

There's a New Sheriff in Town: How the Yates Memo and the Latest Revisions to the U.S. Attorney's Manual Will Change the Way The Federal Government Investigates Business Organizations

I. INTRODUCTION

Between 1999 and 2008 various Deputy Attorney Generals at the Department of Justice (“DOJ”) issued memos that revised and expanded the “Principles of Federal Prosecution of Business Organizations” (“the Principles”¹). These principles set forth a framework, which was incorporated into the U.S. Attorney’s Manual (“USAM”) in 2008, to provide guidance for federal prosecutors to use when analyzing cases against corporations.² The Principles require federal prosecutors to consider ten separate factors in deciding whether they will indict or offer an agreement, in the form of a non-prosecution (“NPA”) or deferred prosecution agreement (“DPA”), to a corporation that is under investigation. On September 9, 2015 Deputy Attorney General Sally Quillian Yates issued a Memo (“Yates Memo”) “Individual Accountability for Corporate Wrongdoing”³ which inspired important revisions to the USAM that are intended to help federal prosecutors preserve cases against individual wrongdoers when investigating a business organization. The recent revisions to the Principles will materially alter the way federal prosecutors conduct future investigations of business organizations.

¹ The term “Principles” is used interchangeably with “DOJ guidelines” throughout this paper.

² The term “corporations” as used in this paper refers to both corporations and any other form of business organization as the DOJ guidelines in the USAM are applicable to both corporations and any other type of business organization.

³ Memorandum from Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, to All U.S. Att’ys et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter Yates Memo], available at <http://www.justice.gov/dag/file/769036/download> (last accessed November 29, 2015).

This report provides a detailed analysis of how the Yates Memo and the recently revised Principles in the USAM will change the way federal prosecutors structure their investigations against business organizations. Additionally, this report will address how the DOJ evaluates corporate compliance programs and the types of corporate governance changes the DOJ seeks to have corporations implement as part of their settlements with the DOJ, which usually come in the form of NPAs or DPAs.

Section II of this report starts by outlining significant revisions to the DOJ's "Principles of Criminal Prosecutions of Business Organizations," made between 1999 and 2008. In particular, Section II examines how these Principles have been revised at times to both expand and restrict a prosecutor's ability to leverage cooperation credit⁴ in exchange for attorney-client privilege ("ACP") and work product protection ("WPP") waivers from a corporation. Section III of this report will explore the types of compliance mechanisms the DOJ seeks to include in DPAs or NPAs and the metrics used by the DOJ in evaluating a corporation's compliance program/procedures in determining the appropriate action to be taken against the corporation in a criminal or civil investigation. Section IV summarizes the Yates Memo and provides insight into the business and legal communities' reaction to the Yates Memo in the months preceding the issuance of the revised USAM. Finally, Section V analyzes how the Yates Memo and the recent revisions to the USAM differ from, and change, previous DOJ Principles used by federal prosecutors in determining whether to indict a business organization. Section V also discusses how the latest revisions to the USAM will affect the way federal prosecutors conduct investigations of business organizations and how business organizations, whether

⁴ "Cooperation Credit" is the credit a corporation receives favoring non-prosecution when it complies with government requests for information during an investigation.

under investigation or not, are expected to comply with the latest revisions in order to receive the credit favoring non-prosecution.

II. PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS

A brief history of the memos issued by various Deputy Attorney Generals between 1999 and 2008 that revised and expanded the “Principles of Federal Prosecution of Business Organizations,” will provide an important context in which to consider and analyze the latest revisions to the Principles issued in response to the Yates Memo.

The first Corporate⁵ Prosecution Principles were adopted by the DOJ in 1999, when then-Assistant Attorney General at that time, Eric Holder, issued a Memo (“Holder Memo”) to all U.S. attorneys titled “Bringing Criminal Charges Against Corporations.”⁶ The Holder Memo provided prosecutors with a useful framework to use in analyzing cases against corporations.⁷ The Holder Memo set forth 9 principles to be considered by Federal prosecutors in deciding whether to “charge a corporation in a particular case.”⁸

In 2003, then-Deputy Attorney General, Larry D. Thompson, issued a second Memo (“Thompson Memo”) titled “Principles of Federal Prosecution of Business Organizations.”⁹ The Thompson Memo revised and expanded the initial principles

⁵ The term “Corporate” here applies to prosecution of all types of business organizations as the Principles discussed in this report are used by federal prosecutors investigating all types of business organizations.

⁶ Memorandum from Eric Holder, Deputy Att’y General., U.S. Dep’t of Justice., To All Component Heads and U.S. Att’ys., Bringing Criminal Charges Against Corporations” (June 16, 1999)[hereinafter “Holder Memo”] available at <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> (last accessed November 16, 2015).

⁷ Id.

⁸ Id.; *see also* U.S. Dep’t of Justice, U.S. Attorney’s Manual §9-28.300 (2015) [hereinafter U.S.A.M.], available at <http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations> (last accessed November 20, 2015) (principles adopted by U.S.A.M in 2008 and now include ten principles)

outlined in the Holder Memo.¹⁰ Under both memos, prosecutors were instructed to consider a corporation's cooperation in the investigation when deciding whether to charge a corporation with a crime. The focus of the Thompson Memo revisions was to place "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."¹¹ The Thompson Memo sought to accomplish this goal through expanding the DOJ's privilege waiver policy¹² by specifically instructing prosecutors to consider a corporation's willingness to waive ACP and WPP when gauging the extent of a corporation's cooperation in an investigation.¹³ Revisions were also made to "address the efficacy of corporate governance mechanisms in place within a corporation, to ensure that [they] are truly effective rather than mere paper programs."¹⁴ The expansion of the DOJ's privilege waiver policy led to prosecutors conditioning the reception of any

⁹ Memorandum from Larry D. Thompson, Deputy Att'y General., U.S. Dep't of Justice., To All Component Heads and U.S. Att'ys., Principles of Federal Prosecution of Business Organizations (January 16, 2003)[hereinafter "Thompson Memo"] available at http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf (last accessed November 16, 2015).

¹⁰ Id.

¹¹ Id. (The intention behind this revision was to make clear that steps taken by a corporation or its actors to "impede the quick and effective exposure of the complete scope of wrongdoing [by the corporation] under investigation" would weigh in favor of corporate prosecution).

¹² "Privilege waiver policy" refers to a DOJ policy that permitted prosecutors to leverage cooperation credit for ACP and WPP waivers from corporations.

¹³ Thompson Memo, *supra* note 9, at 6 § VI (prosecutors were instructed to consider a corporation's cooperation in the investigation when deciding whether to charge a corporation with a crime; quoting "in gauging the extent of . . . cooperation, the prosecutor may consider the corporation's willingness to . . . to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.") ; *see also* Crystal Joy Carpenter, *Federal Prosecution of Business Organizations: The Thompson Memorandum and Its Aftermath*, 59 Ala. L. Rev. 207, 212 (2007) (discussing prosecutors ability to leverage cooperation credit for privilege waiver in light of the Thompson Memo).

¹⁴ Thompson Memo, *supra* note 9, at 6 § VI

cooperation credit on whether in a particular case a corporation waived ACP and WPP.¹⁵ Many corporations acquiesced to the waiver demands of prosecutors out of fear of obtaining a criminal conviction for lack of cooperation.¹⁶ This policy “became the source of heated debate¹⁷” because of its effect on a corporation’s ability to maintain ACP and WPP protection and the propensity to violate a corporation’s constitutional protected rights against self-incrimination and right to counsel.¹⁸

In 2006, then-Deputy Attorney General, Paul J. McNulty, issued a Memo (“McNulty Memo”) that revised the privilege waiver policy in response to criticism from members of the “corporate legal community [who] expressed concern that [the DOJ’s] practices may be discouraging full and candid communications between corporate employees and legal counsel.¹⁹” The McNulty Memo attempted to remedy the effects that the Thompson Memo had on the DOJ’s privilege waiver policy by clarifying that a “[p]rosecutor may only request waiver of attorney-client privilege or work product protections when there is a legitimate need for privileged information to fulfill their law enforcement obligations.²⁰” However, this revision did little to actually limit a

¹⁵ Crystal Joy Carpenter, *Federal Prosecution of Business Organizations: The Thompson Memorandum and Its Aftermath*, 59 Ala. L. Rev. 207, 213 (2007)

¹⁶ *Id.* at 214.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Memorandum from Paul J. McNulty, Deputy Att’y General., U.S. Dep’t of Justice., To All Component Heads and U.S. Att’ys., Principles of Federal Prosecution of Business Organizations (December 12, 2006)[hereinafter “McNulty Memo”] available at http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf (last accessed November 16, 2015)

²⁰ *Id.* at 9 (quoting:

Whether there is a legitimate need depends upon:

prosecutor’s actual ability to leverage cooperation credit for a privilege waiver.²¹ The revisions simply implemented a procedure for prosecutors to follow when seeking privilege waivers, but did little to limit a prosecutor’s ability to continue to leverage cooperation credit for privilege waivers.²²

The next publication came in 2008, when then-Deputy Attorney General, Mark Filip, issued a Memo (“Filip Memo”), which significantly revised the “Principles of Federal Prosecution of Business Organizations.”²³ The Principles as revised by the the Filip Memo were incorporated into the USAM and came to be known as the “Filip Factors.”²⁴

-
- (1) the likelihood and degree to which the privileged information will benefit the government's investigation;
 - (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
 - (3) the completeness of the voluntary disclosure already provided; and
 - (4) the collateral consequences to a corporation of a waiver.)

²¹ Id. at 9-11 § VII. B. 2. (Laying out a procedure for prosecutors to follow when seeking to obtain ACP and WPP waivers and permitting prosecutors to request ACP and WPP waivers “when there is a legitimate need for the privileged information.” The guidelines specify the order in which certain types of information can be sought through a waiver, the times in which the information can be obtained, and lists when dissemination of certain categories of information may be eligible for cooperation credit. Under this framework, prosecutors were first required to request only purely factual information (“category I” information). “A corporation’s response to the government’s request for waiver of privilege for Category I information [could] be considered in determining whether a corporation . . . cooperated in the government’s investigation.” If category 1 information was insufficient, then upon approval, prosecutors could request that a corporation provide attorney client communications or non-factual attorney work product (“category II” information). Compliance with a request for category II information could be considered favorably for cooperation credit, but non-compliance with a request could not be considered at all. Under this scheme, prosecutors maintained their cooperation credit leverage).

²² Id. at 8 § 2

²³ Memorandum from Mark Filip, Deputy Att’y General., U.S. Dep’t of Justice., To All Component Heads and U.S. Att’ys., Principles of Federal Prosecution of Business Organizations (August 28, 2008) [hereinafter “Filip Memo”] available at <http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf> (last accessed November 20, 2015); cf. U.S.A.M § 9-28.730 cmt (2008 previous edition) (section dealing with payment of attorneys fees and participation of a corporation in a joint defense).

²⁴ Filip Memo, Supra note 23; see also U.S.A.M § 9-28.730 cmt (2008)

One of the main revisions concerned the “measures a business entity must take to qualify for the long recognized ‘cooperation’ mitigating factor.”²⁵ This revision essentially stripped federal prosecutors of their previous ability under the McNulty Memo to leverage cooperation credit for privilege waivers.²⁶ The Filip Memo made it clear that prosecutors can no longer ask a corporation for privilege waivers during an investigation or condition cooperation credit upon receiving a voluntary waiver.²⁷ To ensure prosecutors comply with the revisions that eliminate their ability to exchange cooperation credit for privilege waivers, the Filip Memo encourages counsel for corporations to report prosecutors who demand ACP or WPP waivers in exchange for cooperation credit “to their supervisors, including the appropriate United States Attorney or Assistant Attorney General.”²⁸ Now, prosecutors are only permitted to base cooperation credit on a corporation’s disclosure of relevant facts not otherwise protected by ACP or WPP.²⁹ The Filip Memo, thus provided corporation’s with greater ACP and WPP protection by taking away prosecutors ability to condition cooperation credit on corporation’s providing privilege waivers.

The Filip Memo also introduced how “payment of attorneys’ fees by a business organization for its officers or employees, or participation in a joint defense or similar

²⁵ Filip Memo, supra note 23

²⁶ See U.S.A.M § 9-28.700 (2008) (quoting: “failure to cooperate, in and of itself, does not support or require the filing of charges with respect to a corporation than with respect to an individual.”)

²⁷ Filip Memo, supra note 23; see also U.S.A.M § 9-28.720 (2008) (quoting: “eligibility for cooperation credit is not predicated upon the waiver of [ACP] or [WPP].”)

²⁸ Filip Memo, supra note 23; see also U.S.A.M § 9-28.760 (2008) (section providing oversight concerning demands for ACP and WPP waivers by corporations contrary to the policies in the U.S.A.M).

²⁹ Filip Memo, supra note 23; see also U.S.A.M § 9-28.720 (2008) (Quoting: “the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant *facts* concerning such misconduct.”).

agreement, [could] be considered in the prosecutive analysis.³⁰ Generally, the Filip Memo provides that the payment of attorneys' fees by a business organization for its officers or employees, or participation in a joint defense or similar agreement, cannot be considered in the prosecutive analysis.³¹ Accordingly, the Filip Memo specifies that “prosecutors may not request that a corporation refrain from taking such action.”³²

However, the Filip Memo clarifies the reach of the general rule and essentially warns corporations who are under investigation that “[t]his prohibition is not meant to prevent a prosecutor from asking questions about an attorney's representation of a corporation or its employees, officers, or directors, where otherwise appropriate under the law.”³³ The general rule is not “intended to limit the otherwise applicable reach of criminal obstruction of justice statutes.”³⁴ The Filip Memo explains that a “corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit.”³⁵ Further, the Filip

³⁰ Filip Memo, *supra* note 23; *see also* U.S.A.M § 9-28.730 cmt (2008) (section dealing with payment of attorneys fees and participation of a corporation in a joint defense).

³¹ Filip Memo, *supra* note 23; *see also* U.S.A.M § 9-28.730 cmt (2008)

³² Filip Memo, *supra* note 23; *see also* U.S.A.M § 9-28.730 cmt (2008) (quoting: “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”).

³³ Filip Memo, *supra* note 23; *see also* U.S.A.M § 9-28.730 cmt (2008)

³⁴ Filip Memo, *supra* note 23; *see also* U.S.A.M § 9-28.730 cmt (2008) (e.g. quoting “[i]f the payment of attorney fees were used in a manner that would otherwise constitute criminal obstruction of justice—for example, if fees were advanced on the condition that an employee adhere to a version of the facts that the corporation and the employee knew to be false—these Principles would not (and could not) render inapplicable such criminal prohibitions.”).

³⁵ Filip Memo, *supra* note 23; *see also* U.S.A.M § 9-28.730 cmt (2008) (e.g. “Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired.

Memo explains that, “it may on occasion be appropriate for the government to consider whether the corporation has shared with others sensitive information about the investigation that the government provided to the corporation.”³⁶

The last major contribution of the Filip Memo was a section that expressly permitted prosecutors to resolve corporate criminal investigations against business organizations through the use of NPAs and DPAs.³⁷ Prosecutors used NPAs and DPAs prior to the Filip Memo, but previous Memos gave minimal guidance on when and how they should be used.³⁸ Unlike previous Memos issued by the DOJ, the Filip Memo specifically states that “in certain instances, it may be appropriate, upon consideration of the [Filip] factors . . . , to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation.”³⁹ Previous versions of the Principles did not provide much guidance on

Corporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate.”).

³⁶ Filip Memo, supra note 23; *see also* U.S.A.M § 9-28.730 cmt (2008) (e.g. quoting: “In appropriate situations . . . the government may properly request that, if a corporation wishes to receive credit for cooperation, the information provided by the government to the corporation not be transmitted to others—for example, where the disclosure of such information could lead to flight by individual subjects, destruction of evidence, or dissipation or concealment of assets”).

³⁷ Filip Memo, supra note 23; *See also* Section III of this memo (discussing DOJ imposition of corporate monitors in NPAs and DPAS).

³⁸ *see e.g.* McNulty Memo, supra note 19 (providing limited guidance on when NPAs should be used; these principles permit a non-prosecution agreement in exchange for cooperation credit when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.").

³⁹ Filip Memo; *see also* U.S.A.M § 9-28.200 B. cmt (2008) (

“where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with

when NPAs or DPAs should be used, rather, they only mentioned when and how plea agreements with business organizations should be executed.⁴⁰

III. DOJ INFLUENCE ON CORPORATE GOVERNANCE THROUGH USE OF NPAs AND DPAs

a. Metrics Used by the DOJ in Evaluating Corporate Compliance Programs

The U.S. Attorney's Manual ("USAM") also provides U.S. Attorneys with guidance on how to evaluate a company's compliance program.⁴¹ "The existence and effectiveness of a company's pre-existing compliance program,⁴²" is one of ten factors that a prosecutor must consider in "reaching a decision as to the proper treatment of a corporate target."⁴³ Although, there are no "formulaic requirements regarding corporate compliance programs⁴⁴" prosecutors should "attempt to determine whether a

applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims")

⁴⁰ McNulty Memo, supra note 19.

⁴¹ See U.S.A.M § 9-28.000 et. Seq. (revised 2015)(providing guidelines for U.S. attorneys to follow when investigating business organizations).

⁴² See U.S.A.M §9-28.800 (revised 2015) (quoting: "Compliance programs are established by corporate management to prevent and detect misconduct and to ensure that corporate activities are conducted in accordance with applicable criminal and civil laws, regulations, and rules.").

⁴³ U.S.A.M § 9-28.300 (revised 2015).

⁴⁴ U.S.A.M § 9-28.800 cmt. (revised 2015).

corporation's compliance program is merely a 'paper program' or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner.⁴⁵”

Two critical factors that prosecutors are instructed to consider in evaluating any compliance program include: “whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.⁴⁶” Prosecutors are also instructed to consider “the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation⁴⁷ . . . ; revisions to corporate compliance programs in light of lessons learned . . . ;” and “the promptness of any disclosure of wrongdoing to the government.⁴⁸” “Prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct.⁴⁹”

⁴⁵ Id. (including, for example, “whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts[;]” and whether the corporation's employees know about the compliance program and “are convinced of the corporation's commitment to it).

⁴⁶ Id.

⁴⁷ An example of this would be punishing individuals internally for previous instances of misconduct.

⁴⁸ U.S.A.M § 9-28.800 cmt (revised 2015).

⁴⁹ Id. (e.g. quoting “do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy; and have the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law”).

Under the most recent USAM guidelines,⁵⁰ the reception of cooperation credit is made contingent upon a corporation's full disclosure of all non-privileged material facts.⁵¹ This heightened requirement imposes corporate compliance programs to conduct thorough internal investigations that are tailored to the scope of the wrongdoing.⁵² Failure to conduct an adequate investigation will disqualify a company from receiving cooperation credit.⁵³ The existence of a compliance program alone, though, will not by itself absolve a corporation from criminal liability.⁵⁴ However, a program deemed to be effective might result in charges being brought solely against the individual employees responsible for the corporate wrongdoing.⁵⁵

b. Guidance For Prosecutors On The Selection And Use Of Monitors As A Condition In A Non-Prosecution or Deferred Prosecution Agreement

Prosecutors often use NPAs and DPAs ("agreements" collectively) to resolve criminal investigations with business organizations. Two additional memos issued by the DOJ provide 10 principles that should be considered by prosecutors in the selection and use of monitors in agreements with corporations.⁵⁶ In 2008, then-Acting Deputy Attorney

⁵⁰ U.S.A.M § 9-28.720 (revised 2015) (showing significant revisions to former cooperation credit section).

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ See Id. cmt.

⁵⁵ See Id. cmt.

⁵⁶ Memorandum from Craig S. Morford, Deputy Att'y General., U.S. Dep't of Justice., To All Component Heads and U.S. Att'ys., Selection and Use of Monitors in Deferred Prosecution Agreements (March 7, 2008) [hereinafter "Morford Memo"] available at <http://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf> (last accessed on November 20, 2015).

General Craig S. Morford issued the first memo (“Morford Memo”). The Morford Memo set forth the first 9 of these principles.⁵⁷

The first principle outlines the process for selecting a monitor.⁵⁸ Before an agreement can be made “the corporation and the government should discuss the necessary qualifications⁵⁹ for a monitor⁶⁰ based on the facts and circumstances of the case.⁶¹” Accordingly, the selection process for choosing a monitor should be designed to: (1) select a “highly qualified and respected⁶²” person or entity (2) avoid conflicts of interest (3); and “instill public confidence.⁶³”

Principles number two through seven outline the scope of the monitor’s duty.⁶⁴ First, a monitor must be an independent third party, without affiliation to the government or the corporation.⁶⁵ The “monitor's primary responsibility is to assess and monitor a corporation's compliance” with the terms of the agreement designed to “reduce the risk of [a] recurrence of . . . misconduct, including . . . evaluating (and where appropriate

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id. at Principle 1; *see also* cmt. to Principle 1 (quoting: “government and corporation should discuss what role the monitor will play and what qualities, expertise and skills the monitor should have.”).

⁶⁰ Id. at Principle 1; *see also* cmt. to Principle 1 (quoting: “[m]onitors should be individuals with specialized skills for ensuring effective compliance with the agreement, such as accountants, technical or scientific experts, and compliance experts.”).

⁶¹ Id.

⁶² Id.

⁶³ Id. at Principle 1; *see also* cmt. to Principle 1 (requiring a fact specific inquiry, agreements can be structured to give government veto power over the selection of a monitor).

⁶⁴ Morford Memo, *supra* note 56, at Principle 2-7.

⁶⁵ Morford Memo, *supra* note 56, at Principle 2; *see also* cmt. to Principle 2 (quoting: “a monitor is independent both from the corporation and the government,” but the three parties should be in open dialogue throughout the term of the agreement).

proposing) internal controls and corporate ethics compliance programs.⁶⁶ Principle four states that monitor's responsibilities should be limited to addressing and reducing the risk of recurrence of misconduct.⁶⁷ The fifth principle explains that it may be appropriate, depending on the facts and circumstances of the case, to require the monitor to issue written reports to the company, government, or both.⁶⁸ Sixth, in the event the corporation chooses not adopt the monitor's recommendations within a reasonable time, the monitor or the corporation should report to the government the reasons for this decision,⁶⁹ "[t]he government may consider this conduct when determining whether the corporation . . . [complied with] the agreement."⁷⁰ The Seventh principle specifies that an agreement should identify types of undisclosed or new misconduct that the monitor will need to report to the government, and the agreement should state "that the monitor will have discretion to report this misconduct to the government or the corporation."⁷¹

The last two principles address the duration of the agreement.⁷² The duration of the agreement should be as long as necessary "for the monitor to satisfy his mandate."⁷³

⁶⁶ Morford Memo, *supra* note 56, at Principle 3; *see also* cmt to principle 3 (the primary role of a monitor "is to evaluate whether a corporation has both adopted and effectively implemented ethics and compliance programs to address and reduce the risk of recurrence of the corporations misconduct.").

⁶⁷ Morford Memo, *supra* note 56, at Principle 4.

⁶⁸ *Id.* at Principle 5; *see also* Cmt to principle 5 (Reports may include: "(1) the monitor's activities; (2) whether the corporation is complying with the terms of the agreement; and (3) any changes that are necessary to foster the corporations compliance with the terms of the agreement.").

⁶⁹ Morford Memo, *supra* note 56, at Principle 6.

⁷⁰ *Id.* at Principle 6.

⁷¹ *Id.* at Principle 7.

⁷² *Id.* at Principle 8-9.

⁷³ *Id.* at Principle 8.

Additionally, the agreement should provide for extension and early termination of the monitor's services, at the discretion of the government, depending on the circumstances.⁷⁴

A tenth principle was added in 2010, by then-Acting Deputy Attorney General Gary G. Grindler and provided “that an agreement should explain what role the [DOJ] could play in resolving any disputes between the monitor and the corporation, given the facts and circumstances of the case.”⁷⁵

IV. YATES MEMO (2015)

a. Yates Memo Generally

On September 9, 2015, Deputy Attorney General, Sally Quillian Yates, issued a memo (Yates’s Memo) titled, “Individual Accountability for Corporate Wrongdoing.”⁷⁶ The Yates Memo set forth steps that should be taken by U.S. Attorneys to identify and preserve cases against culpable individuals during “any investigation of corporate misconduct.”⁷⁷ These steps were designed to hold culpable individuals who are complicit in corporate wrongdoing and misconduct responsible for their actions.⁷⁸

⁷⁴ Id. at principle 9.

⁷⁵ Memorandum from Gary G. Grindler, Deputy Att’y General., U.S. Dep’t of Justice., Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (March 7, 2008) [hereinafter “Grindler Memo”] available at <http://www.justice.gov/usam/criminal-resource-manual-166-additional-guidance-use-monitors-dpas-and-npas> (last accessed on November 20, 2015); *see also* Grindler Memo fn. 2 (new principle added in response to GAO report finding “that most of the companies that had retained corporate monitors that it surveyed were unclear as to how the Department could help address their concerns over how the monitors were performing their responsibilities or the cost of the monitorships.”).

⁷⁶ *See generally* Yates Memo, *supra* note 3.

⁷⁷ Id.

⁷⁸ Id.

The Yates’s Memo “lists six key steps to strengthen [U.S. Attorneys’] pursuit of individual corporate wrongdoing.⁷⁹” First, “[t]o be eligible for any cooperation credit, corporations must provide the [investigating department] all relevant facts about the individuals involved in corporate misconduct.⁸⁰” Second, “[b]oth criminal and civil investigations should focus on the individuals from the inception of the investigation.⁸¹” Third, “[c]riminal and civil corporate investigations should be in routine communication with each other.⁸²” Fourth, “[a]bsent extraordinary circumstances, no corporate resolution [shall] provide protection from criminal or civil liability for any individuals.⁸³” Fifth, “[c]orporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.⁸⁴” Sixth, “[c]ivil 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.⁸⁵”

The Yates Memo was designed with the focus of holding individual wrongdoers responsible by giving prosecutors a framework to structure their investigations of

⁷⁹ Id.

⁸⁰ Id. at Principle 1.

⁸¹ Id. at Principle 2 (The objective of this step is to provide U.S. Attorneys with a framework for preserving cases against individuals during investigations of corporate wrongdoing and to not foreclose either branch from pursuing a case against the corporation or individual. This step purports to require U.S. attorneys working in different branches to alert other branches of pending cases, new factual revelations made during the respective branches investigations, as well as any decisions to issue an indictment/pursue action, offer an NPA or DPA, or declinations).

⁸² Id at Principle 3.

⁸³ Id at Principle 4.

⁸⁴ Id at Principle 5.

⁸⁵ Id at Principle 6.

corporations in way that identifies culpable individuals and simultaneously builds a case against those individuals. The Yates Memo hopes to accomplish this goal by fostering routine communication and collaboration among different branches investigating corporate misconduct. These principles inspired the latest revisions to the Principles in USAM,⁸⁶ which was updated on November 16, 2015.

b. Legal and Business Communities' Reaction to The Yates Memo

The Yates Memo has been met with criticism seemingly because there is significant uncertainty for the legal and business community on how to apply these new principles.⁸⁷ The Yates Memo makes clear that the DOJ has an increased focus on holding individual corporate wrongdoers accountable, “which is nothing new.”⁸⁸ One commentator notes that this approach “is laudable but problematic,” because the inherent nature of corporations is such that “corporate decision making involves multiple people with conflicting priorities.⁸⁹” Therefore, the new the policy “may not yield more information or convictions of high-level officials,⁹⁰” which are those individuals that the DOJ is seeking to hold accountable in the first place.⁹¹

⁸⁶ See U.S.A.M § 9-28.000 et. Seq. (2015)

⁸⁷ See e.g. Richard Cullen & George J. Terwilliger III, *Unpacking the Yates Memo: What the New DOJ Policy Really Means*, available at (<https://www.mcguirewoods.com/Client-Resources/Alerts/2015/9/Unpacking-Yates-Memo-New-DOJ-Policy.aspx>) (last accessed on November 20, 2015) (quoting: “[n]avigating the pitfalls of internal and government investigations is going to get even more difficult for all concerned – and very personal for the executives involved.”)

⁸⁸ Elizabeth E. Joh & Thomas W. Joo, *The Corporation As Snitch: The New Doj Guidelines on Prosecuting White Collar Crime*, 101 Va. L. Rev. Online 51, 59 (2015)

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

Commentators believe that the imposition of routine communications among the various branches could lead to multiple cases being brought against a company engaged in misconduct.⁹² Commentators also believe that internal DOJ oversight and supervision of a criminal matter will put added pressure on prosecutors to either “build cases or investigation plans against individuals, or defend their choices to senior leaders.”⁹³ Commentators believe the former is more likely than the latter.⁹⁴

Some commentators are concerned that the Yates Memo may have an “unintended chilling consequence on corporate cooperation.”⁹⁵ One commentator believes that requiring full disclosure in exchange for any cooperation credit could make companies reluctant to be compliant with government requests for information.⁹⁶ Alternatively, some commentators believe this may increase cooperation, but impose a significant cost on corporations that need to develop effective compliance programs or increase the effectiveness of existing compliance programs.⁹⁷

One commentator proposed “general preventative steps” that should be taken by companies in response to the Yates Memo.⁹⁸ This proposal suggests that companies

⁹² see e.g. Daniel Chung & Edward Patterson, *DOJ's Newest Policy Pronouncement: the Hunt for Corporate Executives' Scalps*, (September 11, 2015) available at <http://www.gibsondunn.com/publications/pages/Yates-Memo--DOJ-New-Posture-on-Prosecutions-of-Individuals--Consequences-for-Companies.aspx> (quoting: “[it] may well affect a corporation’s analysis as to how vigorously or widely potential misconduct should be investigated, especially where the consequences of not being able to identify culpable individuals could be dire...it may result in an all or nothing approach to cooperation) (Authors are attorneys at Gibson Dunn).

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ See e.g. Cullen, *supra* note 87.

should: (1) implement and review existing compliance programs and assess effectiveness; (2) if applicable, develop or review a document retention program; (3) review the corporation's bylaws and determine when the company is obligated to indemnify executives and employees; (4) require and condition employment on cooperating with investigations; (5) learn data privacy laws of the countries in which the company operates; and (6) adopt strategies to minimize inadvertent dissemination of privileged information.⁹⁹

V. ANALYSIS ~ THE YATES EFFECT

a. How the Yates Memo and Current Developments – Recent Yates Speech, Revised Principles, and New Guidelines in the USAM – Change Previous DOJ Policies

On November 16, 2015, Deputy Attorney General Yates gave a speech at the American Banking Association and American Bar Association Money Laundering Enforcement Conference. In her Speech, Yates explained what the DOJ is “trying to accomplish and how the [DOJ] is implementing the polic[ies][,]” set out in the Yates Memo.¹⁰⁰ On that same day, the DOJ released new guidelines, consistent with the steps set forth in the Yates Memo, which revised the “Principles of Federal Prosecution of Business Organizations” (“Principles”) section of the USAM.¹⁰¹ Yates’ speech addressed

⁹⁸ Madeleine E. Moise Cassetta, *The Cooperation Credit in Corporate Investigations According to New Justice Department Guidance*, 30 Westlaw Journal White-Collar Crime 1 (November, 132015) (Author is a Partner at LeClairRyan, her practice focuses on business litigation, white-collar criminal defense and internal corporate investigations) (November 13, 2015).

⁹⁹ Id.

¹⁰⁰ Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, Speech at the American Banking Association and American Bar Association Money Laundering Enforcement Conference (November 16, 2015) [hereinafter “Yates Speech”], available at <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0> (last accessed November 25, 2015).

the new guidelines and important revisions to the Principles in the USAM. The new guidelines include revisions to the Filip Factors previously adopted in the 2008 version of the Principles in the USAM.¹⁰²

The revised USAM guidelines reflect the initiative set out in the Yates Memo to identify and pursue culpable individual wrongdoers more aggressively. To accomplish this initiative the revised guidelines encourage corporations to voluntarily disclose instances of corporate misconduct and to adopt and implement effective compliance programs that focus on identifying and eliminating misconduct.¹⁰³ The changes “emphasize the primacy in any corporate case of holding individual wrongdoers accountable and list a variety of steps that prosecutors are expected to take to maximize the opportunity to achieve that goal.¹⁰⁴” The most significant changes were those made to the Principles dealing with cooperation credit.¹⁰⁵ Yates explained in her speech that “if a company wants credit for cooperating – *any credit at all* – it must provide all non privileged information about individual wrongdoing.”¹⁰⁶ This differs from the previous

¹⁰¹ *Id.*; *see generally* U.S.A.M § 9-28.100 et. Seq. (2015) (the most recent version of the “Principles of Federal Prosecution of Business Organizations” in the USAM were implemented in light of the Yates Memo principles).

¹⁰² *See supra* Section II of this Memo, at 6-10 (discussing Filip Memo revisions to the Principles of Federal Prosecution of Business Organizations); *see also* U.S.A.M §9-28.100 et. Seq. (revised 2015).

¹⁰³ Yates Speech, *supra* note 100.

¹⁰⁴ Yates Speech, *supra* note 100; *see also* U.S.A.M §9-28.210 (new November 16, 2015)(quoting: “[p]rinciple: provable individual culpability should be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of corporate guilty plea or some other disposition of charges against the corporation[.]”)

¹⁰⁵ *See e.g.* U.S.A.M §§ 9-28.700 Value of Cooperation; 9-28.710 Attorney Client and Work Product Protection; 9-28.720 Cooperation: Disclosing the Relevant Facts; 9-28.750 - Oversight Concerning Demands for Waivers of Attorney-Client Privilege or Work Product Protection By Corporations Contrary to This Policy (provisions of USAM dealing with cooperation credit).

¹⁰⁶ Yates Speech, *supra* note 100 (emphasis added) (quoting: “[a]s the policy makes clear, providing complete information about individuals’ involvement in wrongdoing is a threshold hurdle that must be

policy, which permitted the prosecutors to give corporations cooperation credit for any cooperation, even if it lacked full disclosure of non-privileged information.¹⁰⁷ These revisions make it impossible for corporations to receive cooperation credit unless they provide full disclosure of all material non-privileged information. Under the most recent revisions to the USAM, a corporation and its employees have a greater incentive to disclose information to the government, potentially even more information than what is otherwise required, in order to insulate themselves from criminal or civil liability. While the ban on exchanging cooperation credit for privilege waivers may deter prosecutors from aggressively pursuing privileged information, the factor that conditions the reception of any credit on full disclosure will likely lead potentially culpable parties to disclose privileged information anyway to avoid losing cooperation credit for non-disclosure.

The all-or-nothing disclosure for credit requirement in the new USAM guidelines will likely lead to increased disclosures of privileged information, despite the Filip Memo's ban on leveraging cooperation credit for ACP and WPP waivers.¹⁰⁸ Yates reiterated the Filip Memo's ban in her speech when she clarified that "corporation[s] need not produce protected material in order to receive cooperation credit and prosecutors

crossed before we'll consider any cooperation credit"); *See also* U.S.A.M § 9-28.700 A. Value of Cooperation Credit (2015) (General principle: "requiring a company who wishes to receive cooperation credit to fully disclose facts relating to the identities of all individuals involved or responsible for the misconduct..., and all facts relating to the misconduct; refusal by the company to learn of such facts will disqualify a company for consideration of cooperation credit"); *See also* Yates Memo (discussing how in the past corporations have received cooperation credit even where they stopped short of identifying and providing information on culpable individuals).

¹⁰⁸ *See* Filip Memo, *supra* note 23; *see also*. U.S.A.M § 9-28.720 (2008) (quoting: "eligibility for cooperation credit is not predicated upon the waiver of [ACP] or [WPP]. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant *facts* concerning such misconduct").

will not ask for it.¹⁰⁹” However, the increased emphasis on full disclosure for any credit will likely lead to situation situations where corporations give up privileged information to avoid the risk of losing cooperation credit.

Companies wishing to receive cooperation credit under the new guidelines are also expected to conduct timely,¹¹⁰ “thorough, and independent investigations and report all relevant facts about individuals involved, no matter where they fall in the corporate hierarchy.¹¹¹” These investigations should be “tailored to the scope of the wrongdoing,” and if the company is unsure about “the scope of what’s required...they should . . . discuss it with a prosecutor.¹¹²” Companies are presumed “to have access to all evidence.”¹¹³ Accordingly, companies are expected to inform prosecutors when they do not have certain information or if requested information is privileged.¹¹⁴

Additionally, with respect to cooperation credit, the new guidelines also “split what used to be single a factor that covered a corporation’s voluntary disclosure and its willingness to cooperate into two separate factors – one focused solely on the company’s timely and voluntary disclosure and the second on its cooperation.¹¹⁵” Cooperation

¹⁰⁹ Yates Speech, *supra* note 100.

¹¹⁰ *Id.* (quoting:“timing is of the essence...a company won’t be disqualified from receiving cooperation credit simply because it did not have all the facts...on the first day[.]” but a company will be expected to turn over non privileged information as it receives it”).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*; *See also* U.S.A.M § 9-28.900 Voluntary Disclosures (New November 16, 2015) (Prompt voluntary disclosure will weigh in a company’s favor).

Credit, Yates explained, takes into consideration the timeliness of the corporation's compliance in handing over requested information.¹¹⁶ Whereas, the Voluntary Disclosure Credit factor awards credit to a corporations for prompt voluntary disclosure before an investigation is even underway.¹¹⁷ Under the new Voluntary Disclosures factor, the DOJ and other civil branches "encourage[] corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities."¹¹⁸

The new stand-alone voluntary disclosure factor will likely encourage corporations to voluntarily disclose acts of misconduct by individuals responsible for corporate misconduct in exchange for cooperation credit for the corporation itself. Presumably under the new guidelines, a corporation will be more inclined to identify and hand over potentially culpable individuals to the DOJ, rather than risk the company's own financial or criminal exposure to protect those potentially culpable individuals.

The new USAM guidelines also include the addition of an entirely new section to the chapter on civil cases that deals with "enforcing claims against individuals on corporate matters."¹¹⁹ This new section includes many of the same rules that are apply in

¹¹⁶ Yates's Speech, *supra* note 100; *see also* U.S.A.M §§ 9-28.700 and 9-28.800 (2015) (provisions of USAM dealing with timeliness of compliance with a request for information); *see also* U.S.A.M § 9-28.700 fn. 1 (quoting "[o]f course, the Department encourages early voluntary disclosure of criminal wrongdoing, *see* USAM 9-28.900, even before all facts are known to the company, and does not expect that such early disclosures would be complete. However, the Department does expect that, in such circumstances, the company will move in a timely fashion to conduct an appropriate investigation and provide timely factual updates to the Department.")

¹¹⁷ Yates's Speech, *supra* note 100; *see also* U.S.A.M § 9-28.900 (2015) (corresponding provision in USAM dealing within Voluntary Disclosures)

¹¹⁸ U.S.A.M § 9-28.500 Voluntary Disclosures (looking favorably upon self reporting corporations who report internal misconduct, even in the absence of formal investigation; e.g. the Antitrust Division offers amnesty to the first corporation that self-discloses and agrees to cooperate with an investigation).

¹¹⁹ Yates Speech, *supra* note 100.

criminal cases against individuals, including: (1) focusing on individual actors from the outset of the investigation,¹²⁰ (2) permitting resolution of corporate cases only when there is a clear plan to pursue individuals,¹²¹ (3) permitting cooperation credit for companies only when they have provided full disclosure of non-privileged information about the individuals responsible,¹²² and (4) express instructions that “an individual’s ability to pay cannot be the sole determinative factor in making decisions about whether to pursue individual misconduct.¹²³” The new revisions place more administrative burdens on U.S. Attorneys involved in corporate investigations by requiring them to be in routine communication with US Attorneys in other departments, civil and criminal, throughout virtually every step of the investigation, regardless of whether the other branch is even pursuing the supposed wrongdoer.¹²⁴

The last significant revisions to the USAM include updates to the section on parallel proceedings.¹²⁵ Parallel proceedings are when two different government departments are investigating the same individual or corporation. The updates “lay out specific steps that criminal and civil attorneys handling white collar matters should take with respect to communication and referrals” between departments.¹²⁶ These updates essentially require U.S. Attorneys, working on either criminal or civil investigations, to

¹²⁰ Id; *see also* Yates Memo, supra note 3 (discussing the importance of preserving cases against individual actors involved in corporate wrongdoing from the outset of the investigation).

¹²¹ Yates Speech, supra note 100; Yates Memo, supra note 3.

¹²² Yates Speech, supra note 100; Yates Memo, supra note 3.

¹²³ Yates Speech, supra note 100.

¹²⁴ *See* Yates Memo, supra note 3, at Principle 3.

¹²⁵ Yates Speech, supra note 100.

¹²⁶ *See* Yates Memo, supra note 3.

have clear channels of communication between departments, advise each other of new matters, keep each other abreast of factual disclosures in matters being handled simultaneously, and to keep each other informed on the progress of their respective investigations, including indictments, declinations, or agreements, regardless of whether that department has an open investigation against particular corporation or individual.¹²⁷

The imposition of routine communication between and amongst the various departments, as well as the requirement for the various departments to independently assess each case, will likely encourage different departments to develop cases in situations where they previously would not have. Previous DOJ policies did not impose such stringent routine communication among the different branches.

b. Conclusion

The revised USAM guidelines will change corporate investigations in three major ways. First, the new guidelines will result in more cooperation from corporations with respect to disclosing culpable individuals. However, if the DOJ focuses more resources on pursuing individuals and less on corporations, then they will inevitably miss out on some of the massive settlements with corporations that they have received in the past. Second, corporations being investigated for either civil or criminal misconduct are more susceptible to being investigated for both, under the new guidelines, due to the imposition of routine communication amongst the civil and criminal branches. Lastly, the new guidelines, specifically the cooperation and voluntary disclosure revisions, will force individuals and corporations to disclose privileged information, while purporting not to. This is due to the structure that makes receiving credit contingent upon timely full disclosure, meaning that, parties who wait to disclose, do so at the risk of losing

¹²⁷ Id. (outlining a procedure for parallel proceedings).

cooperation credit. Ultimately, however, it remains to be seen if the new guidelines will result in an increased number of successful prosecutions against individual wrongdoers as the new guidelines are in their infancy.