation instituted by a private party."[79]

B. Conduct of Internal Investigations/Upjohn Warnings/Separate Counsel

Internal investigations of corporate misconduct are extremely common.[80] These investigations—typically conducted by outside counsel—focus on interviews of corporate executives and employees. The Yates Memorandum has significant ramifications for the current practice of providing warnings to employees being interviewed during investigations, pursuant to *Upjohn Co. v. United States*.[81] *Upjohn*, decided in 1981, held that communications between company counsel and employees of the company are privileged, but the privilege is owned by the company and not the individual employee.[82] Thus, in an internal investigation the company

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https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-33rd-annual-international ("No one's been forced to waive the privilege.").

[76] William E. Lawler, III & Jeremy Keeney, *DOJ's Yates Memorandum: Focus Enforcement Efforts on Individuals*, 83 DEFENSE COUNSEL J. 200, 202 (2016). *See also* Michael J. Shepard, Samuel Welch & Beau Shaw, *The Future of Internal Investigations After the Yates Memorandum*, 12 BLOOMBERG BNA WHITE COLLAR CRIME REPORT 39 (Jan. 6, 2017) ("[C]ompanies will waive the privilege, on the theory that this what the DOJ really wants, even though Yates has stated that waiver of the privilege eis not required and that the DOJ will not request it.").

[77] Michael J. Shepard, Samuel Welch & Beau Shaw, *The Future of Internal Investigations After the Yates Memorandum*, 12 BLOOMBERG BNA WHITE COLLAR CRIME REPORT 39 (Jan. 6, 2017).

[78] *See*, *e.g.*, Robert W. Trenchard & Peter K. Vigeland, *Rethinking Selective Waiver*, N.Y. L.J. (Sept. 9, 2010) (noting widely divergent views among courts as to whether disclosure of attorney-client privileged or work product amterial to DOJ or SEC waives privilege or work product protection in related civil litigation).

[79] Jones Day, *Corporate Internal Investigations: Best Practices, Pitfalls to Avoid* 14-15 (2013), http://www.jonesday.com/corporate-internal-investigations-best-practices-pitfalls-to-avoid-01-07-2013/.

[80] *See*, *e.g.*, American College of Trial Lawyers, *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, 46 AM. CRIM. L. REV. 73, 73 (2009) ("Since 2001, over 2,500 public companies have retained outside counsel to conduct internal investigations into suspected wrongdoing by corporate executives and employees. These investigations have included inquiries into suspected violations of the Foreign Corrupt Practices Act; alleged options backdating activities; alleged violations of the antitrust, environmental, import/export, and other laws; and financial statement improprieties.").

[81] 449 U.S. 383 (1981).

[82] 449 U.S. at 394-95.

is the client and controls the decision whether to waive the privilege and disclose the content of the communication to the government. This right is jeopardized if the constituent claims that he is personally represented by the company's lawyer.

Upjohn did not directly address the issue of providing warnings to employees during the course of an investigation, but in 1983 the American Bar Association (ABA) enacted Model Rules of Professional Conduct (Model Rules) imposing on attorneys affirmative obligations to clarify their roles in certain circumstances.[83] By May 2017 California was the only state that did not have professional conduct rules that follow the format of the Model Rules,[84] which—in accord with *Upjohn*—require corporate counsel to clarify that an investigatory interview has the purpose of providing legal advice to the company, not the constituent.[85] *Upjohn* warnings are generally regarded as tools to preserve the corporate privilege and avoid ethical conflicts of interest.[86] If company counsel fails to provide an adequate *Upjohn* warning to an employee and the latter concludes reasonably and in accordance with the applicable law that the company counsel also represents him personally, then the company may be prohibited from disclosing the employee's interview statements to the DOJ. This prohibition may limit the company's ability to secure cooperation credit and result in other more serious consequences.[87]

The Model Rules affirmatively require *Upjohn* warnings only in a subset of employee interviews—those where it appears that the business organization's interests may differ from those of the constituents with whom the lawyer is dealing.[88] As a practical matter, it will very rarely be the case that, prior to interviewing any particular employee, corporate counsel can exclude the possibility of diverging interests.[89] Accordingly, attorneys now deliver warnings as a matter of course at the start of employee interviews.[90] It typically suffices to give *Upjohn*

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[83] American Bar Ass'n, Model Rules of Professional Conduct, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html.

[84] American Bar Ass'n, Model Rules of Professional Conduct, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited May 17, 2017).

[85] *See* American Bar Ass'n, Model Rules of Professional Conduct, Rule 1.13(f), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html; Michael Li-Ming Wong & Asheesh Goel, *Beefing Up 'Corporate Miranda Warnings': Averting Misunderstandings & Detrimental Consequences in Internal Investigations*, 13 WALL STREET LAWYER (Aug. 2009) ("A critical function of the Upjohn warning is to ensure not only that the attorney-client privilege attaches to the interview, but also that the corporation retains exclusive control of that privilege.").

[86] John E. Clabby & Jonathan C. Sterling, *Keep This Between Us—and the Government: Confidentiality of Witness Interviews in Corporate Internal Investigations*, CORP. L. & ACCOUNTABILITY REPORT (Jan. 28, 2016), https://www.carltonfields.com/confidentiality-witness-interviews-corporate-internal-investigations/.

[87] Jones Day, *Corporate Internal Investigations: Best Practices, Pitfalls to Avoid* 14-15 (2013), http://www.jonesday.com/corporate-internal-investigations-best-practices-pitfalls-to-avoid-01-07-2013/.

[88] *See* American Bar Ass'n, Model Rules of Professional Conduct, Rule 1.13(f), cmt. 10, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html

[89] Paul Schoeman, Eric Tirschwell & Philip Ellenbogen, *Separate Representation for Employees in Investigations: A Delicate Line*, N.Y. L.J. (Nov. 10, 2014), http://www.kramerlevin.com/Separate-Representation-for-Employees-in-Investigations-A-Delicate-Line-11-10-2014/.

[90] *See* Jeffrey P. Dodd, *Practical Considerations in Planning, Executing, Refining, and Concluding Investigations*, 39 AM. J. TRIAL ADVOC. 567, 574 (2016) ("Any employee interview should always begin with a so-called *Upjohn*

warnings orally,[91] and in practice they usually are oral rather than written, to ensure cooperation.[92] While *Upjohn* warnings have no statutory basis[93] and federal courts differ about the requisite content,[94] they typically consist of the following admonitions: (1) the lawyer represents the company only and not the witness personally; (2) the lawyer is collecting facts for the purpose of providing legal advice to the company; (3) the communication is protected by the attorney-client privilege, which belongs exclusively to the company, not the witness; (4) the company may choose to waive the privilege and disclose the communication to a third-party, including the government; and (5) the communication must be kept confidential, meaning that it cannot be disclosed to any third-party other than the witness's counsel.[95] Once the foregoing points have been addressed and the witness has been permitted to ask questions, best practices dictate that the *Upjohn* warnings be memorialized, usually by counsel in a contemporaneous memorandum summarizing the interview.[96]

The Yates Memorandum is likely to alter the foregoing scenario because the disclosure value of information learned from an investigatory interview with a culpable constituent has been amplified. In the post-Yates environment, "if the *Upjohn* warning is not adequately delivered the company runs the risk of losing its cooperation credit eligibility."[97] In this

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warning. . . ."); Anne M. Chapman & Kathleen E. Brody, *Attorney-Client Privilege in Internal Investigations: Best Practices and Lessons from Recent Cases*, 39 CHAMPION 28, 33 (2015) (noting that *Upjohn* warnings should be given at the beginning of all witness interviews during an internal investigation).

[91] John E. Clabby & Jonathan C. Sterling, *Keep This Between Us—and the Government: Confidentiality of Witness Interviews in Corporate Internal Investigations*, CORP. L. & ACCOUNTABILITY REPORT (Jan. 28, 2016), https://www.carltonfields.com/confidentiality-witness-interviews-corporate-internal-investigations/.

[92] American Bar Ass'n, White Collar Crime Working Group, *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees* 33 (July 17, 2009), https://www.crowell.com/PDF/ABAUpjohnTaskForceReport.pdf.

[93] John Rafael Perez, William Stone & Sarah Weiner, *Navigating Conflicting Roles: The Ethical Obligations of an Organization's Lawyers Post-Wells Fargo*, 34 YALE J. ON REG. ONLINE 9, 11 (2016).

[94] *See* In re Kellogg Brown & Root, Inc., 756 F.3d 754, 758 (D.C. Cir. 2014) ("[N]othing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation."); Timothy M. Middleton, '*Watered-Down Warnings': The Legal and Ethical Requirements of Corporate Attorneys in Providing Employees with 'Upjohn Warnings' in Internal Investigations*, 21 GEO. J. LEGAL ETHICS 951, 955 (2008) ("The federal courts of appeals have promulgated a range of rulings describing what is required for an Upjohn warning to be effective in preserving exclusive control of the attorney-client privilege for the corporation."). *See also* United States v. Merida, 828 F.3d 1203, 1210 (10th Cir. 2016) (describing five elements corporate employees who claim corporation's counsel represented them individually must satisfy).

[95] *See, e.g.*, American Bar Ass'n, White Collar Crime Working Group, *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees* 3 (July 17, 2009), https://www.crowell.com/PDF/ABAUpjohnTaskForceReport.pdf.

[96] American Bar Ass'n, White Collar Crime Working Group, *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees* 3 (July 17, 2009), https://www.crowell.com/PDF/ABAUpjohnTaskForceReport.pdf; Lee G. Dunst & Daniel J. Chirlin, *A Renewed Emphasis on* Upjohn *Warnings*, 23 WHITE-COLLAR CRIME: ANDREWS LITIG. RPTR. (Sept. 2009), http://www.gibsondunn.com/publications/Documents/Dunst-Chirlin-RenewedEmphasisOnUpjohnWarnings.pdf ("[W]hen interviewing a company employee, an attorney should always administer a full *Upjohn* warning and note the fact in writing contemporaneously or memorialize it soon thereafter.").

[97] McDermott Will & Emery, Health Care Compliance and Defense Resource Center, *The Need for Enhanced Upjohn Warnings After Yates* 2 (Feb. 17, 2016), https://www.mwe.com/~/media/files/experience/health-care-resource-center/yates-memorandum/the-need-for-enhanced-upjo.pdf.

environment the provision of enhanced *Upjohn* warnings may be a best practice, whether or not it is an ethical obligation. Recall the first directive of the Yates Memorandum—to be eligible for any cooperation credit, corporations must provide to the DOJ all relevant facts about the individuals involved in corporate misconduct. This specifically includes facts obtained from witness interviews, even if those interviews are privileged. The standard pre-Yates *Upjohn* warning should be supplemented to reflect this directive by making clear that (1) Corporation A may decide to cooperate with DOJ in order to resolve the government's investigation of, or charges against, A, and (2) Corporation A may choose to disclose the entirety of a witness interview to government attorneys and/or investigators without consulting the witness.[98]

The provision of enhanced *Upjohn* warnings may chill the constituent's candor and thereby undermine the truth-finding function of an internal investigation.[99] Moreover, the DOJ may view enhanced *Upjohn* warnings as unnecessary and therefore potentially a subterfuge designed to allow the company to assert its cooperation while ensuring that it will be unable to fully describe its misconduct to the DOJ.[100] But this risk is likely de minimis, because constituents typically cooperate with investigations even when it is contrary to their self-interest—probably because many companies have "walk or talk" policies[101] that deem non-cooperation a fireable offense, at least if the interview is conducted in the United States.[102] This situation is unlikely to change if enhanced *Upjohn* warnings are given.[103] Conversely, if enhanced warnings are not provided, the constituent may be more likely to believe he has a

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[98] Peter Thomson, Stone Pigman Walther Wittman LLC, *Corporate Criminal Law Update: Enhanced Upjohn Warnings in the Wake of the Yates Memorandum* (Apr. 19, 2016), https://www.stonepigman.com/newsroom-announcements-Upjohn_Warnings_in_the_Wake_of_the_Yates_Memorandum.html ("[T]he standard Upjohn warnings are no longer enough. . . ."). *But see* Julian Cokic, McGuireWoods, *The Yates Memo and Individual Representation*, SUBJECT TO INQUIRY (Nov. 17, 2016), http://www.subjecttoinquiry.com/compliance/the-yates-memo-and-individual-representation/ (reporting conclusion of panel of Securities Industry and Financial Markets Association that no post-Yates modification of *Upjohn* warnings is necessary).

[99] *See* Michael Li-Ming Wong & Asheesh Goel, *Beefing Up 'Corporate Miranda Warnings': Averting Misunderstandings & Detrimental Consequences in Internal Investigations*, 13 WALL STREET LAWYER (Aug. 2009) ("The obvious downside risk of beefed up *Upjohn* warnings is a possible chilling effect on employees' cooperation with internal investigations.").

[100] Michael J. Shepard, Samuel Welch & Beau Shaw, *The Future of Internal Investigations After the Yates Memorandum*, 12 BLOOMBERG BNA WHITE COLLAR CRIME REPORT 39 (Jan. 6, 2017).

[101] Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1825 (2015).

[101] Michael J. Shepard, Samuel Welch & Beau Shaw, *The Future of Internal Investigations After the Yates Memorandum*, 12 BLOOMBERG BNA WHITE COLLAR CRIME REPORT 39 (Jan. 6, 2017).

[102] *See, e.g.*, American Bar Ass'n, White Collar Crime Working Group, *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees* 32 (July 17, 2009), https://www.crowell.com/PDF/ABAUpjohnTaskForceReport.pdf ("Most Constituents cooperate with the investigation even when it is against their interest to do so because the immediate consequence they face—potential termination for lack of cooperation—is regarded as the more immediate risk."); George M. Cohen, *Of Coerced Waiver, Government Leverage, and Corporate Loyalty: The Holder, Thompson, and McNulty Memos and Their Critics*, 93 VA. L. REV. IN BRIEF 153, 160 (July 23, 2007) ("The main motivation for employees to cooperate with corporate investigations has always been the threat of being fired or incurring other job-related consequences. . . .").

[103] *See* McDermott Will & Emery, Health Care Compliance and Defense Resource Center, *The Need for Enhanced Upjohn Warnings After Yates* 3 (Feb. 17, 2016), https://www.mwe.com/~/media/files/experience/health-care-resource-center/yates-memorandum/the-need-for-enhanced-upjo.pdf ("The psychology underlying constituent cooperation is unlikely to be materially impacted by these enhanced *Upjohn* measures.").

personal attorney-client relationship with the company lawyer, which may lead the constituent to block disclosure to the government of information obtained during the investigatory interview. In turn, this could both impede the company's ability to comply with the requirement of the Yates Memorandum that all relevant facts be disclosed and "optically align the interests of the individual wrongdoer with the corporation."[104]

The post-Yates environment may justify four additional modifications to pre-Yates *Upjohn* practice. First, counsel may be wise to develop a formal script for the delivery of *Upjohn* warnings. Second, while it seems counterproductive to provide constituent witnesses with written warnings,[105] post-Yates it may be useful to provide them with a written summary of the key points that comprise the oral warnings. Third, constituent witnesses should be required to acknowledge in writing that they received *Upjohn* warnings and they understand the scope of the attorney-client privilege.[106]

Fourth, corporate counsel may have an ethical obligation to conform their *Upjohn* warnings to the standard policy of the DOJ with respect to targets of criminal investigations who testify in front of grand juries. The DOJ's policy is to advise such targets before they testify that their conduct is being investigated for possible violations of federal criminal law.[107] Corporations that plan to interview employees suspected of illegal activity for the purpose of disclosing to the DOJ information gleaned during the interviews may have an ethical obligation to provide similar "target" warnings before the interviews begin.[108]

In addition to dictating modification of traditional *Upjohn* warnings, the Yates Memorandum also has resulted in the retention by employees of separate counsel both more often and earlier in the investigative process than was common pre-Yates. While the use by employees of counsel separate from counsel representing the business organization has typically been an option (albeit a costly one) in internal investigations, pre-Yates it was often not exercised. The Yates Memorandum changes the calculation in two respects. First, if an employee has apparent exposure and knows that corporate counsel are required to report all relevant facts regarding the employee's involvement in the misconduct in order to obtain any cooperation credit for the corporation, then the employee may be much more reticent to participate in interviews without separate counsel.[109] Second, insofar as the provision of

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[104] *See* McDermott Will & Emery, Health Care Compliance and Defense Resource Center, *The Need for Enhanced Upjohn Warnings After Yates* 3 (Feb. 17, 2016), https://www.mwe.com/~/media/files/experience/health-care-resource-center/yates-memorandum/the-need-for-enhanced-upjo.pdf

[105] *See* Julian Cokic, McGuireWoods, *The Yates Memo and Individual Representation*, SUBJECT TO INQUIRY (Nov. 17, 2016), http://www.subjecttoinquiry.com/compliance/the-yates-memo-and-individual-representation/ (reporting conclusion of panel of Securities Industry and Financial Markets Association that providing an employee with written *Upjohn* warnings is neither necessary nor recommended).

[106] *See* McDermott Will & Emery, Health Care Compliance and Defense Resource Center, *The Need for Enhanced Upjohn Warnings After Yates* 3 (Feb. 17, 2016), https://www.mwe.com/~/media/files/experience/health-care-resource-center/yates-memorandum/the-need-for-enhanced-upjo.pdf.

[107] Michael P. Kelly & Ruth K. Mandelbaum, *Are the Yates Memorandum and the Federal Judiciary's Concerns About Over-Criminalization Destined to Collide?*, 53 AM. CRIM. L. REV. 899, 909 (2016).

[108] *Id*.

[109] Anthony S. Barkow & Anne Cortina Perry, *The Value of Separate Employee Counsel After Yates Memo*, LAW360 (Dec. 9, 2015, 1:17 PM), https://www.law360.com/articles/734845/the-value-of-separate-employee-

cooperation credit hinges on the DOJ's belief that the organization has provided all relevant facts about individual culpability, the decision to bifurcate the legal representation can enhance the credibility of corporate counsel when it asserts that no individual is culpable.[110] The overall result has been the increased retention of separate counsel, often at an early stage of the investigation,[111] and more costly internal investigations. One upside, at least from the perspective of the DOJ, is that employees are more likely to give more complete and truthful answers during investigations when they have received the benefit of separate counsel.[112]

C. Joint Representation/Joint Defense Agreements

Joint representation of the corporation and constituents may be ethically possible when the facts demonstrate the absence of a conflict of interest between the former and the latter. Typically this occurs following the completion of an internal investigation and when a regulatory inquiry has commenced.[113] Problems arise when one of the clients (typically the corporation) desires to waive the attorney-client privilege and the other does not. This issue can be avoided if the constituents have separate representation, and the corporation and constituents enter into a joint defense agreement (JDA).

A JDA is a contract, oral or written, between defendants to extend an existing privilege to confidential communications between outside counsel and defendants.[114] JDAs are commonly used in corporate representations[115] because they offer numerous advantages—they permit

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counsel-after-yates-memo?article_related_content=1; Jonathan S. Feld & Eric S. Klein, *The Yates Memo and the Push for Individual Accountability*, 10 J. HEALTH & LIFE SCI. L. 67, 82 (2017) ("Providing *Upjohn* warnings to employees in the post-Yates Memo era will likely result in employees becoming more reluctant to cooperate in investigations, especially without their own counsel.").

[110] Anthony S. Barkow & Anne Cortina Perry, *The Value of Separate Employee Counsel After Yates Memo*, LAW360 (Dec. 9, 2015, 1:17 PM), https://www.law360.com/articles/734845/the-value-of-separate-employee-counsel-after-yates-memo?article_related_content=1.

[111] *See* Julian Cokic, McGuireWoods, *The Yates Memo and Individual Representation*, SUBJECT TO INQUIRY (Nov. 17, 2016), http://www.subjecttoinquiry.com/compliance/the-yates-memo-and-individual-representation/ (noting that post-Yates, employees are asking their firms and their corporate counsel whether they should be represented by individual counsel "(1) earlier in investigations, and (2) more frequently than ever"); William Sullivan & John Durrant, *Yates Memo: Increasing the Perils of Parallel Proceedings*, LAW360 (Nov. 3, 2015, 10:33 AM), https://www.law360.com/articles/720868/yates-memo-increasing-the-perils-of-parallel-proceedings ("In light of the Yates Memorandum, it may be proper for individuals to consider obtaining separate counsel earlier than usual, or even at the outset of any investigation."); Wiley Rein LLP, *Coming to Terms with the Yates Memo: Implications for Government Contractors* (Dec. 2015), http://www.wileyrein.com/newsroom-newsletters-item-Coming-to-Terms-with-the-Yates-Memo-Implications-for-Government-Contractors.html ("The Yates Memo makes it far more likely that a greater number of individuals will need counsel and that such a need will arise earlier in an investigation than in the past.").

[112] Nicolas Bourtin, *Expert Q&A on the DOJ's Yates Memo*, PRACTICAL LAW 16, 19 (Apr./May 2016).

[113] American Bar Ass'n, White Collar Crime Working Group, *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees* 34 (July 17, 2009), https://www.crowell.com/PDF/ABAUpjohnTaskForceReport.pdf

[114] Ruth D. Kahn, ABA Committee News, Products, General Liability and Consumer Law, *Relationships with Co-Counsel: The Joint Defense Privilege* 1, 14 (Spring 2007), http://www.steptoe.com/assets/attachments/3264.pdf.

[115] *See* Patrick Linehan & William Drake, *BNA Insights: The Yates Memo and the Future of Joint Defense Agreements*, 48 SEC. REG. & L. REP. 954 (May 9, 2016),

multiple parties to pool resources, coordinate strategy, and avoid duplicative work, and, in the context of alleged corporate misconduct, they facilitate internal investigations.[116] JDAs also facilitate the exchange of information during government investigations by permitting the subjects of the investigation and/or their counsel to share such information without waiving an otherwise applicable privilege.[117] Privilege is maintained even if the parties to the JDA later become adverse.[118]

While it is often asserted that JDAs are based on a joint defense or common interest privilege,[119] and that such a privilege is widely recognized,[120] there is no such discrete privilege. Rather, a JDA can be used as a tool to extend the umbrella for existing protection—primarily attorney-client privilege or work product doctrine.[121] The umbrella generally can be extended in federal court if three conditions have been met: (1) the subject communications were made in the course of a joint defense effort, (2) the communications were made to further the joint defense effort, and (3) the communications were intended to be kept confidential, and the privilege has not otherwise been waived.[122] The umbrella protection of a JDA applies to both civil and

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http://www.steptoe.com/assets/htmldocuments/spyates%20srlr%205916 .pdf; Kathryn M. Fenton, *Conflict and Ethics Issues Arising from Joint Defense/Common Interest Relationships*, ANTITRUST SOURCE 1, 1 (Dec. 2009), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/ Dec09_Fenton12_17f.authcheckdam.pdf ("It is common for companies under investigation for possible cartel activities to enter into a JDA to facilitate fact gathering and development of a coordinated strategy.").

[116] *See* Patrick Linehan & William Drake, *BNA Insights: The Yates Memo and the Future of Joint Defense Agreements*, 48 SEC. REG. & L. REP. 954 (May 9, 2016), http://www.steptoe.com/assets/htmldocuments/spyates%20srlr%205916 .pdf; Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 FORDHAM L. REV. 871, 883 (1996) ("Employees are more likely to cooperate in an internal investigation being undertaken as part of a joint defense effort because their legal interests also will be protected.").

[117] Mark Mermelstein, *Hanging Together: Well-Crafted Joint Defense Agreements Can Avoid Conflicts of Interest and Obstruction of Justice Charges*, 27 L.A. LAWYER 38, 38 (Oct. 2004), https://www.lacba.org/docs/default-source/lal-back-issues/2004-issues/october-2004.pdf.

[118] Jerold S. Solovy & Robert Byman, *What's a Swell Litigant Like You Doing in a Joint Agreement Like This?*, NAT'L L.J. (May 28, 2011), https://www.jenner.com/system/assets/assets/4572/original/05_28_2001_Joint_Defense_ Agreements.pdf?1320179255.

[119] *See, e.g.*, Kathryn M. Fenton, *Conflict and Ethics Issues Arising from Joint Defense/Common Interest Relationships*, ANTITRUST SOURCE 1, 1 (Dec. 2009), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/ Dec09_Fenton12_17f.authcheckdam.pdf.

[120] *See, e.g.*, Craig S. Lerner, *Conspirators' Privilege and Innocents' Refuge: A New Approach to Joint Defense Agreements*, 77 NOTRE DAME L. REV. 1449, 1492 (2002) ("All fifty states have embraced the defense privilege in some form. In roughly half the states the privilege has been codified.").

[121] Jerold S. Solovy & Robert Byman, *What's a Swell Litigant Like You Doing in a Joint Agreement Like This?*, NAT'L L.J. (May 28, 2011), https://www.jenner.com/system/assets/assets/4572/original/05_28_2001_Joint_Defense_ Agreements.pdf?1320179255 ("There is no such thing as a 'joint-defense privilege. . . . ' Joint-defense' is rubric to preserve, not create, privilege."). *Accord* Ferko v. NASCAR, Inc., 219 F.R.D. 396, 401 (E.D. Tex. 2003) ("Despite its name, the common interest privilege is neither common nor a privilege. Instead, it is an extension of the attorney-client privilege and of the work-product doctrine.").

[122] Craig S. Lerner, *Conspirators' Privilege and Innocents' Refuge: A New Approach to Joint Defense Agreements*, 77 NOTRE DAME L. REV. 1449, 1494 (2002). *Cf.* Michael A. Brockland, American Bar Ass'n Commercial & Business Litig. Section, *Unsteady Bedfellows: Joint Defense Agreements After the Yates Memo* (Feb. 14, 2017), http://www.americanbar.org/publications/litigation-committees/commercial-business/articles/2017/unsteady-

criminal cases.[123] There is no requirement that a JDA be reduced to writing, and many such agreements remain oral, contrary to courts' stated preference for written agreements.[124]

Prosecutors generally dislike JDAs for multiple reasons—the agreements can shield relevant and probative evidence, they may serve to obstruct justice, and they may permit the continuation of criminal conspiracies.[125] The McNulty Memorandum, like its predecessors, allowed prosecutors to consider a company's participation in JDAs with employees in determining whether to grant cooperation credit. However, since 2008—when the Filip Memorandum was issued—the USAM has provided that "the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements."[126] The USAM further specifies that to avoid the prospect of a business organization losing cooperation credit eligibility, the DOJ should not bar the company "from providing some relevant facts to the government. . . ."[127]

The foregoing USAM provision concerning "some relevant facts" appears to conflict with the "all or nothing" policy established by the Yates Memorandum. This conflict is likely to create the following effects. First, while some evidence suggests that *requests* by employees for JDAs have become more common post-Yates Memorandum,[128] actual agreements are likely to become less frequent, for multiple reasons.[129] Joint representation could signal to the DOJ that a company is not committed to producing all relevant evidence of employee misconduct, "and instead prefers to keep its interests aligned with those of its employees."[130] Moreover, joint representation magnifies the risk that counsel will discover a privileged fact suggesting an employee's culpability. That fact could not be shared without the employee's consent, "creating

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bedvellows-joint-defense-agreements-after-yates-memo.html ("The scope and permutations of the joint defense doctrine vary significantly by jurisdiction.").

[123] *See*, *e.g.*, United States v. Am. Tel. and Tel. Co., 642 F.2d 1285, 1298-99 (D.C. Cir. 1980); Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 FORDHAM L. REV. 871, 883 (1996).

[124] Jones Day, *Corporate Internal Investigations: Best Practices, Pitfalls to Avoid* 14-15 (2013), http://www.jonesday.com/corporate-internal-investigations-best-practices-pitfalls-to-avoid-01-07-2013/.

[125] Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 FORDHAM L. REV. 871, 879 (1996). *Accord* Sarah Kropf, *Will the New DOJ Policy End Joint Defense Agreements?*, GRANDJURYTARGET.COM (Sept. 27, 2015), https://grandjurytarget.com/2015/09/27/will-the-new-doj-policy-end-joint-defense-agreements/ ("To DOJ, a JDA is simply more evidence of the conspiracy. In short, JDAs make DOJ's life harder, and DOJ doesn't like that.").

[126] United States Attorneys' Manual § 9.28.730 (Sept. 2008).

[127] United States Attorneys' Manual § 9.28.730 (Sept. 2008).

[128] Michael J. Shepard, Samuel Welch & Beau Shaw, *The Future of Internal Investigations After the Yates Memorandum*, 12 BLOOMBERG BNA WHITE COLLAR CRIME REPORT 39 (Jan. 6, 2017).

[129] McDermott Will & Emery, Health Care Compliance and Defense Resource Center, *Does Yates Sound the Death Knell for Joint Defense Agreements?* (May 12, 2016), https://www.mwe.com/~/media/files/experience/health-care-resource-center/yates-memorandum/does-the-yates-sound-the-death-knell-for-joint-defense-agreements.pdf. *But cf.* Robert R. Stauffer & William C. Pericak, *Twenty Questions Raised by the Justice Department's Yates Memorandum*, 99 BLOOMBERG BNA CRIM. L. REP. 191 (May 18, 2016), https://jenner.com/system/assets/publications/15188/original/Stauffer_Pericak_Bloomberg_May_2016.pdf?1463730304 ("[W]e are skeptical that the Yates Memo will have much impact on the decision whether to enter into a joint defense agreement.").

[130] Nicolas Bourtin, *Expert Q&A on the DOJ's Yates Memo*, PRACTICAL LAW 16, 19 (Apr./May 2016).

an immediate and perhaps unwaivable conflict of interest,"[131] and potentially limiting the company's capacity to provide all relevant facts to the DOJ. Of course, this risk presupposes that facts can be privileged, a proposition that the DOJ rejects.

Post-Yates JDAs could further impede a corporation's ability to obtain cooperation credit if one or more constituents seek to block the company from disclosing facts acquired under the joint agreement. If the company insists on an anti-blocking provision then constituents will have less incentive to join a JDA, as their fears of being sacrificed by the leniency-seeking corporation are magnified.[132] Indeed, the DOJ may seek to leverage the Yates Memorandum to discourage JDAs expressly or impliedly, given prosecutors' general aversion to such agreements.[133] The government could persuasively argue that a common interest sufficient to support a JDA never existed, if a company decides early in an investigation to cooperate in order to obtain credit. This cooperation would undercut an alleged common interest between the company and an individual target.[134]

Second, those JDAs which do form post-Yates Memorandum are likely to be more complex than those which formed in prior years. While constituents will be less likely to enter into JDAs with their companies they will retain their incentives to enter into joint agreements with their fellow constituents, to the exclusion of the company.[135] This is because the Yates Memorandum's policy concerning eligibility for cooperation credit applies to organizational entities but not to individuals. This could lead to a "web of multiple, overlapping JDAs that would only compound the complexity of tracking common interests and confidentiality obligations."[136]

D. Civil Enforcement by the DOJ

The Yates Memorandum expressly states that the conditions for cooperation credit apply with equal force in both the civil and criminal contexts and that "a company under civil investigation must provide to the [DOJ] all relevant facts about individual misconduct in order to

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[131] Nicolas Bourtin, *Expert Q&A on the DOJ's Yates Memo*, PRACTICAL LAW 16, 19 (Apr./May 2016).
[132] McDermott Will & Emery, Health Care Compliance and Defense Resource Center, *Does Yates Sound the Death Knell for Joint Defense Agreements?* (May 12, 2016), https://www.mwe.com/~/media/files/experience/health-care-resource-center/yates-memorandum/does-the-yates-sound-the-death-knell-for-joint-defense-agreements.pdf.
[133] *See* Sarah Kropf, *Will the New DOJ Policy End Joint Defense Agreements?*, GRANDJURYTARGET.COM (Sept. 27, 2015), https://grandjurytarget.com/2015/09/27/will-the-new-doj-policy-end-joint-defense-agreements/ (predicting such an effect).
[134] Michael A. Brockland, American Bar Ass'n Commercial & Business Litig. Section, *Unsteady Bedfellows: Joint Defense Agreements After the Yates Memo* (Feb. 14, 2017), http://www.americanbar.org/publications/litigation-committees/commercial-business/articles/2017/unsteady-bedvellows-joint-defense-agreements-after-yates-memo.html.
[135] *See* Sarah Kropf, *Will the New DOJ Policy End Joint Defense Agreements?*, GRANDJURYTARGET.COM (Sept. 27, 2015), https://grandjurytarget.com/2015/09/27/will-the-new-doj-policy-end-joint-defense-agreements/ (noting that the Yates Memorandum "may encourage JDAs among individuals that *exclude* companies").
[136] McDermott Will & Emery, Health Care Compliance and Defense Resource Center, *Does Yates Sound the Death Knell for Joint Defense Agreements?* (May 12, 2016), https://www.mwe.com/~/media/files/experience/health-care-resource-center/yates-memorandum/does-the-yates-sound-the-death-knell-for-joint-defense-agreements.pdf.

receive any consideration in the negotiation."[137] Pursuant to this directive, a new section entitled "Pursuit of Claims Against Individuals" has been added to Title 4 of the USAM to implement the six standards set forth in the Yates Memorandum, as applied to civil matters.[138] The USAM now provides that civil corporate investigations should focus on individuals from the inception and that a determination as to whether to bring suit against an individual should not be based solely on that person's ability to pay a judgment.[139]

The USAM also makes clear that individuals will not be released from civil liability based on corporate settlement releases absent "extraordinary circumstances," which must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.[140] Similarly, if a decision is made at the conclusion of a civil investigation not to bring civil claims against involved individuals, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.[141]

This focus of the Yates Memorandum on civil enforcement is widely expected to result in an increase in the number and depth of civil investigations under a variety of statutes with civil enforcement provisions, including the False Claims Act.[142] This will reflect a significant change. While pre-Yates enforcement of the False Claims Act, Foreign Corrupt Practices Act, and federal antitrust laws was quite robust, there had been little civil enforcement against individuals under these statutes.[143]

IV. Applying the Yates Memorandum

The next part of this Article examines the DOJ's application of the Yates Memoranda in four separate subject areas, at least three of which are international in scope: foreign corruption/FCPA, export controls and economic sanctions, antitrust/international cartels, and the False Claims Act (FCA).

A. Foreign Corrupt Practices Act/Pilot Program

The FCPA, enacted in 1977, regulates international corruption using both accounting and anti-bribery provisions. The accounting provisions mandate regular reports to the Securities and Exchange Commission (SEC), maintenance of accurate books and records, and the establishment of internal compliance controls. These requirements apply to domestic and foreign corporations traded on U.S. stock exchanges. The anti-bribery provisions criminalize the transfer of money or

[137] United States Attorneys' Manual (2015).
[138] *Id*.
[139] *Id*.
[140] *Id*.
[141] *Id*.
[142] *See*, *e.g.*, Nicolas Bourtin, *Expert Q&A on the DOJ's Yates Memo*, PRACTICAL LAW 16, 18 (Apr./May 2016).
[143] William E. Lawler, III & Jeremy Keeney, *DOJ's Yates Memorandum: Focus Enforcement Efforts on Individuals*, 83 DEFENSE COUNSEL J. 200, 205 (2016).

other gifts to foreign officials and political actors with intent to influence or obtain or retain business. These provisions apply to conduct by securities issuers, U.S. citizens and entities, and certain foreign nationals and entities. Both the SEC and DOJ are authorized to enforce the FCPA's anti-bribery provisions, with civil or criminal enforcements actions, respectively. There is no private right of action under the FCPA.[144]

In April 2016 the DOJ announced a one-year FCPA Pilot Program in a document entitled "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" (FCPA Guidance).[145] The Pilot Program has two components—it delineates both the DOJ's expectations for how a company should manage an FCPA investigation and the potential benefits if a company chooses to follow the FCPA Guidance. The FCPA Pilot Program is intended to complement the Yates Memorandum and the Filip Memorandum and to improve the transparency of DOJ charging decisions.[146]

The FCPA Guidance states that the DOJ expects companies to (1) voluntarily disclose the wrongful conduct to the DOJ in a timely manner; (2) cooperate fully with the DOJ over the course of the investigation; and (3) if necessary, make the appropriate remedial efforts to ensure that similar conduct does not occur again.[147] The burden of proving these elements is on the cooperating company.[148] If, over the course of the investigation, a company establishes that it has satisfied the three requirements, it may receive a 50% reduction off the bottom of the fine range set forth in the Federal Sentencing Guidelines for Organizations (Sentencing Guidelines),[149] it will generally not be directed to appoint a monitor, and the DOJ will consider declining prosecution altogether (provided that the company disgorges all of the profits flowing from the misconduct).[150] If a company does not voluntarily disclose the wrongful conduct it may still receive up to a 25% reduction from the bottom of the Sentencing Guidelines fine range in recognition of its cooperation.[151]

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[144] *See* Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419 (2012) (arguing in favor of a private right of action).

[145] U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download.

[146] Shearman & Sterling LLP, *FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act* 23 (Jan. 3, 2017), http://www.shearman.com/~/media/Files/NewsInsights/Publications/2017/01/Recent-Trends-and-Patterns-in-the-Enforcement-of-the-Foreign-Corrupt-Practices-Act-011117.pdf.

[147] U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download.

[148] Latham & Watkins, Client Alert No. 2103, *DOJ Announces Continuation and Ongoing Review of FCPA Pilot Program* (Mar. 24, 2017), https://www.lw.com/thoughtLeadership/DOJ-announces-continuation-ongoing-review-FCPA-pilot-program.

[149] United States Sentencing Comm'n, Federal Sentencing Guidelines, Ch. 8—Sentencing of Organizations (2015), http://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-8.

[150] Mark Mendelsohn, Alex Oh & Farrah Berse, *Shedding Further Light on the FCPA Pilot Program*, LAW360 (July 29, 2016, 2:12 PM EDT), https://www.law360.com/articles/822817/shedding-further-light-on-the-fcpa-pilot-program.

[151] U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download.

The one-year FCPA Pilot Program was scheduled to expire in April 2017, but one month prior to its expiration it was temporarily extended for an indefinite period, pending review by the DOJ of the Program's utility and efficacy.[152] What are the program's prospects in the Trump era? As is true with regard to the fate of the Yates Memorandum, it is difficult to predict. Following the November 2016 election many commentators predicted that Trump's DOJ would relax enforcement of the FCPA.[153] But this was far from a uniform view.[154] Prior to his confirmation as U.S. Attorney General Jeff Sessions stated that if confirmed he would enforce the FCPA "as appropriate based on the facts and circumstances of each case."[155]

When the FCPA Pilot Program was announced it was greeted with a fair amount of skepticism. Critics focused on the following issues. First, one of the primary goals of the Pilot Program—the encouragement of voluntary disclosures to permit the DOJ to prosecute individuals—is undercut by the recent history of the FCPA. In the five years before the Pilot Program was adopted, only 26 percent of the corporate DOJ FCPA enforcement actions that originated with voluntary disclosures included a related DOJ prosecution of individuals.[156] Given this low percentage, it seemed unlikely that the Pilot Program could accomplish its goal. Second, the two incentives or carrots that the Pilot Program offers are nothing new. The DOJ had previously offered companies that voluntarily disclosed, cooperated, and remediated up to and sometimes more than a 50 percent reduction off the minimum amount suggested by the Sentencing Guidelines. And the DOJ had previously offered companies that cooperated and remediated but did not voluntarily disclose at least 25 percent reductions off the minimum amount suggested by the Sentencing Guidelines.[157]

Third, the FCPA Pilot Program is non-binding and commits the DOJ to nothing.[158] Indeed, the FCPA Guidance states: "This memorandum is for internal use only and does not create any privileges, benefits, or rights, substantive or procedural, enforceable by any

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[152] *See* Jody Godoy, *DOJ Will Continue FCPA Pilot Program While Reviewing Results*, LAW360 (Mar. 10, 2017, 10:54 AM), https://www.law360.com/whitecollar/articles/900564/breaking-doj-will-continue-fcpa-pilot-program-while-reviewing-results.

[153] *See* Roderick L. Thomas & Colin Cloherty, *FCPA Expectations Under President Trump*, LAW360 (Jan. 24, 2017, 1:09 PM), https://www.law360.com/securities/articles/883641/fcpa-expectations-under-president-trump.

[154] *See* Roderick L. Thomas & Colin Cloherty, *FCPA Expectations Under President Trump*, LAW360 (Jan. 24, 2017, 1:09 PM), https://www.law360.com/securities/articles/883641/fcpa-expectations-under-president-trump.

[155] *See* Richard L. Cassin, *Jeff Sessions: I'll Enforce the FCPA*, FCPA BLOG (Jan. 27, 2017, 8:22 AM), http://www.fcpablog.com/blog/2017/1/27/jeff-sessions-ill-enforce-the-fcpa.html ("We remain skeptical that FCA enforcement will wane. . . ."). *See also* Marc Bohan, Michael Skopets & Leah Moushey, *13 FCPA Enforcement Actions Resolved in 2017 So Far*, LAW360 (May 4, 2017, 11:11 AM EDT), https://www.law360.com/articles/919703/13-fcpa-enforcement-actions-resolved-in-2017-so-far ("There are no significant indications that FCPA enforcement efforts by the U.S. Securities and Exchange Commission and the U.S. Department of Justice will shift dramatically under the Trump administration.").

[156] Mike Koehler, *Grading the DOJ's Foreign Corrupt Practices Act 'Pilot Program*,' 11 BLOOMBERG BNA WHITE COLLAR CRIME REP. 353 (Apr. 29, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2772105.

[157] Mike Koehler, *Grading the DOJ's Foreign Corrupt Practices Act 'Pilot Program*,' 11 BLOOMBERG BNA WHITE COLLAR CRIME REP. 353 (Apr. 29, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2772105.

[158] *See* Andy Spalding, *On Maximizing Deterrence Per Dollar*, 67 FLA. L. REV. F. 233, 242 (2016) (noting that under the FCPA Pilot Program the DOJ "may" provide a reduction in penalties and will "consider" declinations).

individual, organization, party or witness in any administrative, civil, or criminal matter."[159] The fact that penalty reductions remain discretionary may minimize the benefit of voluntary participation in the Pilot Program. Fourth, both the SEC and DOJ are authorized to enforce the FCPA's anti-bribery provisions, and cooperation on investigations is common,[160] but the FCPA Pilot Program is a DOJ program only. Accordingly, only half of the enforcement landscape has been addressed. Fifth, under the Pilot Program only corporations can receive leniency for self-reporting misconduct. The Program's failure to provide any analogous provision for granting leniency to cooperating employees "may undermine the goal of self-reporting."[161]

Sixth, the FCPA Pilot program includes a de-confliction provision, pursuant to which companies may be expected to halt internal investigations to permit the DOJ to interview employees before the company does so.[162] Implementation of this provision may be unwise, insofar as it would keep directors, officers, and shareholders in the dark about critical on-going investigations.

The FCPA Pilot Program marked its one-year anniversary in April 2017. What have the results been so far, and how accurate were the predictions of the Program's early skeptics? The results to date suggest that some but clearly not all of the initial objections were unwarranted.

Between April 2016 and April 2017 the DOJ resolved 18 FCPA cases.[163] Seven of the 19 cases involved companies that self-reported misconduct and five of the seven received a declination, which is the program's maximum reward. This represents an uptick from the prior year, when only two companies received declinations. The two companies that self-disclosed but did not receive declinations received 50 percent and 30 percent discounts. No company that self-reported was required to engage a corporate compliance monitor,[164] but all seven self-disclosing companies were required to disgorge profits pursuant to the Pilot Program's requirements.[165] The declinations with disgorgement mark a new category of enforcement action

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[159] U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download.

[160] Meghan Hansen & Carolyn Wald, *100 Days of FCPA Under Trump: 10 Takeaways*, LAW360 (Apr. 27, 2017, 5:33 PM EDT), https://www.law360.com/articles/917416/100-days-of-fcpa-under-trump-10-takeaways.

[161] Nicholas M. De Feis & Philip C. Patterson, *Limits in New FCPA Leniency Program May Hinder Effectiveness*, N.Y. L.J. (Apr. 26, 2016), http://www.newyorklawjournal.com/id=1202755915736/Limits-in-New-FCPA-Leniency-Program-May-Hinder-Effectiveness?slreturn=20170420231143.

[162] U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download.

[163] Ryan J. Rohlfsen, Kim B. Nemirow & Dante A. Roldan, *Evaluating the FCPA Pilot Program: The Data, the Trends*, Ropes & Gray (Apr. 14, 2017), https://www.ropesgray.com/newsroom/alerts/2017/04/Evaluating-FCPA-Pilot-Program-The-Data-The-Trends.aspx.

[164] For a discussion of many of the problems associated with monitors, see Veronica Root, *Modern-Day Monitorships*, 33 YALE J. ON REG. 109 (2016); Veronica Root, *The Monitor-"Client" Relationship*, 100 VA. L. REV. 523 ((2014).

[165] Ryan J. Rohlfsen, Kim B. Nemirow & Dante A. Roldan, *Evaluating the FCPA Pilot Program: The Data, the Trends*, Ropes & Gray (Apr. 14, 2017), https://www.ropesgray.com/newsroom/alerts/2017/04/Evaluating-FCPA-Pilot-Program-The-Data-The-Trends.aspx.

for the DOJ,[166] and probably constitute the Program's most innovative feature. Of the 11 companies that did not self-report, nine received a discount of 25 percent or less.[167] The level of cooperation appeared to impact the discount, regardless of whether a company self-reported. Finally, of the 11 NPA and DPA resolutions in cases with no self-disclosure, nine required the company to appoint a monitor.[168]

The foregoing results serve to underscore one of the advantages of the FCPA Pilot Program—to a greater degree than before, companies are able to perceive the benefits of self-reporting (and cooperation). This enhanced transparency—which is one of the goals of the Program[169]—has been aided in part by the DOJ's break with precedent by publicly disclosing several declination decisions. While the DOJ has stated that it will not publicize all of its declinations,[170] public release no doubt helps companies understand the benefits of the Pilot Program. Self-reporting companies are likely to receive a declination (or at least a significant penalty discount), and they are highly unlikely to received a monitor. In contrast, companies that fail to self-report will not receive a declination, will receive a lesser penalty discount, and are quite likely to receive a monitor. The imposition of a monitor represents a significant expense for companies that may even exceed the value of a penalty discount.[171]

However, the foregoing conclusions must be qualified, because most of the 19 FCPA cases resolved during the first year of the FCPA Pilot Program were reported prior to the Program's inception.[172] Also, while FCPA declinations have increased,[173] several of the Program's reported declinations involved private companies and resulted in minimal sanctions where the DOJ may not have collected evidence required to ultimately prove criminal conduct. More definitive conclusions await a larger set of cases handled entirely within the Program's framework.

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[166] *See* Jessica Mussallem & Kurt Oldenburg, Vinson & Elkins, *Declinations with Disgorgement: The DOJ's New Enforcement Category* (Oct. 3, 2016), https://www.velaw.com/Insights/Declinations-with-Disgorgement--The-DOJ-s-New-Enforcement-Category/.

[167] Ryan J. Rohlfsen, Kim B. Nemirow & Dante A. Roldan, *Evaluating the FCPA Pilot Program: The Data, the Trends*, Ropes & Gray (Apr. 14, 2017), https://www.ropesgray.com/newsroom/alerts/2017/04/Evaluating-FCPA-Pilot-Program-The-Data-The-Trends.aspx.

[168] *Id*.

[169] Mona Patel, *Evaluating FCPA Pilot Program: A Shift in Company Thinking?*, LAW360 (Apr. 11, 2017, 2:17 PM EDT), https://www.law360.com/articles/912000/evaluating-fcpa-pilot-program-a-shift-in-company-thinking.

[170] Marc Alain Bohn & James G. Tillen, *Evaluating FCPA Pilot program: Declinations on the Rise*, LAW360 (Apr. 10, 2017, 5:10 PM EDT), https://www.law360.com/articles/905127/evaluating-fcpa-pilot-program-declinations-on-the-rise.

[171] Ryan J. Rohlfsen, Kim B. Nemirow & Dante A. Roldan, *Evaluating the FCPA Pilot Program: The Data, the Trends*, Ropes & Gray (Apr. 14, 2017), https://www.ropesgray.com/newsroom/alerts/2017/04/Evaluating-FCPA-Pilot-Program-The-Data-The-Trends.aspx.

[172] *Id*.

[173] *See* Marc Alain Bohn & James G. Tillen, *Evaluating FCPA Pilot Program: Declinations on the Rise*, LAW360 (Apr. 10, 2017, 5:10 PM EDT), https://www.law360.com/articles/905127/evaluating-fcpa-pilot-program-declinations-on-the-rise ("{T]he DOJ's pilot program has been accompanied by a notable uptick in declinations by the department.").

In addition, it remains unclear that the Pilot Program is a bargain for defendant companies. The up to 50 percent reduction in penalties is not guaranteed, and it remains the subject of considerable prosecutorial discretion. It remains difficult, if not impossible, to determine why one cooperating company receives a 15 percent discount but another cooperating company receives a 20 percent discount. It also is unclear exactly why one company receives a penalty discount but another company receives a declination.[174] And a declination neither relieves companies from the obligation to disgorge alleged profits nor reduces the amount of profits that must be disgorged, "which is usually a number subject to interpretation and a lot of negotiation."[175] The DOJ's new enforcement category of declinations with disgorgement is a harsher result than a mere declination, even if it is less onerous than an NPA or DPA, and there are no public standards applicable to disgorgement.[176]

As noted *supra*, one of the early objections to the FCPA Pilot Program was that it excludes the SEC, which has overlapping FCPA jurisdiction with the DOJ. Is this objection valid? The DOJ issued five public declinations (and a number of additional non-public declinations) from the inception of the Pilot Program in April 2016 through April 2017.[177] Three of the public declinations involved companies subject to overlapping SEC jurisdiction. In one of the three cases the SEC sought disgorgement (as contemplated under the Program), and in another case the SEC imposed an additional civil penalty.[178] But this is consistent with the SEC's statutory role under the FCPA. The SEC is more or less a co-equal partner with the DOJ in FCPA enforcement. Thus, in 2016, the SEC brought a record 26 enforcement actions, far exceeding its prior record of 18 in 2007. In 14 of these cases, the SEC functioned more or less independently, taking action where the SEC elected not to do so.[179] And in those cases under the Pilot Program in which the DOJ publicly declined to take action and the SEC could take action,

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[174] Erin G.H. Sloane, Jay Holtmeier & Kimberly A. Parker, *Evaluating FCPA Pilot Program: Lessons and Expectations*, LAW360 (Apr. 14, 2017, 3:13 PM EDT), https://www.law360.com/articles/912437/evaluating-fcpa-pilot-program-lessons-and-expectations. It has always been unclear why a particular company receives a declination in an FCPA case. *See* Beverley Earle & Anita Cava, *The Mystery of Declinations Under the Foreign Corrupt Practices Act: A Proposal to Incentivize Compliance*, 49 U.C. DAVIS L. REV. 567 (2015).

[175] Jessica Mussallem & Kurt Oldenburg, Vinson & Elkins, *Declinations with Disgorgement: The DOJ's New Enforcement Category* (Oct. 3, 2016), https://www.velaw.com/Insights/Declinations-with-Disgorgement--The-DOJ-s-New-Enforcement-Category/.

[176] Erin G.H. Sloane, Jay Holtmeier & Kimberly A. Parker, *Evaluating FCPA Pilot Program: Lessons and Expectations*, LAW360 (Apr. 14, 2017, 3:13 pM EDT), https://www.law360.com/articles/912437/evaluating-fcpa-pilot-program-lessons-and-expectations.

[177] Marc Alain Bohn & James G. Tillen, *Evaluating FCPA Pilot Program: Declinations on the Rise*, LAW360 (Apr. 10, 2017, 5:10 PM EDT), https://www.law360.com/articles/905127/evaluating-fcpa-pilot-program-declinations-on-the-rise ("{T]he DOJ's pilot program has been accompanied by a notable uptick in declinations by the department.").

[178] Meghan Hansen & Carolyn Wald, *100 Days of FCPA Under Trump: 10 Takeaways*, LAW360 (Apr. 27, 2017, 5:33 PM EDT), https://www.law360.com/articles/917416/100-days-of-fcpa-under-trump-10-takeaways.

[179] Luke T. Cadigan & Michael McMahon, *Evaluating FCPA Pilot Program: A Look at SEC Involvement*, LAW360 (Apr. 12, 2017, 5:49 PM EDT), https://www.law360.com/articles/911911/evaluating-fcpa-pilot-program-a-look-at-sec-involvement.

the latter did so.[180] More broadly, 21 companies received declinations (public and non-public) in FCPA cases from the DOJ in 2016 and the first quarter of 2017, and the SEC prosecuted nine of these companies and opened investigations involving another three.[181] These statistics reflect a broader shift in recent years by the DOJ and SEC "away from parallel enforcement of the FCPA, which used to be the norm, towards standalone enforcement, which is now the norm."[182] This shift can be attributed at least in part to the FCPA Pilot Program, and it demonstrates that the DOJ has made a strategic decision to allocate internal resources to larger, higher-impact cases, including those against culpable individuals (per the Yates Memorandum), both in the United States and in foreign countries.[183]

Overall, the DOJ's new FCPA Pilot Program is flawed, but it has proven effective in encouraging self-disclosure, cooperation, and remediation, in exchange for flexibility in charging decisions and leniency at sentencing.[184] The fate of the Program in the trump era remains to be seen.

B. Export Controls and Economic Sanctions

In October 2016 the DOJ's National Security Division (NSD) published a memorandum establishing a policy framework for negotiated resolutions of export control and economic sanctions investigations with potential criminal liability that is substantially similar to the FCPA Pilot Program (NSD Guidance).[185] The NSD Guidance seeks to encourage business organizations to self-disclose, cooperate, and remediate in DOJ investigations of criminal violations of export control and sanctions laws. The document applies the Yates Memorandum to DOJ investigations of such violations and thus further institutionalizes the Memorandum. Indeed, the Guidance specifically states that one of its primary purposes is to implement the Yates Memorandum.[186]

Export controls and economic sanctions are widely regarded as indispensable weapons in the United States foreign policy arsenal.[187] Exports of sensitive equipment, software, and

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[180] *Id*.
[181] *Id.*
[182] *Id*.
[183] *Id.*
[184] Erin G.H. Sloane, Jay Holtmeier & Kimberly A. Parker, *Evaluating FCPA Pilot Program: Lessons and Expectations*, LAW360 (Apr. 14, 2017, 3:13 pM EDT), https://www.law360.com/articles/912437/evaluating-fcpa-pilot-program-lessons-and-expectations.
[185] U.S. Dep't of Justice, Nat'l Sec. Div., Guidance Regarding Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations (Oct. 2, 2016), https://www.justice.gov/nsd/file/902491/download.
[186] *Id.*
[187] Jeremy Zucker, et al., *Recent Developments and Trends in Economic Sanctions and Export Controls Enforcement and Expected Changes Ahead*, BLOOMBERG INTERNATIONAL TRADE DAILY BULLETIN (Jan. 27, 2017), https://www.dechert.com/Recent_Developments_and_Trends_in_Economic_Sanctions_and_Export_Controls_Enforcement_and_Expected_Changes_Ahead_01-27-2017/. *See also* Carnegie Endowment for International Peace, *U.S. Treasury Secretary Jacob J. Lew on the Evolution of Sanctions and Lessons for the Future* (Mar. 30, 2016), http://carnegieendowment.org/2016/03/30/u.s.-treasury-secretary-jacob-j.-lew-on-evolution-of-sanctions-and-

technology are controlled by the Arms Export Control Act (AECA),[188] the International Emergency Economic Powers Act (IEEPA),[189] and regulations promulgated thereunder. Multiple federal agencies are charged with enforcing export controls and economic sanctions, with criminal enforcement jurisdiction given to the NSD. The NSD Guidance is only applicable to willful violations of the foregoing statutes, pursuant to *Bryan v. United States*.[190] It does not apply to financial institutions, by virtue of their unique stand-alone and compliance and reporting obligations.[191]

The NSD Guidance provides that a company that (1) voluntarily self-discloses the issues to NSD's Counterintelligence and Export Controls Section (CES), (2) cooperates fully with CES, and (3) engages in timely and appropriate remediation may be eligible for reduced criminal penalties and/or an NPA or DPA, instead of a criminal plea.[192] The Guidance defines in detail NSD's criteria for most of these requirements,[193] and explicitly states that companies failing to meet the applicable standards will be ineligible for the full credit offered.[194] Full cooperation will require actions not typically involved in most disclosures to the agencies involved in administering the AECA and IEEPA, "including making employees and former employees available for interviews and disclosing all relevant facts rather than a general narrative."[195] Pursuant to the Yates Memorandum, this includes disclosure of information concerning involvement by the company's officers, employees, or agents in the alleged misconduct. Companies are not required to waive the attorney-client privilege or work product protection in order to obtain full cooperation credit.

The NSD Guidance closely tracks the FCPA Pilot program with respect to defining the voluntariness of a disclosure, full cooperation, and appropriate remediation.[196] But there are some key differences. First, even where full credit is allowed, the NSD Guidance—unlike the FCPA Pilot Program—does not offer companies the prospect of a declination of prosecution. Instead, an NPA, in combination with disgorgement and any criminal fine, is the most lenient

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lessons-for-future-event-5191 ("Economic sanctions have become a powerful force in service of clear and coordinated foreign policy objectives—smart power for situations where diplomacy alone is insufficient but military force is not the right response. They must remain a powerful option for decades to come.").

[188] Pub. L. No. 94-329, 90 Stat. 729 (1976), codified at 22 U.S.C. § 2278 (2012).

[189] Pub. L. No. 95-223, 91 Stat. 1626 (1977), codified at 50 U.S.C. § 1705 (2012).

[190] 524 U.S. 184 (1998).

[191] U.S. Dep't of Justice, Nat'l Sec. Div., *Guidance Regarding Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations* 2 n.3 (Oct. 2, 2016), https://www.justice.gov/nsd/file/902491/download.

[192] U.S. Dep't of Justice, Nat'l Sec. Div., Guidance Regarding Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations (Oct. 2, 2016), https://www.justice.gov/nsd/file/902491/download.

[193] *Id*.

[194] *Id*.

[195] Barbara D. Linney, *New DOJ Guidance Adds New Complexity and Costs to Export Control and Sanctions Investigations and Disclosures*, FINANCIER WORLDWIDE 1, 4 (Dec. 2016), http://www.millerchevalier.com/Publications/PublishedArticles?find=184202.

[196] William M. McGlone, et al., *Latham & Watkins Discusses How DOJ Credits Self-Disclosure of Export Controls and Sanctions Violations*, CLS BLUE SKY BLOG (Dec. 20, 2016), http://clsbluesky.law.columbia.edu/2016/12/20/latham-watkins-discusses-how-doj-credits-self-disclosure-of-export-controls-and-sanctions-violations/.

possible resolution, and relevant regulatory authorities may still bring civil enforcement actions.[197]

Second, the NSD Guidance—unlike the FCPA Pilot Program—does not specify how soon after discovering a potential violation a company must make a disclosure in order for the disclosure to be considered timely. Under the FCPA Pilot Program a disclosure is timely if made within three months of discovering an FCPA violation. CES may look to this provision and adopt a similar approach.[198]

Third, the NSD Guidance—unlike the FCPA Pilot Program—does not quantify the savings a company can realize by self-disclosing, cooperating, and remediating, and it does not permit companies to ascertain the credit NSD assigns specifically to each of the foregoing three tasks. As noted *supra*, the FCPA Pilot program provides up to a 50% penalty reduction off the bottom end of the Sentencing Guidelines range for companies that voluntarily disclose, cooperate, and remediate (and in most cases provides for no appointment of a federal monitor), and up to a 25% reduction if the company fully cooperated and remediated but did not voluntarily self-disclose. The NSD Guidance includes no comparable provision.

In this regard the NSD Guidance is consistent with two Enforcement Advisories issued in January 2017 by the U.S. Commodity Futures Trading Commission (CFTC) Division of Enforcement setting forth the factors that the Division may consider in assessing cooperation by companies and individuals in the context of CFTC enforcement proceedings.[199] The 2017 CFTC Enforcement Advisories—one for companies and one for individuals—are the first update to the CFTC's corporate cooperation guidelines since 2007 and the Division's first statement of its policy specifically concerning cooperating individuals. The 2017 Advisories outline three sets of factors the Division may use in evaluating a party's cooperation: (1) the value of the cooperation to the Division's investigation or enforcement action; (2) the value of the cooperation in the context of the Division's broader enforcement interests; and (3) the balance of culpability and any history of misconduct against acceptance of responsibility and mitigation or remediation.[200]

The 2017 Advisories echo the Yates Memorandum by emphasizing the identification of culpable individuals,[201] but unlike Yates they do not explicitly require a corporation to provide all relevant facts relating to these individuals as a prerequisite to qualify for any cooperation

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[197] U.S. Dep't of Justice, Nat'l Sec. Div., Guidance Regarding Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations (Oct. 2, 2016), https://www.justice.gov/nsd/file/902491/download.

[198] *See* Covington & Burling LLP, *Recent Developments in Enforcement of U.S. Export Controls and Sanctions Law* 2 (Jan. 13, 2017), https://www.cov.com/-/media/files/corporate/publications/2017/01/recentdevelopmentsinenforcementofusexportcontrolsandsanctionslaws.pdf.

[199] *See* U.S. Commodity Futures Trading Comm'n, *Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies* (Jan. 19, 2017), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf and U.S. Commodity Futures Trading Comm'n, *Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals* (Jan. 19, 2017), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf.

[200] *Id*.

[201] *Id.*

credit.[202] And unlike the FCPA Pilot Program the 2017 Advisories fail to quantify the financial benefits that may attach to voluntary cooperation.[203] Indeed, the 2017 Advisories provide "no assurance that a company providing a particular amount of credit will receive a particular amount of credit—or any credit—in return."[204] The failure of both the NSD Guidance and the 2017 CFTC Enforcement Advisories to provide clarity and transparency regarding what companies can expect to receive in return for self-disclosing information threatens to limit their effectiveness.[205]

C. Antitrust (International Cartels)

Since the mid-1990s almost half of criminal antitrust violations targeted by the DOJ's Antitrust Division (Division) have involved international cartels.[206] The Yates Memorandum is likely to impact the DOJ's approach to cartel enforcement. In order to understand the possible impact it is necessary to first understand the Division's recent approach to such enforcement. Beginning in the 1990s the Division began adopting policies and developing enforcement techniques based on the proposition that individual accountability is the most effective way to deter cartel conduct.[207] Part of this approach was to convince other nations to criminalize cartel conduct. This lobbying effort has been successful—by 2017 more than 30 countries imposed criminal liability for cartel activities. These countries include major economic powers like Australia, Brazil, Canada, Israel, Japan, Mexico, South Korea, the United Kingdom, and Russia.[208] Almost all of the countries that have criminalized cartel conduct have done so since 1995.[209]

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[202] Latham & Watkins, Client Alert Commentary No. 2076, *CFTC Releases New Enforcement Cooperation Guidelines* 2 (Feb. 14, 2017), https://www.lw.com/thoughtLeadership/CFTC-new-enforcement-cooperation-guidelines.

[203] Cleary Gottlieb Steen & Hamilton LLP, Alert Memorandum, *CFTC's Demanding New Cooperation Guidelines for Companies and Individuals* 5 (Jan. 24, 2017), https://www.clearygottlieb.com/~/media/cgsh/files/alert-memos/alert-memo-201716.pdf.

[204] Robert Houck, David Yeres & Benjamin Peacock, Clifford Chance US LLP, Client Briefing, *CFTC Gives Guidance on Cooperation* (Jan. 2017), https://www.cliffordchance.com/briefings/2017/01/cftc_gives_guidanceoncooperation.html.

[205] *See*, *e.g.*, David Meister, Mark Young & Chad Silverman, *Inside the CFTC's New Advisories on Cooperation*, LAW360 (Feb. 8, 2017, 11:34 AM), https://www.law360.com/articles/889615/inside-the-cftc-s-new-advisories-on-cooperation ("Until an entity knows with greater certainty what benefit it can expect to receive in return for self-reporting information to the CFTC, the utility and effectiveness of this new guidance will naturally be limited.").

[206] D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 806 (2013).

[207] Robert E. Bloch, Kelly B. Kramer & Stephen M. Medlock, *The Yates Memorandum's Impact on U.S. Cartel Enforcement: Evolution or Revolution?*, COMPETITION POLICY INTERNATIONAL 2 (June 2016).

[208] *See* Morgan Lewis, *2016 Global Cartel Enforcement Report* 15 (Jan. 2017), https://www.morganlewis.com/~/media/files/publication/report/2016-year-end-cartel-report-january-2017_optimized.ashx?la=en (listing 33 countries).

[209] Gregory C. Schaffer & Nathaniel H. Nesbitt, *Criminalizing Cartels: A Global Trend?*, at 2, University of Minnesota Law School, Legal Studies Research Paper Series, Research Paper No. 11-26 92013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288871.

A second aspect of the Division's modern approach to cartel enforcement has been the increased prosecution of foreign executives. The Division has convinced a substantial number of foreign nationals to voluntarily travel to the United States to plead guilty to a Sherman Act violation and serve a federal prison term. In the auto parts price-fixing conspiracy, for example, dozens of foreign executives negotiated plea agreements that involved serving prison terms in this country.[210] There are least dual incentives for the executives—they avoid the risk of an unexpected arrest during foreign travel based on an international arrest warrant, and negotiated sentences are typically lower than the sentences that would be imposed following a trial.[211] Not all executives share this perspective, and thus the Division is required to rely on extradition in many cases involving global cartels. Prior to 2010 the Division had never successfully extradited a foreign executive. That record of failure changed in 2010 with the successful extradition of Ian Norris, the former CEO of Morgan Crucible, PLC, from the United Kingdom to the United States.[212] Subsequently, in April 2014, the Division announced that Germany had agreed to extradite Romano Pisciotti, an Italian citizen, to face United States antitrust charges. Pisciotti was the first person ever extradited to the United States based solely on antitrust charges.[213] And in October 2016 the Division secured the extradition from Bulgaria of an Israeli national, Yuval Marshak, a former owner and executive of an Israel-based defense contractor.[214] However, even after Norris, Pisciotti, and Marshak, extradition of foreign executives in cartel cases is the exception, rather than the norm.[215]

A third aspect of the Division's modern approach is its increased prosecution of individuals who have been carved out of corporate plea agreements—many of whom are foreign citizens. From 1990 to 1999 the Division prosecuted roughly even numbers of corporations and individuals, from 2000 to 2009 the Division prosecuted twice as many individuals (453) as corporations (220), and from 2010 to 2015 the Division prosecuted nearly three times as many individuals (352) as corporations (123).[216] During the period January 2009 to June 2016 the

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[210] Mark L. Krotoski, *Extradition in International Antitrust Enforcement Cases*, ANTITRUST SOURCE (Apr. 2015), https://www.morganlewis.com/~/media/files/publication/outside%20publication/article/antitrust-source-extradition-in-international-antitrust-enforcement-cases-april2015.ashx.

[211] Robert E. Bloch, Kelly B. Kramer & Stephen M. Medlock, *The Yates Memorandum's Impact on U.S. Cartel Enforcement: Evolution or Revolution?*, COMPETITION POLICY INTERNATIONAL 5 (June 2016).

[212] Mark L. Krotoski, *Extradition in International Antitrust Enforcement Cases*, ANTITRUST SOURCE (Apr. 2015), https://www.morganlewis.com/~/media/files/publication/outside%20publication/article/antitrust-source-extradition-in-international-antitrust-enforcement-cases-april2015.ashx.

[213] *Id*.

[214] Gibson Dunn, *2016 Year-End Criminal Antitrust and Competition Law Update* 4 (Jan. 10, 2017), http://www.gibsondunn.com/publications/Pages/2016-Year-End-Criminal-Antitrust-and-Competition-Law-Update.aspx.

[215] *See* Quinn Emanuel Urquhart & Sullivan LLP, *Extradition for U.S. Antitrust Crimes: An Anomaly or the New Normal?* (2015), http://www.quinnemanuel.com/the-firm/news-events/article-august-2015-extradition-for-us-antitrust-crimes-an-anomaly-or-the-new-normal/ (expressing doubt that extradition for antitrust crimes will become common).

[216] Shylah R. Alfonso & Mara Boundy, Perkins Coie, *Antitrust Division Focuses Enforcement Efforts on Individuals Behind International Cartels* (Sept. 12, 2016), https://www.perkinscoie.com/en/news-insights/antitrust-division-focuses-enforcement-efforts-on-individuals.html.

Division prosecuted 417 individuals who were carved-out of corporate plea agreements, and approximately one-third of these individuals were foreign citizens.[217]

In what respects will the Yates Memorandum change the foregoing landscape? At the outset, it is important to note that the Yates Memorandum is unlikely to change one of the key elements of the Division's enforcement arsenal—the Corporate Leniency Program, which has been extraordinarily effective during the past few decades in uncovering illegal cartel activities[218] and has been adopted in form by a number of foreign countries.[219] Under the Leniency Program a company can avoid a criminal conviction and fines and obtain a wholesale grant of immunity for all of its employees by being the first company to confess participation in illegal cartel activity. An applicant must make full disclosure of its cartel activity in order to qualify for leniency, which also significantly reduces damages exposure in parallel civil class actions.[220] The Yates Memorandum is widely expected to have little, if any, effect on the Leniency Program.[221]

So what will change? First, companies likely will be required to disclose more information—perhaps significantly more information—about their own culpable executives in order to obtain cooperation credit. Before the Yates Memorandum was issued, companies generally did not exert themselves to implicate their own executives in criminal cartel conduct, and typically provided only the minimum information required for a resolution.[222] This minimum often included disclosing the conduct of colluding competitors, producing documents located in foreign countries, and making available at the company's expense witnesses beyond the reach of the federal grand jury.[223] This level of cooperation will no longer suffice, because the Yates Memorandum ties a company's cooperation credit to the disclosure of specific information about the company's executives. The DOJ's Criminal Division has already

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[217] Robert E. Bloch, Kelly B. Kramer & Stephen M. Medlock, *The Yates Memorandum's Impact on U.S. Cartel Enforcement: Evolution or Revolution?*, COMPETITION POLICY INTERNATIONAL 4 (June 2016).

[218] *See*, *e.g.*, Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, *Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, 26th Annual Inst. on White Collar Crime (Mar. 1, 2012), https://www.justice.gov/atr/speech/deterrence-and-detection-cartels-using-all-tools-and-sanctions ("[T]he Antitrust Division's leniency program is now the most important tool either for detecting cartels or for developing the evidence necessary to prosecute them"); Christopher R. Leslie, *Replicating the Success of Antitrust Amnesty*, 90 TEX. L. REV. SEE ALSO 171, 172 (2012) (describing the Leniency Program as "wildly successful").

[219] *See* Joseph E. Harrington, Jr. & Myong-Hun Chang, *When Can We Expect a Corporate Leniency Program to Result in Fewer Cartels?,* 58 J.L. & ECON. 417, 418 (2015) ("Globally, leniency programs are now present in more than 50 countries and jurisdictions.").

[220] Linklaters, *U.S. DOJ Antitrust Division Updates Leniency Program FAQs* (Feb. 2017), http://www.linklaters.com/Insights/us-publications/Pages/US-DOJ-Antitrust-Division-Updates-Leniency-Program-FAQs.aspx.

[221] *See*, *e.g.*, James W. Cooper, Frank Liss, Wilson D. Mudge & Tiana Russell, *Yates Memo May Change DOJ Cartel Enforcement*, LAW360 (Sept. 17, 2015, 10:21 AM EDT), https://www.law360.com/articles/703818/yates-memo-may-change-doj-cartel-enforcement.

[222] Robert E. Bloch, Kelly B. Kramer & Stephen M. Medlock, *The Yates Memorandum's Impact on U.S. Cartel Enforcement: Evolution or Revolution?*, COMPETITION POLICY INTERNATIONAL 6 (June 2016).

[223] James W. Cooper, Frank Liss, Wilson D. Mudge & Tiana Russell, *Yates Memo May Change DOJ Cartel Enforcement*, LAW360 (Sept. 17, 2015, 10:21 AM EDT), https://www.law360.com/articles/703818/yates-memo-may-change-doj-cartel-enforcement.

demonstrated its reluctance to grant cooperation credit post-Yates,[224] and this reluctance may complicate hybrid cases in which the company's conduct constitutes both an antitrust violation and a violation of other criminal statutes that fall under the purview of the Criminal Division. If the Criminal Division has a stricter view than the Antitrust Division of what constitutes effective cooperation, or requires a guilty plea as a condition of settlement, than companies may be discouraged from self-reporting antitrust violations.[225]

Second, foreign executives are increasingly likely to face charges in the United States. The Yates Memorandum emphasizes both corporate cooperation and the prosecution of individuals, especially culpable executives of multinational corporations who are located abroad. This emphasis, in combination with the increasing criminalization of cartel offenses in other countries and the Division's recent success in extraditing foreign executives, means that such executives are increasingly likely to confront criminal prosecution in the United States.[226] However, there are numerous obstacles to a rapid expansion of this trend. The DOJ must successfully serve process on individual defendants abroad, which is a complicated task. The United States can request assistance through a mutual legal assistance treaty (MLAT), but numerous foreign countries have not signed MLATs with the United States.[227] In the absence of an MLAT requests for assistance must be made through the extremely cumbersome process of obtaining letters rogatory. Even where there is an MLAT it often contains exceptions under which foreign authorities are not required to act. One common exception is where the conduct at issue would not constitute a criminal offense under the laws of the foreign jurisdiction.[228] If a defendant is successfully served abroad he may refuse to submit to United States jurisdiction, in which case the DOJ's ability to successfully prosecute will depend on successful extradition. The Division has acknowledged that it faces an uphill battle in extraditing foreign nationals on antitrust charges.[229] While the United States has extradition treaties with more than 100 countries,[230] successful extradition requires double criminality—the alleged antitrust violation must be punishable under the criminal laws of both the United States and the surrendering

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[224] Gibson Dunn, *2016 Year-End Criminal Antitrust and Competition Law Update* 7 (Jan. 10, 2017), http://www.gibsondunn.com/publications/Pages/2016-Year-End-Criminal-Antitrust-and-Competition-Law-Update.aspx.

[225] Gibson Dunn, *2016 Year-End Criminal Antitrust and Competition Law Update* 7 (Jan. 10, 2017), http://www.gibsondunn.com/publications/Pages/2016-Year-End-Criminal-Antitrust-and-Competition-Law-Update.aspx.

[226] Robert E. Bloch, Kelly B. Kramer & Stephen M. Medlock, *The Yates Memorandum's Impact on U.S. Cartel Enforcement: Evolution or Revolution?*, COMPETITION POLICY INTERNATIONAL 8 (June 2016).

[227] Lauren Briggerman, *DOJ is Losing the Battle to Prosecute Foreign Executives*, LAW360 (Mar. 3, 2015, 10:40 AM), https://www.law360.com/articles/626482/doj-is-losing-the-battle-to-prosecute-foreign-executives.

[228] Lauren Briggerman, *DOJ is Losing the Battle to Prosecute Foreign Executives*, LAW360 (Mar. 3, 2015, 10:40 AM), https://www.law360.com/articles/626482/doj-is-losing-the-battle-to-prosecute-foreign-executives.

[229] Lauren Briggerman, *DOJ is Losing the Battle to Prosecute Foreign Executives*, LAW360 (Mar. 3, 2015, 10:40 AM), https://www.law360.com/articles/626482/doj-is-losing-the-battle-to-prosecute-foreign-executives.

[230] Mark L. Krotoski, *Extradition in International Antitrust Enforcement Cases*, ANTITRUST SOURCE (Apr. 2015), https://www.morganlewis.com/~/media/files/publication/outside%20publication/article/antitrust-source-extradition-in-international-antitrust-enforcement-cases-april2015.ashx.

jurisdiction.[231] More than 30 countries have criminalized cartel conduct, but more than 100 countries have not.

Third, executives are increasingly likely to face civil liability. As noted *supra*, the Yates Memorandum expressly states that the conditions for cooperation credit apply with equal force in both the civil and criminal contexts and that a company under civil investigation must provide to the DOJ all relevant facts about individual misconduct in order to receive any consideration in the negotiation. Pursuant to this directive, a new section entitled "Pursuit of Claims Against Individuals" was added to Title 4 of the USAM to implement the six standards set forth in the Yates Memorandum, as applied to civil matters. The USAM now provides that civil corporate investigations should focus on individuals from the inception and that a determination as to whether to bring suit against an individual should not be based solely on that person's ability to pay a judgment. Consistent with both the Yates Memorandum and the subsequent USAM revision, the Division recently announced that it will consider bringing civil enforcement actions against individuals alleged to have participated in price-fixing.[232] The Division has not yet provided guidance on whether and when it will pursue civil actions, but such enforcement is expected to occur.

Fourth, the Yates Memorandum may change the Division's carve-out decisions. As noted *supra*, in the past, corporate plea agreements resolving antitrust violations typically provided a guarantee of future non-prosecution to both the company signing the plea agreement and current and former employees who cooperated with the Division's investigation. These non-prosecution guarantees often carved-out a discrete number of individuals who were not protected.[233] Post-Yates, it will be increasingly difficult for defense counsel to argue, and for prosecutors to justify, that high-level executives should be carved-in to corporate plea agreements, at least in the absence of substantial corporate disclosure about the executives' conduct. This difficulty is likely to prompt prosecutors to carve-out an increasing number of individual executives.[234] Moreover, these carved-out executives are increasingly likely to be prosecuted. A decision to carve-out is not a decision to indict. But the Yates Memorandum's increased emphasis on individual prosecutions makes it increasingly likely that carved-out executives ultimately will be indicted.[235]

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[231] Christopher Thomas & Gianni De Stefano, *Extradition & Antitrust: Cautionary Tales for Global Cartel Compliance* 3, MLEX AB EXTRA (Sept. 30, 2016), https://www.hoganlovells.com/en/publications/extradition-and-antitrust.

[232] Robert E. Bloch, Kelly B. Kramer & Stephen M. Medlock, *The Yates Memorandum's Impact on U.S. Cartel Enforcement: Evolution or Revolution?*, COMPETITION POLICY INTERNATIONAL 8 (June 2016).

[233] James W. Cooper, Frank Liss, Wilson D. Mudge & Tiana Russell, *Yates Memo May Change DOJ Cartel Enforcement*, LAW360 (Sept. 17, 2015, 10:21 AM EDT), https://www.law360.com/articles/703818/yates-memo-may-change-doj-cartel-enforcement.

[234] Robert E. Bloch, Kelly B. Kramer & Stephen M. Medlock, *The Yates Memorandum's Impact on U.S. Cartel Enforcement: Evolution or Revolution?*, COMPETITION POLICY INTERNATIONAL 8 (June 2016).

[235] James W. Cooper, Frank Liss, Wilson D. Mudge & Tiana Russell, *Yates Memo May Change DOJ Cartel Enforcement*, LAW360 (Sept. 17, 2015, 10:21 AM EDT), https://www.law360.com/articles/703818/yates-memo-may-change-doj-cartel-enforcement.

Fifth, most of the same ethical considerations discussed *supra* have specific application in the context of cartel enforcement. For example, company counsel may need to provide more robust *Upjohn* warnings, and executives are likely to seek the retention of separate counsel earlier in the investigative process.

D. False Claims Act

The False Claims Act (FCA) authorizes private citizens who observe fraud against the federal government to file a *qui tam* claim on behalf of the government and share in any recovery against the wrongdoer, up to 30% of the total funds recovered.[236] The archetypical case is one where an employee who witnesses or participates in a fraudulent scheme uses that information as the foundation to sue the employer on the government's behalf.[237] These individuals are referred to as "relators." During the period 1986 to 2016 relators brought more than 11,000 FCA *qui tam* cases.[238] The DOJ can choose to participate in these cases by intervening, and this choice is strongly correlated with the success of the suits. The DOJ chooses to intervene in about 20% of FCA *qui tam* suits,[239] and approximately 90% of those suits result in recovery, while cases in which the government declines to intervene are much less successful.[240] The DOJ's participation in FCA enforcement is not restricted to intervention in *qui tam* suits—the Attorney General can choose to bring independent enforcement actions.[241]

The FCA was enacted during the Civil War to address procurement fraud by Union Army suppliers,[242] but it experienced a long period of disuse until it was amended in 1986. Those amendments, in combination with subsequent amendments in 2009 and 2010, enhanced the FCA's whistleblower and damages provisions, thereby easing the path for both the government and whistleblowers to sue.[243]

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[236] 31 U.S.C. § 3730(d)(2) (2012).
[237] Sam F. Halabi, *Collective Corporate Knowledge and the Federal False Claims Act*, 68 BAYLOR L. REV. 265, 288 (2016).
[238] Gibson Dunn & Crutcher, *2016 Year-End False Claims Act Update* 2 (Jan. 5, 2017), http://www.gibsondunn.com/ publications/Pages/2016-Year-End-False-Claims-Act-Update.aspx.
[239] Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards as Well as Punishment in Regulatory and Tort Law*, 51 HARV. J. ON LEGIS. 315, 348 (2014).
[240] *See* Christina Orsini Broderick, *Qui Tam Provision and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 971 (2007) (concluding that the vast majority of non-governmental FCA suits are of highly questionable merit); U.S. Chamber Institute for Legal Reform, *Fixing the False Claims Act: The Case for Compliance-Focused Reforms* 7 (Oct. 2013), http://www.instituteforlegalreform.com/research/fixing-the-false-claims-act-the-case-for-compliance-focused-reforms ("DOJ intervention is almost always an accurate predictor of the ultimate success of the case. Approximately 95 percent of intervened cases result in a settlement or judgment for the government, while only 6 percent of non-intervened cases do.").
[241] *See* U.S. Chamber Institute for Legal Reform, *Fixing the False Claims Act: The Case for Compliance-Focused Reforms* 6 (Oct. 2013), http://www.instituteforlegalreform.com/research/fixing-the-false-claims-act-the-case-for-compliance-focused-reforms.
[242] Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards as Well as Punishment in Regulatory and Tort Law*, 51 HARV. J. ON LEGIS. 315, 339 (2014).
[243] Lori L. Pines, Kristen M. Murphy & Nadya Salcedo, *Understanding the False Claims Act* 37, 37, PRACTICAL LAW (April/May 2014) , http://www.weil.com/~/media/files/pdfs/LIT_AprilMay2014_FalseClaimsActFeature.pdf.

During the last three decades the FCA has become the federal government's primary tool to combat fraud perpetrated against it.[244] The statute has been described as "spectacularly successful" when measured in terms of monetary recoveries.[245] Fiscal year 2016 was the seventh consecutive year in which the federal government recovered more than $3 billion under the FCA and where there were at least 700 new FCA matters.[246] In 2016 more than 800 new FCA cases were filed (the second-highest number of cases in any single year), and the federal government recovered more than $4.7 billion in civil settlements and judgments (the third highest-amount on record).[247] This trend is not expected to change under Trump and his new Attorney General. During his confirmation hearings Sessions pledged his support for the FCA and lauded the effectiveness of FCA enforcement.[248]

The health care industry has become a primary focus of the FCA. In both 2016 and 2015, 55% of all federal FCA recoveries came from the health care industry (including life sciences companies).[249] During the period from 2009 to 2016 the DOJ recovered $19.3 billion for purported health care fraud under the FCA.[250] A typical health care fraud case includes allegations that a defendant defrauded such health care programs as Medicare, Medicaid, and TRICARE (which provides health care to members of the armed services and their dependents.[251]

The Yates Memorandum has had a major impact on FCA enforcement, in numerous respects. First, post-Yates there has been an increase in parallel civil and criminal FCA investigations. In 1970, in *United States v. Kordel*,[252] the Supreme Court recognized the legality of parallel investigations and since then parallel civil and criminal proceedings have become the

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[244] Lori L. Pines, Kristen M. Murphy & Nadya Salcedo, *Understanding the False Claims Act* 37, 37, PRACTICAL LAW (April/May 2014) , http://www.weil.com/~/media/files/pdfs/LIT_AprilMay2014_FalseClaimsActFeature.pdf.

[245] *See* Julie Rose O'Sullivan, *'Private Justice' and FCPA Enforcement: Should the SEC Whistleblower Program Include a Qui Tam Provision?*, 53 AM. CRIM. L. REV. 67, 72 (2016).

[246] Gibson Dunn & Crutcher, *2016 Year-End False Claims Act Update* 2 (Jan. 5, 2017), http://www.gibsondunn.com/ publications/Pages/2016-Year-End-False-Claims-Act-Update.aspx.

[247] Gibson Dunn & Crutcher, *2016 Year-End False Claims Act Update* 2 (Jan. 5, 2017), http://www.gibsondunn.com/ publications/Pages/2016-Year-End-False-Claims-Act-Update.aspx.

[248] Alexis Ronickher, *Whistleblower Protections: What to Expect in the Trump Era*, LAW360 (Feb. 8, 2017, 11:04 AM), https://www.law360.com/articles/887721/whistleblower-protections-what-to-expect-in-the-trump-era. *See also* Jeff Overley, *5 FCA Issues to Watch as Trump Takes Power*, LAW360 (Jan. 6, 2017, 3:57 PM), https://www.law360. com/articles/845515/5-fca-issues-to-watch-as-trump-takes-power (noting that FCA was modernized under Republican President Ronald Reagan and average FCA recoveries spiked under Republican President George H.W. Bush).

[249] Gibson Dunn & Crutcher, *2016 Year-End False Claims Act Update* 4 (Jan. 5, 2017), http://www.gibsondunn.com/ publications/Pages/2016-Year-End-False-Claims-Act-Update.aspx. *See also* Joshua A. Levy, *Lessons from the Private Enforcement of Health Care Fraud*, 53 AM. CRIM. L. REV. 117, 119 (2016) ("[T]he FCA has become the primary legislative tool used by whistleblowers to help the government enforce health care fraud laws. . . .").

[250] Gibson Dunn & Crutcher, *2016 Year-End False Claims Act Update* 2 (Jan. 5, 2017), http://www.gibsondunn.com/ publications/Pages/2016-Year-End-False-Claims-Act-Update.aspx.

[251] Gibson Dunn & Crutcher, *2016 Year-End False Claims Act Update* 2 (Jan. 5, 2017), http://www.gibsondunn.com/ publications/Pages/2016-Year-End-False-Claims-Act-Update.aspx.

[252] 397 U.S. 1, 10 (1970). *See also* United States v. Stringer, 535 F.3d 929, 933 (9th Cir. 2008) ("There is nothing improper about the government undertaking simultaneous criminal and civil investigations.").

norm in many areas of federal law.[253] Parallel enforcement is especially common in highly regulated industries, such as healthcare and financial services.[254] The Yates Memorandum provides that DOJ attorneys should be alert for circumstances where concurrent civil and criminal investigations of individual misconduct should be pursued, and coordination in this area "should happen early."[255] This statement has obvious applications in FCA cases, given the dual criminal and civil nature of the statute, and it reinforces a 2014 announcement by the DOJ[256] that it will automatically review all new civil qui tam complaints in order to determine whether a complaint identifies any criminal conduct.[257] The result is that parallel investigations have become increasingly common in FCA cases[258] and such coordination has begun much earlier than in the past.[259] Parallel investigations may present business organizations with an enhanced opportunity to persuade the DOJ to forego criminal charges in favor of an alternative resolution, but this opportunity may be undercut if individuals are less willing to cooperate in internal investigations post-Yates.[260] And given the Memorandum's emphasis on companies identifying all individuals involved in or responsible for misconduct, the interests of companies and individuals are increasingly likely to diverge, thereby decreasing the extent of cooperation by the latter.[261]

Second, post-Yates there has been a sharp increase in the share of health care-related FCA settlements that include a cooperation clause directing business organizations to cooperate fully with investigations of individuals who could be involved in related fraud. During the years

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[253] James Koukios, *3 Ways the Yates Memo May Affect FCA Cases*, LAW360 (Feb. 16, 2016, 10:30 AM), https://www.law360.com/articles/759309/3-ways-the-yates-memo-may-affect-fca-cases; Richard M. Strassberg, Yvonne M. Cristovici & Christina E. Nolan, *Navigating Parallel Proceedings*, N.Y. L.J. (July 24, 2006) (noting that the commencement of parallel civil and criminal proceedings is "standard operating practice today in sophisticated white-collar cases").

[254] U.S. Chamber Institute for Legal Reform, *Enforcement Gone Amok: The Many Faces of Over-Enforcement in the United States* 30 (May 2016), http://www.instituteforlegalreform.com/research/enforcement-gone-amok-the-many-faces-of-over-enforcement-in-the-united-states. *Accord* Marilyn May & Sean Hennessy, *What's New About the DOJ's Handling of Health-Care Fraud Matters?*, 18 BLOOMBERG BNA HEALTH CARE FRAUD REPORT 935 (Oct. 29, 2014), http://www.apks.com/~/media/files/perspectives/publications/2014/10/whats-new-about-the-dojs-handling-of-criminal-he__/files/publication/fileattachment/whatsnewaboutthedojshandlingofcriminalhealthcare__.pdf? (noting that in FCA cases, "we can expect to see continued emphasis on joint criminal-civil investigations").

[255] U.S. Dep't of Justice, Memorandum from Sally Yates to All Component Heads and U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

[256] *See* U.S. Dep't of Justice, Justice News, *Remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell at the Taxpayers Against Fraud Education Fund Conference* (Sept. 17, 2014), https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-taxpayers-against.

[257] *See* Jonell B. Beeler & Ted Lotchin, *Yates Memo Puts Health Care Employees, Execs on Notice*, LAW360 (Oct. 20, 2015, 4:52 PM), https://www.law360.com/articles/716328/yates-memo-puts-health-care-employees-execs-on-notice.

[258] Tony Maida & Rebecca C. Martin, *The Perils of Parallel Proceedings: To Stay or Not to Sta*y, FCA UPDATE (Sept. 22, 2016), http://www.fcaupdate.com/2016/09/the-perils-of-parallel-proceedings-to-stay-or-not-to-stay/.

[259] James Koukios, *3 Ways the Yates Memo May Affect FCA Cases*, LAW360 (Feb. 16, 2016, 10:30 AM), https://www.law360.com/articles/759309/3-ways-the-yates-memo-may-affect-fca-cases.

[260] James Koukios, *3 Ways the Yates Memo May Affect FCA Cases*, LAW360 (Feb. 16, 2016, 10:30 AM), https://www.law360.com/articles/759309/3-ways-the-yates-memo-may-affect-fca-cases.

[261] Jonell B. Beeler & Ted Lotchin, *Yates Memo Puts Health Care Employees, Execs on Notice*, LAW360 (Oct. 20, 2015, 4:52 PM), https://www.law360.com/articles/716328/yates-memo-puts-health-care-employees-execs-on-notice ("Many executives and key employees my ultimately decide not to cooperate with a company's investigation. . . .").

2008 to 2015 a cooperation clause appeared in 17-32% of health care-related settlement agreements.[262] For the first five months of 2016, a cooperation clause appeared in 46% of health care-related settlement agreements.[263] Such clauses generally provide that the settling organization will: (a) cooperate fully with investigations relating to the settlement allegations, including investigations into individuals and entities not released from liability in the agreement; (b) make former directors, officers, and employees available for interviews and testimony, and (c) produce non-privileged documents to the government concerning the conduct covered by the settlement.[264] Pre-Yates Memorandum cooperation clauses were included in settlement agreements only when the DOJ expected to investigate individuals who may have been involved in the fraud.[265] The Yates Memorandum altered that practice, and now cooperation clauses are significantly more common.

Third, since the Yates Memorandum was released there has been a gradual increase in the number of individuals named as defendants in FCA cases. Most, but not all, of this increase has occurred in healthcare cases. In 2016 more than half a dozen individual executives settled FCA cases by paying settlements ranging from $250,000 to $9.35 million.[266] This is a clear departure from prior practice, insofar as historically the government has not pursued FCA actions against individuals,[267] and it reflects the growing impact of the Yates Memorandum.[268] Moreover, FCA

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[262] Eric Topor, *DOJ Increasingly Demanding Corporate Cooperation in FCA Settlements After Yates Memo*, HEALTH CARE DAILY REPORT (May 25, 2016), https://www.bna.com/doj-increasingly-demanding-n57982072932/. *See also* Tony Maida & Rebecca C. Martin, *One Year Later: The Yates Memo, False Claims Act and Director & Officer Executive Liability* (Sept. 28, 2016), https://www.mwe.com/en/thought-leadership/publications/2016/09/yates-memo-false-claims-act-director-executive (noting that it is becoming common for post-Yates FCA settlements to impose ongoing cooperation requirements).

[263] Eric Topor, *DOJ Increasingly Demanding Corporate Cooperation in FCA Settlements After Yates Memo*, HEALTH CARE DAILY REPORT (May 25, 2016), https://www.bna.com/doj-increasingly-demanding-n57982072932/. *See also* Dawn L. Merkle, *Individual Accountability and Corporate Cooperation—A Year in Review*, 65 VIRGINIA LAWYER 28, 29 (Dec. 2016) (noting increased use of cooperation clauses in FCA cases).

[264] Eric Topor, *DOJ Increasingly Demanding Corporate Cooperation in FCA Settlements After Yates Memo*, HEALTH CARE DAILY REPORT (May 25, 2016), https://www.bna.com/doj-increasingly-demanding-n57982072932/.

[265] Eric Topor, *DOJ Increasingly Demanding Corporate Cooperation in FCA Settlements After Yates Memo*, HEALTH CARE DAILY REPORT (May 25, 2016), https://www.bna.com/doj-increasingly-demanding-n57982072932/.

[266] U.S. Dep't of Justice, Office of Public Affairs, Press Release, *Justice Department Recovers Over $4.7 Billion from False Act Claims Cases in Fiscal Year 2016* (Dec. 14, 2016), https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016. *See also* WilmerHale, *False Claims Act: 2016 Year-in-Review* 2 (Jan. 31, 2017), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDfs/2017-01-31-false-claims-act-year-in-review.pdf (attributing increase in prosecutions of individuals in FCA cases to Yates Memorandum); Haynes and Boone, LLP, *2016 Year in Review—The False Claims Act* 1-2 (Jan. 2017), http://www.haynesboone.com/~/media/files/newsletter/fca/fca_2016review.ashx (identifying settlements with executives in FCA cases).

[267] Wiley Rein LLP, *Coming to Terms with the Yates Memo: Implications for Government Contractors* (Dec. 2015), http://www.wileyrein.com/newsroom-newsletters-item-Coming-to-Terms-with-the-Yates-Memo-Implications-for-Government-Contractors.html. *Accord* Sidley Austin LLP, Sidley Update, *The DOJ's New Focus on Individual Accountability: Implications for Life Sciences Companies* (Sept. 15, 2015), http://www.sidley.com/news/2015-09-15_global_life_sciences_update (noting that Yates Memorandum "threatens to alter the DOJ's historical policy of rarely seeking FCA damages from individuals").

[268] See U.S. Dep't of Justice, Office of Public Affairs, Press Release, *Justice Department Recovers Over $4.7 Billion from False Act Claims Cases in Fiscal Year 2016* (Dec. 14, 2016), https://www.justice.gov/opa/pr/justice-

actions typically have a long incubation period, so the settlements in 2016 likely represent the beginning of a "consistent pattern of complaints and settlements involving senior corporate leaders."[269] Such a conclusion is consistent with statements from the DOJ that post-Yates it has flipped its historical presumption that individuals would be released from FCA liability when their organizations settled with the government.[270]

Fourth, the Yates Memorandum may curtail the ability of business organizations to pay reduced damages. There are no civil guidelines for FCA downward penalty departures that are directly comparable to the federal sentencing guidelines. The FCA presumptively provides for treble damages upon a finding of a violation,[271] but it also offers companies an opportunity to pay reduced damages if three conditions are satisfied: (1) the company must give investigating officials all information known about the violation(s) within 30 days of when such information was first obtained; (2) the company must fully cooperate with any government investigation into the violations; and (3) at the time the company provides the information, there can be no criminal prosecution, civil action or administrative action already commenced under the FCA, nor can the company have any actual knowledge of the existence of an investigation into such violation.[272] If all three conditions are satisfied then damages may be reduced from treble to double.[273]

The only example the Yates Memorandum gave of how cooperation might apply in a civil case related to the foregoing provision. But the Memorandum may curtail the ability of companies to take advantage of the opportunity to pay reduced damages insofar as it "greatly expands the nature and amount of information that must be provided" in order to do so.[274] The DOJ has made clear that in order to qualify for the provision the organization must voluntarily identify any culpable individuals and provide all material facts about those individuals.[275] This requirement is layered on the existing requirement, noted above, that parties furnish the government with information about FCA violations before the parties know of the existence of an investigation into such violations. Such voluntary disclosures represent a small fraction of

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department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016 (noting that Yates Memorandum reinforced the DOJ's commitment to use the FCA to deter and redress fraud by individuals as well as corporations).

[269] Michael W. Peregrine, Rebecca C. Martin & Tony Maida, *Engaging Board and Corporate Leaders About New Avenues for Officer and Director Exposure Under the Stark Law and False Claims Act*, 25 BLOOMBERG BNA HEALTH LAW REPORTER 1449 (Oct. 6, 2016), https://www.mwe.com/~/media/files/press-room/2016/bylined-publication-reprints/10/25_hlr_1449.pdf.

[270] *See* U.S. Dep't of Justice, Justice News, *Acting Associate Attorney General Bill Baer Delivers Remarks on Individual Accountability at American Bar Association's 11th National Institute on Civil False Claims Act and Qui Tam Enforcement* (June 9, 2016), https://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-individual-accountability ("The presumption is flipped in the other direction. Admittedly this is a departure from past practice. . . .").

[271] 31 U.S.C. § 3729(a)(1) (2012).

[272] 31 U.S.C. § 3729(a)(2) (2012); Vermont Agency of Nat'l Res. v. United States, 529 U.S. 765, 786 n.16 (2000).

[273] *See* United States v. Anchor Mort. Corp., 711 F.3d 745, 748 (7th Cir. 2013).

[274] Sidley Austin LLP, Sidley Update, *The DOJ's New Focus on Individual Accountability: Implications for Life Sciences Companies* (Sept. 15, 2015), http://www.sidley.com/news/2015-09-15_global_life_sciences_update.

[275] U.S. Dep't of Justice, Justice News, *Principal Deputy Assistant Attorney General Benjamin C. Mizer Delivers Remarks at the 16th Pharmaceutical Compliance Congress and Best Practices Forum* (Oct. 22, 2015), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-benjamin-c-mizer-delivers-remarks-16th.

FCA matters,[276] and thus the small universe of FCA cases with the potential for reduced damages will contract even further post-Yates Memorandum. One off-setting factor is that the DOJ is unlikely to be the final arbiter of whether a defendant is entitled to cooperation credit and reduced damages under the FCA. That role will be filled by the courts.[277]

As noted *supra*, the health care industry has become a primary focus of the FCA. The Yates Memorandum may have one additional effect on life sciences companies in this industry—an expanded use by the government of the doctrine set forth in *United States v. Park.*[278] Under this doctrine senior corporate officials who by reason of their position in the corporation have the responsibility and authority to take necessary measures to prevent or remedy violations of the Federal Food, Drug and Cosmetic Act (FDCA)[279] and fail to do so may be held criminally liable as responsible corporate officers (RCO), regardless of whether they were aware of or intended to cause the violation.[280] Liability as an RCO is not equivalent to vicarious liability. Under the former, a corporate officer is held accountable not for the acts or omissions of others, but instead for his own failure to prevent or remedy the conditions which gave rise to the charges against him.[281] While this is tantamount to strict liability, in practice both the Food and Drug Administration (FDA) and DOJ have utilized the Park Doctrine only where there has been some evidence that the individual prosecuted was negligent.[282]

The federal government utilized the Park Doctrine to prosecute some FDCA cases in the 1960s and 1970s but ceased such prosecutions by the late 1980s.[283] The doctrine remained dormant for several decades, but was revived in the 2010s.[284] It is likely to be particularly

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[276] Rebecca C. Martin & Laura McLane, McDermott Will & Emery, *Cooperation is in the Eye of the Beholder: DOJ Official Bill Baer Elaborates on Cooperation in False Claims Act and Other Civil Enforcement Matters* (Oct. 18, 2016), https://www.mwe.com/it-it/thought-leadership/publications/2016/10/doj-elaborates-on-cooperation-in-fca ("[T]he only example given in the Yates memo for how cooperation could benefit a company in the FCA context is in the case of a voluntary disclosure—the very small minority of FCA matters.").

[277] *See* United States ex rel. v. Raggio v. Jacintoport Int'l, LLC, Civ. Action No. 10-01908 (BJR), 2015 WL 5155185 (D.D.C. Mar. 12, 2015) (granting FCA cooperation credit to defendant over DOJ's objection); Scott Stein & Emily Van Wyck, Sidley Austin LLP, *Yates Memo Sets Forth Aggressive View of FCA's Cooperation Clause, but Whether Courts Will Follow Remains to Be Seen*, ORIGINAL SOURCE: FALSE CLAIMS ACT ENFORCEMENT AND LITIGATION (Oct. 5, 2015), http://sidley42.rssing.com/browser.php?indx=60593695&item=9 ("[W]hile the Yates Memo stakes out an aggressive interpretation for which constitutes 'full cooperation' under the FCA, it will ultimately be the courts that will decide what qualifies. . . .").

[278] 421 U.S. 658 (1975).

[279] 21 U.S.C. §§ 301-399f (2012).

[280] United States v. Park, 421 U.S. 658, 673-74 (1975).

[281] United States v. DeCoster, 828 F.3d 626, 633 (8th Cir. 2016).

[282] Marc A. Rodwin, *Do We Need Stronger Sanctions to Ensure Legal Compliance by Pharmaceutical Firms?*, 70 FOOD & DRUG L.J. 435, 440 (2015). Authority to enforce the FDCA is divided. The FDA lacks independent authority to prosecute criminal violations of the food and drug laws, but it can refer cases to the DOJ. The DOJ often declines to prosecute these referrals. *Id*. at 442.

[283] Sasha Ivanov, Note, *When the Punishment Does Not Fit the Crime: Exclusions from Federal Health Care Programs Following Convictions Under the Responsible Corporate Officer Doctrine*, 84 GEO. WASH. L. REV. 776, 796 (2016).

[284] Roscoe C. Howard, Jr. & Leasa Woods Anderson, *Trends in Responsible Corporate Officer Doctrine Under FDCA*, LAW360 (Dec. 14, 2015, 1:11 PM), https://www.law360.com/articles/737403/trends-in-responsible-corporate-officer-doctrine-under-fdca ("Over the past several years it appears that prosecutors have rediscovered the RCO doctrine and they are pursuing individuals more readily. . . . In addition to an uptick in prosecutions, harsher

attractive to the government post-Yates Memorandum because, as noted by the Memorandum, large corporations often feature diffuse responsibility and fragmented decision-making. This diffusion and fragmentation make it very difficult to establish individual liability.[285] *Park* would obviate that difficulty,[286] and a number of observers have noted that, in the context of FDCA violations, the government is likely to increasingly resort to the Park Doctrine.[287] Even before the Yates Memorandum was issued the Park Doctrine had expanded beyond its initial application by the FDA in FDCA cases to encompass both environmental enforcement actions[288] and the DOJ's prosecution of pharmaceutical and medical device executives.[289] And because FDCA cases increasingly arise under FCA whistleblower suits, rather than with the FDA,[290] the FCA is likely to see additional applications of the Park Doctrine.

A further expansion of *Park* will no doubt prove controversial. The RCO doctrine has been widely criticized,[291] primarily on two grounds. The first is normative and the second is practical. First, prosecuting and punishing executives who did not participate in the misconduct violates the foundation of Anglo-American criminal law that there can be no crime absent mens rea.[292] Second, the doctrine is subject to prosecutorial over-reach, because it provides no principled basis upon which to distinguish between those executives who did not participate in

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penalties are being imposed."); Andrew C. Baird, Comment, *The New Park Doctrine: Missing the Mark*, 91 N.C. L. REV. 949, 965 (2013) ("After nearly two decades of disuse, the Park doctrine was recently put back into play by the FDA and DOJ.").

[285] U.S. Dep't of Justice, Memorandum from Sally Yates to All Component Heads and U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

[286] *See* Richard A. Samp & Cory L. Andrews, *Restraining Park Doctrine Prosecutions Against Corporate Officials Under the FDCA*, 13 ENGAGE: J. FEDERALIST SOC'Y PRACTICE GROUPS 19 (2012) ("Indeed, it is highly unlikely that a CEO or COO exists who cannot be convicted under the Park doctrine, as there is little if anything within most companies' operation that is not, at least on paper, within their supervisory authority and responsibility.").

[287] *See, e.g.*, Gary Giampetruzzi, Terra Reynolds & Jahmila Williams, Paul Hastings, *Not Guilty, Again: Individual Corporate Liability in the Wake of the Reichel Acquittal* (June 2016), https://www.paulhastings.com/publications-items/details/?id=6cc9e969-2334-6428-811c-ff00004cbded (speculating that acquittal of former Warner Chilcott President W. Carl Reichel may motivate the DOJ to pursue Park Doctrine liability in future cases); Sidley Austin LLP, Sidley Update, *The DOJ's New Focus on Individual Accountability: Implications for Life Sciences Companies* (Sept. 15, 2015), http://www.sidley.com/news/2015-09-15_global_life_sciences_update.

[288] *See, e.g.*, Kevin M. LaCroix, *Eighth Circuit Split Spotlights Tensions with the Responsible Corporate Officer Doctrine*, D&O DIARY (July 12, 2016), http://www.dandodiary.com/2016/07/articles/uncategorized/eighth-circuit-split-spotlights-tensions-with-the-responsible-corporate-officer-doctrine/.

[289] *See* Skadden, Arps, Slate, Meagher & Flom LLP, *FDA Announces New Push to Prosecute Corporate Officers and Executives for No-Intent Crimes* (Mar. 5, 2010), https://www.skadden.com/insights/fda-announces-new-push-prosecute-officers-and-executives-no-intent-crimes.

[290] Patrick O'Leary, *Credible Deterrence: FDA and the Park Doctrine in the 21st Century*, 68 FOOD & DRUG L.J. 137, 154-55 (2013).

[291] *See, e.g.*, Martin Petrin, *Circumscribing the 'Prosecutor's Ticket to Tag the Elite'—A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283 (2012).

[292] Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371, 379. *See also* Joshua D. Greenberg & Ellen C. Brotman, *Strict Vicarious Criminal Liability for Corporations and Corporate Executives: Stretching the Boundaries of Criminalization*, 51 AM. CRIM. L. REV. 79, 94-95 (2014) (setting forth nine reasons why the RCO doctrine is unfair, is bad policy, and should be abolished); Katrice Bridges Copeland, *The Crime of Being in Charge: Executive Culpability and Collateral Consequences*, 51 AM. CRIM. L. REV. 799 (2014) (arguing that collateral consequences of criminal conviction under RCO doctrine render the doctrine misguided).

the corporate crime but still deserve to be punished and those who do not deserve punishment.[293] Both of those arguments can be effectively rebutted,[294] but RCO prosecutions remain contentious.

Conclusion

One of the harshest and most common critiques of the federal government's response to the Great Recession of 2007-09 has been that the DOJ pursued enforcement actions against financial institutions but failed to prosecute any senior officers employed by those organizations. The Yates Memorandum, issued in September 2015 in response to this critique, was designed to reaffirm the DOJ's commitment to hold executives and other individuals accountable for corporate misconduct.

The Yates Memorandum has been in effect for twenty months. While it is unclear whether the Memorandum will be retained at all, or even in modified form, in the Trump administration, it is useful to analyze the impact of the document to date. This Article examines a spectrum of issues raised by the Yates Memorandum, many of which are ethical and many of which concern the international application of the document. Specifically, the Article examines the impact of the Yates Memorandum with respect to four ethical issues: (A) waiver of attorney-client privilege, (B) the conduct of internal investigations, including the provision of *Upjohn* warnings and the retention of separate counsel, (C) the use of joint representation and defense agreements, and (D) civil enforcement by the DOJ. The Article then analyzes the application of the Yates Memorandum in four specific subject areas, three of which are international in scope: (A) foreign corruption (FCPA), (B) export controls and economic sanctions, (C) antitrust (international cartels), and (D) health care fraud (FCA).

Some conclusions can be drawn. Overall, the adoption of the Yates Memorandum has been a positive development. Given the long time lag inherent in most white collar investigations, it is too soon to tell whether the Memorandum is accomplishing its primary goal of holding executives and other individuals accountable for corporate misconduct. But it is already clear that the Memorandum is having beneficial effects in specific subject areas. In the area of foreign corruption, the DOJ's new FCPA Pilot Program has proven effective in encouraging self-disclosure, cooperation, and remediation, in exchange for flexibility in charging decisions and leniency at sentencing. The basic format of the Pilot Program has been adopted in the area of export controls and economic sanctions, and similar positive effects can be expected. In the area of antitrust enforcement, the pursuit of individuals responsible for criminal cartels

[293] Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371, 379.

[294] *See* Patrick O'Leary, *Credible Deterrence: FDA and the Park Doctrine in the 21st Century*, 68 FOOD & DRUG L.J. 137, 176 (2013) (concluding that concerns about the Park Doctrine's effectiveness and fairness are exaggerated and "the credible threat of individual prosecution is a uniquely salient deterrent in an industry where the cost of misconduct can too often be measured in human lives."); Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371 (defending RCO liability).

was a key objective of the DOJ's Antitrust Division even before the Yates Memorandum was issued, and the issuance has served to reinforce the Division's approach. The Memorandum already has had a major impact on FCA enforcement, as well. Post-Yates there has been an increase in parallel civil and criminal FCA investigations, there has been a sharp increase in the share of health care-related FCA settlements that include a cooperation clause directing business organizations to cooperate fully with investigations of individuals who could be involved in related fraud, and there has been a gradual increase in the number of individuals named as defendants in FCA cases.

Still, the Yates Memorandum could benefit from some tweaking. If the DOJ is serious that it does not seek waivers of the attorney-client privilege or attorney work product doctrine, then it probably should make that explicit. Currently the Memorandum merely states that the DOJ does not require waivers. This of course is a very different situation from one in which companies nevertheless feel compelled to waive in order to obtain cooperation credit. Similarly, the DOJ should make clear that participation in a joint defense agreement will have no negative impact on whether or to what extent a company receives cooperation credit.

The FCPA Pilot Program also could benefit from some modifications, primarily by providing clarity as to how the DOJ determines the amount of a penalty reduction, how it decides whether to grant a declination, and how it calculates the amount of required disgorgement. In the area of export controls and economic sanctions, the DOJ should consider adopting some additional features of the FCPA Pilot Program. The NSD Guidance does not offer the possibility of a declination, it does not specify how quickly a disclosure must be made in order to be timely, it does not quantify the savings a company can realize by self-disclosing, cooperating, and remediating, and it does not permit companies to ascertain the credit NSD assigns specifically to each of the foregoing tasks. The NSD should consider adopting some of the FCPA Pilot Program's approaches to these issues. In the area of cartel enforcement, possibly the major obstacle to realizing the objectives of the Yates Memorandum is the difficulty inherent in extraditing to the United States foreign nationals who participated in the criminal cartel activity but refuse to voluntarily subject themselves to serving prison sentences in this country. The United States has extradition treaties with more than 100 countries, but extradition typically requires double criminality and only 30 or so countries currently criminalize cartel activity. Further progress in this area will require further diplomatic effort.