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**INTERNAL INVESTIGATIONS**

Three attorneys with Hogan Lovells explore the future of internal investigations following the issuance of the Yates Memorandum in September 2015. The authors address the impact on internal corporate investigations of the declaration in the memo that in order to be eligible for cooperation credit, a company is required to provide all relevant facts to the government. They also examine whether the memo will place greater pressure on the attorney-client privilege of corporations that are under investigation.

**The Future of Internal Investigations After the Yates Memorandum**

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**O**n Sept. 9, 2015, Deputy Attorney General Sally Quillian Yates became the fifth deputy attorney general in 15 years to issue a memorandum addressing prosecution of corporate wrongdoing. Deputy Attorney General Yates' Memorandum, entitled "Individual Accountability for Corporate Wrongdoing" ("Yates Memorandum"), was another step in the effort by the Department of Justice to encourage the prosecution of individual corporate wrongdoers, and to encourage corporations to produce information to the government that would help fuel those prosecutions. Among other things, the memo prohibits providing any mitigation to a wrongdoing company if that company "declines . . . to provide the Department with complete factual information."

Because many of the themes in the Yates Memorandum had been struck in one of the memos written by her predecessors, some commentators questioned

whether the memorandum actually amounted to a material change or was primarily a public relations exercise in response to criticism that the DOJ had failed to prosecute individuals in many high-profile events perceived to be criminal, such as events that contributed to the financial meltdown in 2008. *See, e.g.,* Robert J. Anello and Richard F. Albert, *Latest Approach on Prosecuting Individuals for Corporate Misconduct*, 254 *NEW YORK LAW J.* 67 (Oct. 6, 2015). One aspect of the Yates Memorandum that was recognized as different was the declaration that "to be eligible for any credit for cooperation, a company must identify all individuals involved in or responsible for the conduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct." James W. Cooper, *et al., All or Nothing: Highlights and Areas of Concern from DOJ's New Guidance on Individual Culpability in Civil and Criminal Investigations*, *Arnold & Porter Advisory* (Sept. 16, 2015) (emphasis added).

This article addresses the impact of that declaration in the Yates Memorandum on the conduct of internal corporate investigations. While the DOJ has stated after issuance of the Yates Memorandum that it will continue to respect the privilege, the memo triggered questions from critics, as yet unresolved, about whether the memo placed greater pressure on the attorney-client privilege of corporations that are under investigation. All these questions—and the Yates Memorandum itself—will be given greater scrutiny and may be viewed in a different light by the new administration, given the doubt that some Republican former DOJ officials have expressed about the wisdom of the memo’s approach. Former Attorney General Michael Mukasey, for example, described the Yates Memorandum as “simply an urge to have bodies swinging from lamp posts,” and declared that this urge “isn’t a very edifying way for the Justice Department to proceed.” Adam Dobrik, *Mukasey: Yates Memo aims for ‘bodies swinging from lamp posts,’* GLOBAL INVESTIGATIONS REVIEW (June 23, 2016).

### Sergeant Joe Friday And ‘Just the Facts, Ma’am’

Elaborating in a speech on the declaration in the memo about the disclosure of all facts in order to be eligible for any credit, Yates acknowledged that the attorney-client privilege and work-product protections may protect memoranda of interviews of individuals from an internal investigation. But she went on to explain that a company’s obligation to produce all relevant facts “includes the facts learned through those interviews,” because “as we all know, legal advice is privileged,” but “facts are not.” Sally Quillan Yates, *Remarks at American Banking Association and American Bar Association Money Laundering Enforcement Conference*. In other words, the way the DOJ sees it, a company seeking credit for cooperation can withhold its interview memoranda but cannot withhold all relevant facts learned through those interviews.

This “just the facts, ma’am” approach, reminiscent of Sergeant Joe Friday on *Dragnet*, raises an important issue about what falls within the attorney-client privilege. Although Yates insists in describing “what exactly the attorney client privilege means” that “facts are not [privileged],” this proposition is subject to dispute at least in certain circumstances. While the deputy attorney general did not offer a citation for her proposition (and the context of her speech did not call for one), it may be grounded in a line in the U.S. Supreme Court’s seminal opinion in *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981), stating that “the privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.” Matthew S. Miner, *DOJ’s New Threshold for Cooperation: Challenges Posed by the Yates Memo and USAM Reforms*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM at 21-23 (May 2016); David M. Greenwald and Michele L. Slachetka, *Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under The Attorney-Client Privilege And The Work Product Doctrine*, JENNER & BLOCK: PRACTICE SERIES at 9-10 (August 2015).

**Unanswered Questions.** But on its face it is unclear exactly what this line from *Upjohn* means: for example, it could mean that those who communicated with the at-

torney can be questioned about those same facts by others, who are equally free to learn about the facts; or it could mean that a fact learned by company counsel through a privileged interview (or even only through a privileged interview) is not privileged. Because the line from *Upjohn* appears as an answer to a concern expressed by the U.S. Court of Appeals for the Sixth Circuit in the decision that the Supreme Court was reversing, to the effect that expanding the privilege beyond a narrow control group would “create a broad ‘zone of silence’ over corporate affairs, *Upjohn* did not answer this question, and the line is dicta. Nonetheless, the next paragraph of *Upjohn* suggests that the first of the two possibilities may have been what the Supreme Court intended: in the paragraph following the line quoted above, Justice William Rehnquist explained that “the client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communications to his attorney.”

Although not in an internal investigation context, a few courts have addressed the second question of whether a privilege protects a fact that is known only from a privileged communication; both stated in dicta that the privilege *does* protect those facts, at least from disclosure by the recipient of the privileged communication. See, e.g., *United States v. Rakes*, 136 F.3d 1, x n.3 (1st Cir. 1998). In *Rakes*, a prosecution alleging perjury for denying extortion threats, the prosecution sought to admit defendant’s statements about the extortion to his wife and to his attorney. In the face of the defendant’s privilege claims, which seemed to meet all the elements of a valid claim, the government noted that the defendant was relating to his wife “events that occurred prior to the communication,” and argued, citing *Upjohn*, that privileges protect inquiry into communications and not into the underlying facts. The First Circuit rejected the government’s argument and upheld the district court’s suppression of several privileged statements, on the ground that the suppression order “was directed to communications, not to facts.” In a footnote, the court added that “where an attorney knows facts only because they were confidentially communicated by the client, the government cannot circumvent the privilege by asking the attorney about ‘the facts.’”

Similarly, in a case affirming the disqualification of attorneys for criminal defendants who had previously represented one of the witnesses against those defendants, the Second Circuit addressed the issues arising out of a possible cross examination of the government’s witness by his prior counsel. In a footnote, the court noted that “the attorney is barred from disclosing not only the confidential communications, but also such facts as he learned only from the confidential communications.” *United States v. James*, 708 F.2d 40, 44, n.3 (2nd Cir. 1983).

**Will the DOJ Backtrack?** Will the DOJ walk back from demanding “all relevant facts” and insisting that all facts are not privileged, and allow exclusion of facts learned by company counsel only through privileged communications? If not, will courts uphold claims of privilege after companies have provided to the government “all relevant facts” that include facts learned only through privileged communications? The answers to these questions will define whether the regime of the

Yates Memorandum lives up to statements by the deputy attorney general and the assistant attorney general that the new guidance does not backtrack on the policy statement memorialized in the Filip Memorandum that companies are not required to waive privilege to receive credit for cooperation, and will determine whether the Yates Memorandum materially increases the risks of obtaining credit for cooperation.

In the end, the extent of the impact from the insistence of the DOJ on the production of facts even if their only source is a privileged conversation will depend on the frequency with which companies seek to obtain cooperation credit while retaining their privilege. It has been speculated that some companies will decline the government's invitation to cooperate due to the higher degree of difficulty of meeting the new, higher standard for cooperation credit. See Matthew Miner, *DOJ's New Threshold for "Cooperation": Challenges Posed by the Yates Memo and USAM Reforms*. It is also the case that some companies that cooperate will waive the privilege, on the theory that this is what the DOJ really wants, even though Yates has stated that waiver of the privilege is not required and that the DOJ will not request it. Yates, *Remarks at American Banking Association and American Bar Association Money Laundering Enforcement Conference*; Mark Filip, *Principles of Federal Prosecution of Business Organizations*, at 9-28.710, n. 3 (Aug. 28, 2008).

In fact, at least for many years, no request needed to be made, and waivers of the privilege were prevalent. See, e.g., *United States v. Bergonzi*, 216 F.R.D. 487, 498 (N.D. Cal. 2004). This is because the government, speaking through the McNulty and Thompson memorandums, had historically left no doubt that, regardless of whether it was requested, a corporation's waiver "may always [be] favorably consider[ed]" by prosecutors "in determining whether a corporation has cooperated in the government's investigation," and that the pinnacle of cooperation was production of "statements of possible witnesses, subjects, and targets," without the need for the government to "negotiate individual cooperation or immunity agreements," especially statements that were made prior to the person being interviewed having an opportunity to consult with counsel and review documents. Deputy Attorney General Paul J. McNulty, *Principles of Federal Prosecution of Business Organizations* at 10 (Dec. 12, 2006); Deputy Attorney General Larry Thompson, *Principles of Federal Prosecution of Business Organizations* at 7 (Jan. 20, 2003); N. Richard Janis, *The McNulty Memorandum: Much Ado About Nothing*, WASHINGTON LAWYER (February 2007).

Although not specifically addressed in the Yates Memorandum, it is reasonable to assume that this preference for a full waiver remains in effect, with companies that fully waive the privilege doing better with the DOJ when it determines "the extent of that cooperation credit," which depends on "all the various factors that have traditionally applied in making this assessment." Yates Memorandum at 1.

## The Yates Memo Meets Upjohn Warnings

The Yates Memorandum highlights another set of issues, which has been bandied about in internal investi-

gations for many years: what admonitions should be given to employees who are interviewed in internal investigations, and whether the admonitions generally settled upon by commentators after *Upjohn*, the so-called *Upjohn* warnings, are still sufficient after the Yates Memorandum. Many commentators and practitioners view as necessary admonitions to interviewed employees that (1) the lawyer represents the company and not the individual, (2) that, therefore, anything revealed during the course of the interview is only privileged as between the lawyer and the company, and (3) that the employee has no control over whether the company decides to waive the privilege. Lee G. Dunst and Daniel Chirlin, *A Renewed Emphasis on Upjohn Warnings*, 23 WHITE COLLAR CRIME 12 at 1 (September 2009); David Conrad, Paul Foley, Karen Seifert, and Laurie Martindale, *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees*, ABA WCC WORKING GROUP at 2 (July 17, 2009). There is less agreement on whether additional admonitions, such as that the company will provide the details of any interview to the government, and/or that counsel is seeking to gather and report evidence of individual wrongdoing to the Justice Department, are required. Robert E. Bloch, Kelly B. Kramer, and Stephen M. Medlock, 8 *Thoughts On Cartel Investigations Post-Yates Memo*, LAW360 (March, 2016); Claudius O. Sokenu, *DOJ Issues Policy On Holding Individuals Accountable For Corporate Malfeasance*, NEW YORK LAW JOURNAL (November, 2015). Some have urged a more direct admonition at least for certain employees about the conflict between the company and those individuals. See 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, 960-61 (2008); see also Steven M. Kaufmann, James M. Koukious, Robert J. Baehr, *Three Key Takeaways from DOJ's New Yates Memo on Individual Accountability for Corporate Wrongdoing*, MORRISON FOERSTER (September, 2015); see also Nicolas Bourtin, *Expert Q&A on the DOJ's Yates Memo*, PRACTICAL LAW THE JOURNAL (April/May 2016).

This dispute is heightened by the proposition in the Yates Memorandum that to obtain any cooperation credit a company must provide all relevant facts, specifically including facts obtained from witness interviews, even if those interviews are privileged. Suppose the internal investigation interviews a high-ranking employee at a time when counsel has already learned enough to know that the company will need to cooperate with the DOJ because it is lacking any reasonable defense, and at a time when counsel already knows that the employee is likely to be culpable in the wrongdoing.

At this point, given the likelihood of the company's cooperation with the government and its provision of "facts" that will include those learned from interviewing the employee, is there such a conflict that the standard *Upjohn* warnings are no longer sufficient? Even under these circumstances—where the lawyer knows or reasonably should know that his client's interests are adverse to the employee's interests—the American Bar Association's Model Rules suggest that all that is required is that the lawyer explain the identity of the lawyer's client. See Model Rule 1.13(a) ("In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall ex-



plain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing").

**Ethical Rules.** Especially in light of the Yates Memorandum, the ethical rules in two states might suggest a different result. Both California's Rule 3-600(D) and commentary to New York's Rule of Professional Conduct 1.13 make a material addition to Model Rule 1.13(a) by triggering admonitions not just if the lawyer knows or reasonably should know that the interests are adverse but also if they *may become* adverse (California) or if the interests *may differ* (New York). In that event, in New York, additional admonitions beyond *Upjohn* are required, including (i) that a conflict or *potential conflict* of interest exists, and (ii) that the constituent may wish to obtain independent representation. NY ST RPC Rule 1.13 (McKinney).

Perhaps even more significantly, in addition to expanding Rule 1.13 to include potential conflicts, the California rule adds a new requirement that "the member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent." Putting those two additions together, in California, if it is apparent that the interests of the company and the employee may become adverse, a lawyer cannot mislead employees into believing the confidential information they communicate will not be used in favor of the company, or in a way adverse to the employee.

The question whether *Upjohn* warnings are sufficient under this rule may turn on what qualifies as misleading. Is mentioning only that the lawyer represents the company and not the individual misleading on the subject of whether the employee can safely communicate confidential information, at least in the absence of the additional admonition that the company owns the privilege and can communicate to the government what it learns without the employee's consent? If as hypothesized above the company has effectively already decided that it must cooperate and that the employee to be interviewed is likely culpable, is it misleading to describe the interview merely as part of an internal investigation? Is it misleading not to add some combination of the facts that the interests of the company and the employee are adverse, and that the company expects to cooperate and to provide to the government the information it learns from the employee?

It is too soon to tell whether the Yates Memorandum changes the answers to these questions. But one California case may shed some light on where a court might go. In *Quezada v. Schneider Logistics Transloading and Distribution*, 2013 U.S. Dist. LEXIS 47639 (C.D. Cal., March 25, 2013), a company interviewed its employees and told them it was doing so in an internal investigation about the conditions at the company's warehouse. It also went beyond *Upjohn* and told the employees that they were putative members of a recently-filed class action with claims pertaining to the subject matter to be discussed at the interview, including issues of unpaid wages. But it did not disclose that the purpose of the interview was to gather evidence to be used against the employees in the lawsuit. On that basis, and finding that Rule 3-600(D) appears to have been violated, the

court struck all the declarations that the employees signed during the interviews. While the facts in *Quezada* can be distinguished from a more typical internal investigation—for example, in the typical internal investigation, no adverse claim is actually pending—the California rule, *Quezada's* interpretation of it, and the dictates of the Yates Memorandum highlight the possibility that more robust admonitions could now be required in certain circumstances.

**Elaborate Admonitions.** The possibility that, in light of the Yates Memorandum, an attorney's ethical obligation might compel admonitions that would provide additional encouragement to employees to refuse to participate in an internal investigation raises the question of how the DOJ would react if an attorney for a company seeking to cooperate gave more elaborate admonitions and key employees declined to cooperate in the investigation. There is a risk that the DOJ would view the more elaborate admonitions as unnecessary and therefore potentially a ruse in order to allow the company to claim to be cooperating while ensuring that it will not be in a position to fully describe its wrongdoing to the DOJ; some of the seeds of concern grow from the deputy attorney general's statement acknowledging respect for the privilege but adding that "we will also expect companies to respect its boundaries and not to wrongly exploit its boundaries by using it to shield non-privileged information from investigators." Or, less cynically, the DOJ could easily take the sum total of the resulting cooperation and determine that the company did not "provide to the Department all facts relating to that misconduct" and did not "provide the Department with complete factual information about individual wrongdoers." Yates Memorandum at 1. Whether the DOJ will pressure companies not to provide more complete admonitions even if doing so risks a lack of compliance with the ethical obligations of the company or its lawyers remains to be seen.

No answer to this question is readily apparent, but perhaps some insight can be drawn from the SEC's answer to a somewhat analogous question: whether, in responding to a subpoena, a company can decline to provide information if the provision of that information would subject the company to criminal liability in another country. The SEC recently sanctioned the Chinese branch of Deloitte for not complying with a subpoena, despite the fact that expert testimony likely showed that producing the documents would violate Chinese law, subjecting the recipients to both civil and criminal penalties. *In the Matter of Bdo China Dahua Cpa Co. Ltd., Ernst & Young Hua Ming LLP, Kpmg Huazhen (Special Gen. P'ship), Deloitte Touche Tohmatsu Certified Pub. Accountants Ltd., & Pricewaterhousecoopers Zhong Tian Cpas Ltd.*, SEC Release No. 553, at \*52-88 (Jan. 22, 2014) (redacting most of the expert testimony provided); *Id.* at 52-88. The court reasoned that "the motive for the choice [to not produce the documents] is irrelevant, so long as the Respondent knew of the request and made a choice not to comply with it. As a result, bad faith need not be demonstrated, and good faith is not a defense." *Id.* at 93. Whether the DOJ will take a similar approach to cooperation credit remains to be seen.

**Common Interest Agreement.** A related issue is how the DOJ would react if, in light of the Yates Memorandum, a key employee announced that he would agree to

be interviewed only if the company entered into a joint defense or common interest agreement. These agreements serve the purpose of expanding an attorney-client privilege type of protection to communications among members of a group of individuals or entities with a common interest, and generally restrict any member of the agreement from communicating to any non-member of the agreement any information shared pursuant to the agreement. More specifically, the agreement would allow a key employee to be interviewed by the company in an internal investigation, but would in some ways prohibit the company from sharing that information with the government without the consent of the individual who provided the information.

The possible application of a common interest agreement to an interview in an internal investigation—a request being raised more frequently after the Yates Memorandum—triggers a series of issues. Should the company refuse such requests and is it obliged to fire any employee who insists that the company enter into a common interest agreement before agreeing to be

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interviewed? Can the company agree to the request and still be able to claim credit for cooperation? These questions reprise some of the issues noted above about a company that gave expanded *Upjohn* warnings; the government may reject this approach, viewing it as an indication that the company is looking for excuses not to gather all the facts, or the government may merely determine in the end that the company has not provided enough facts to merit cooperation credit. Is it possible for the company to gather information pursuant to a common interest agreement and then present “just the facts” (including facts derived from witness interviews conducted under a common interest agreement)? There is an argument that such a presentation should be sufficient to satisfy the government, given that the distinction between facts and sources of facts, with facts being what is required, is the DOJ's own construct in the Yates Memorandum. But whether it will in fact satisfy the government or not is a separate question, and the harder question is whether there is a credible argument that those facts can be conveyed without violating the terms of the common interest agreement—a question that will be hard to answer in the affirmative, but might depend on the specifics of the agreement and how the agreement treats “derivative use” of the common interest information that is was conveyed to the company.

## Conclusion

None of the issues identified in this article necessarily qualify as new issues. But they are issues that are more likely to arise given the highlighting of individual prosecutions in the Yates Memorandum, given some of the specific policies that the memo adopts, and given questions likely to arise about the future of the Yates Memorandum in the new administration. How the new leaders of the DOJ respond to these questions, and how they strike the balance between competing considerations relating to the prosecution of individuals, will help determine the extent to which the DOJ will “respect the privilege,” as the deputy attorney general has committed. Sally Quillian Yates, *Remarks at American Banking Association and American Bar Association Money Laundering Enforcement Conference*.