
The Yates Memorandum

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INTRODUCTION

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 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 broad spectrum of issues raised by the Yates Memorandum. It 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 criminal conduct. Part III examines the impact of the Yates Memorandum with respect to six underlying issues: (A) waiver of attorney-client privilege and work product protection, (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 joint defense agreements, (D) civil enforcement by the DOJ, (E) the DOJ's use of deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs") to resolve corporate criminal cases, and (F) cross-border investigations and data privacy. Part IV analyzes the

¹ See, e.g., J.S. Nelson, *Paper Dragon Thieves*, 105 GEO. L.J. 871, 873 (2017) (noting that 40–45% of the world's wealth was destroyed by the Great Recession, but "not a single top executive has been held criminally responsible"); Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions> ("[I]f . . . the Great Recession was in material part the product of intentional fraud, the failure to prosecute those responsible must be judged one of the more egregious failures of the criminal justice system in many years.").

² Memorandum from Sally Q. Yates, Deputy Attorney Gen., U.S. Dep't of Justice, to All Component Heads and United States Attorneys (Sept. 9, 2015), <https://www.justice.gov/dag/file/769036/download> [hereinafter Yates Memorandum].

³ See Robert R. Stauffer & William C. Pericak, *Twenty Questions Raised by the Justice Department's Yates Memorandum*, 99 Crim. L. Rep. (BNA) 191 (May 18, 2016) (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).

application of the Yates Memorandum in two specific subject areas: (A) foreign corruption and (B) export control and economic sanctions.⁴ The Article concludes that the adoption of the Yates Memorandum has been a mostly positive development with significant unintended negative consequences, and it proposes a set of modifications.

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.

A. *Sally Yates Issues the Memorandum*

The Yates Memorandum was issued on September 9, 2015. It was the product of an internal senior-level working group of DOJ attorneys⁵ but does not appear to have been drafted in consultation with members of the white collar defense bar.⁶ 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,”⁷ and identifies as its purpose the amendment of DOJ policies and procedures to most effectively pursue the foregoing individuals.⁸ It then outlines six key steps to strengthen the DOJ's pursuit of individual corporate wrongdoing. Those steps are discussed below.

⁴ A companion essay by the author examines the application of the Yates Memorandum to international cartel enforcement. See Gideon Mark, *The Yates Memorandum and Cartel Enforcement*, 51 UC DAVIS L. REV. ONLINE 95, 95-96 (2018).

⁵ *DOJ Guidance Prioritizes Individuals in Criminal and Civil Corporate Enforcement Actions*, LATHAM & WATKINS: CLIENT ALERT COMMENTARY, no. 1872, Sept. 15, 2015, at 1, <https://www.lw.com/thoughtLeadership/lw-yates-memo-enforcement-actions-prioritize-individuals>; Steven M. Witzel & Joshua D. Roth, *Deputy Attorney General Describes New Initiative to Hold Individuals Responsible for Corporate Misconduct*, FRIED FRANK, Sept. 10, 2015, at 1, <http://www.friedfrank.com/siteFiles/Publications/FINAL%20V3%20-%209-10-2015-%20Deputy%20Attorney%20General%20Describes%20New%20Initiative.pdf>.

⁶ See *Unpacking the Yates Memo: What the “New” DOJ Policy Really Means*, MCGUIREWOODS (Sept. 11, 2015), <https://www.mcguirewoods.com/Client-Resources/Alerts/2015/9/Unpacking-Yates-Memo-New-DOJ-Policy.aspx> (attention to note 1). Similarly, the document was not subject to public comment or judicial review prior to its release. Melissa Maleske, *Impact of Yates Memo Is Becoming Clearer, GCs Say*, LAW360 (Oct. 18, 2016, 10:53 PM), <https://www.law360.com/articles/852716/impact-of-yates-memo-is-becoming-clearer-gcs-say>.

⁷ Yates Memorandum, *supra* note 2, at 1.

⁸ *Id.* at 2.

First, to be eligible for any credit for cooperating with the DOJ, corporations must provide all relevant facts about the individuals involved in corporate misconduct.⁹ 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.¹⁰ 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.¹¹ These include the timeliness of cooperation, the diligence, thoroughness, and speed of internal investigations, and the proactive nature of cooperation.¹²

A corporation's identification of potentially culpable employees had long been among the numerous factors that the DOJ considered in deciding how to resolve corporate investigations.¹³ Nevertheless, this initial key step outlined in the Yates Memorandum represents a core policy shift¹⁴ in at least two respects. First, the DOJ had not previously used an all or nothing approach in assessing cooperation — instead, it had used a sliding scale.¹⁵ Second, the DOJ had previously granted credit for alternative forms of cooperation that fell short of disclosures, including making available foreign witnesses and documents beyond the reach of a United States grand jury.¹⁶ These alternatives no longer suffice, insofar as any credit for cooperation now hinges on the

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ U.S. Department of Justice Official Urges Companies to Provide Evidence Against Their Employees to Obtain Cooperation Credit, KIRKLAND ALERT, Oct. 2014, at 1, https://www.kirkland.com/siteFiles/Publications/Alert_100614.pdf.

¹⁴ See William Ortman, *The Yates Memo Versus Administrative Law*, 165 U. PA. L. REV. ONLINE 191, 198 (2017) (“The Yates Memo’s core policy shift was its threshold requirement that corporations disclose all information they have or can learn about individuals in order to receive any cooperation credit.”).

¹⁵ See *White Collar Update: The Department of Justice Incorporates Yates Memo’s Focus on Individual Prosecutions into U.S. Attorneys’ Manual*, DAVISPOLK, Dec. 1, 2015, at 3 https://www.davispolk.com/files/2015_12_01_White_Collar_Update_DOJ_Incorporates_Yates_Memo_US_Attorneys_Manual.pdf (noting that under Yates Memorandum, cooperation credit is no longer provided on a sliding scale).

¹⁶ James W. Cooper et al., Advisory, *All or Nothing: Highlights and Areas of Concern from DOJ’s New Guidance on Individual Culpability in Civil and Criminal Investigations*, ARNOLD & PORTER LLP, Sept. 2015, at 3, https://www.arnoldporter.com/~media/files/perspectives/publications/2015/09/all-or-nothing-highlights-and-areas-of-concern-f_/files/newsletter-item/fileattachment/adv16september2015allornothing.pdf?

provision of all relevant facts about the individuals involved in misconduct.¹⁷

The second key step outlined by the Yates Memorandum is that both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.¹⁸ There is disagreement as to whether this item represents a departure. According to some defense counsel, the focus on individuals in both civil and criminal investigations was common practice before the Yates Memorandum was issued.¹⁹ Other observers assert that the DOJ's standard pre-Yates practice had been to first focus on resolving cases against corporations and only then to pivot to individuals.²⁰ In any event, the Yates Memorandum establishes the best practice that both criminal and civil corporate investigations should focus on individuals from the inception.

The third key step identified by the Yates Memorandum is that criminal and civil attorneys handling corporate investigations should be in routine communication with one another.²¹ 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.²² This policy often failed to translate to practice. Historically, the DOJ utilized a bifurcated process, pursuant to which a

¹⁷ *Id.*

¹⁸ Yates Memorandum, *supra* note 2, at 4.

¹⁹ See Michael P. Kelly & Ruth E. 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.").

²⁰ See, e.g., Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015), <https://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html> ("The Justice Department often targets companies themselves and turns its eyes toward individuals only after negotiating a corporate settlement."); William E. Lawler, III & Jeremy Keeney, *DOJ's Yates Memorandum: Focus Enforcement Efforts on Individuals*, IADC COMMITTEE NEWSL., Dec. 2015, at 6, <https://www.velaw.com/Insights/DOJ-s-Yates-Memorandum-Focus-Enforcement-Efforts-on-Individuals>.

²¹ Yates Memorandum, *supra* note 2, at 4.

²² See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 1-12.000 (Sept. 2008) [hereinafter UNITED STATES ATTORNEYS' MANUAL] ("Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings").

case file would transfer to the Civil Division if the Criminal Division declined an investigation.²³ However, Civil Division attorneys would not always gain full access to the record developed by their criminal counterparts, and frequently the transfer of files was accompanied by minimal communication.²⁴

More recently, the DOJ has increasingly relied on parallel civil and criminal proceedings.²⁵ The Yates Memorandum reinforces and expands this practice, by providing that criminal attorneys should notify civil attorneys as early as permissible of potential civil liability, and vice versa.²⁶ This increased cooperation may result in more civil actions where evidence fails to satisfy the higher criminal burden of proof and in more criminal charges stemming from civil investigations.

The fourth key step is that absent extraordinary circumstances or approved departmental policy, no corporate resolution will provide protection from criminal or civil liability for any individuals.²⁷ Any such release must be approved in writing by the relevant Assistant Attorney General or U.S. Attorney.²⁸ This is a departure, inasmuch as pre-Yates settlement agreements between the DOJ and corporations resolving civil actions frequently included releases from civil liability for both the company and its directors, officers, and employees²⁹ (conversely, the standard release in a pre-Yates DOJ civil settlement agreement with a corporation excluded criminal liability for any person or entity).³⁰ One unresolved issue is the scope of “extraordinary circumstances,” insofar as the Yates Memorandum provides no examples. Some possible defining factors include the size of the financial settlement the company consents to make, the importance of the company or industry to the United States economy or national security, proof problems, and/or the commitment of DOJ resources required to charge and try the culpable individuals.³¹

²³ MARK J. NACKMAN ET AL., GOVERNMENT CONTRACTS COMPLIANCE: LEADING LAWYERS ON UNDERSTANDING ENFORCEMENT TRENDS AND UPDATING COMPLIANCE PROGRAMS 2 (2016).

²⁴ *Id.*

²⁵ Witzel & Roth, *supra* note 5, at 2.

²⁶ Yates Memorandum, *supra* note 2, at 5.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Cooper et al., *supra* note 16, at 5.

³⁰ *Id.*

³¹ See *Trial Practice Update*, QUINN EMANUEL (Jan. 2016), <http://www.quinnemanuel.com/the-firm/news-events/article-january-2016-trial-practice-update>.

Fifth, corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations in such cases must be memorialized.³² 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. These delays enabled statute of limitations defenses, given that complex criminal investigations can take years to complete.³³ Some evidence suggests that the average foreign corruption investigation lasts more than seven years.³⁴ Corporations typically sign tolling agreements as part of this process, but individuals are rarely asked and rarely agree to toll before investigations have concluded.³⁵

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 his ability to pay a monetary penalty.³⁶ 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 federal resources to pursue a civil case with minimal prospects of a recovery.³⁷

B. *The Five 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. All of the documents in the sequence are linked by the proposition that a corporation can only act

³² Yates Memorandum, *supra* note 2, at 6.

³³ Nicolas Bourtin, *Expert Q&A on the DOJ's Yates Memo*, PRAC. L., Apr./May 2016, at 16, 18, https://www.sullcrom.com/files/upload/AprMay16_OfNote.pdf.

³⁴ See Joan E. Meyer, *One Year After Yates Memo: The DOJ's Yates-Lite Approach*, LAW360 (Oct. 19, 2016, 5:19 PM), <https://www.law360.com/articles/841773/1-year-after-yates-memo-the-doj-s-yates-lite-approach>.

³⁵ See *id.*; Megan Zwiebel, *How Will the Yates Memo Change DOJ Enforcement? (Part Two of Two)*, 4 FCPA REPORT 230, 231 (Oct. 7, 2015), <https://www.fcpareport.com/issue/295>.

³⁶ Yates Memorandum, *supra* note 2, at 6.

³⁷ Laura G. Hoey et al., *The Yates Memo: Have the Rules Really Changed?*, ROPES & GRAY, Mar. 29, 2016, at 5, https://www.ropesgray.com/~media/Files/articles/2016/March/20160329_GE_Alert.pdf.

through its officers, directors, employees, and agents. Through *respondeat superior*, the corporation can be found criminally liable for the criminal conduct of those individuals, if undertaken within the scope of their employment by the corporation and intended, at least in part, to benefit the corporation.³⁸

1. The Holder Memorandum

The Supreme Court established the basis for corporate criminal liability in 1909,³⁹ but ninety years elapsed before the DOJ issued specific guidance regarding corporate criminal prosecutions. 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 when making charging decisions against corporations (“the Principles”).⁴⁰ 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 this document 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.⁴¹

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 Attorneys’ Manual (“USAM”) — which provides guidance to federal prosecutors nationwide — and are normally considered during the exercise of prosecutorial discretion.⁴² These include the sufficiency of the

³⁸ AMELIA TOY RUDOLPH ET AL., *MANAGING WHITE COLLAR LEGAL ISSUES: LEADING LAWYERS ON UNDERSTANDING CLIENT EXPECTATIONS, CONDUCTING INTERNAL INVESTIGATIONS, AND ANALYZING THE IMPACT OF RECENT CASES* 73 (2016).

³⁹ See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494-95 (1909).

⁴⁰ Memorandum from Eric H. Holder, Jr., Deputy Attorney Gen., U.S. Dep’t of Justice, to All Component Heads and United States Attorneys (June 16, 1999), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> [hereinafter Holder Memorandum].

⁴¹ Gideon Mark & Thomas C. Pearson, *Corporate Cooperation During Investigations and Audits*, 13 *STAN. J.L. BUS. & FIN.* 1, 2 (2007).

⁴² Holder Memorandum, *supra* note 40, § II(A).

evidence, the likelihood of success at trial, and the deterrent, rehabilitative, and other consequences of conviction.⁴³

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”⁴⁴ The document authorized prosecutors to request privilege waivers in “appropriate circumstances,”⁴⁵ 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.⁴⁶ However, the incidence of waiver during the effective years of the document was never quantified.

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.⁴⁷ 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 privilege⁴⁸ — and added a ninth: the adequacy of the prosecution of the individuals responsible for the corporation’s malfeasance.⁴⁹ The revised guidelines indicated that “[o]nly rarely

⁴³ *Id.*

⁴⁴ *Id.* § II(A)(4).

⁴⁵ *Id.* § VII(B).

⁴⁶ Beth A. Wilkinson & Alex Young K. Oh, *The Principles of Federal Prosecution of Business Organizations: A Ten-Year Anniversary Perspective*, 27 N.Y. ST. B. ASS’N INSIDE 8, 8 (Fall 2009), https://www.paulweiss.com/media/1497187/pw_nysba_oct09.pdf.

⁴⁷ Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep’t of Justice, to Heads of Departments Components and United States Attorneys (Jan. 20, 2003), https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf [hereinafter Thompson Memorandum].

⁴⁸ *See id.* at 3; *see also* 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”).

⁴⁹ Thompson Memorandum, *supra* note 47, at 3.

should provable individual culpability not be pursued, even in the face of offers of corporate guilty pleas.”⁵⁰ 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.”⁵¹

Whereas the Holder Memorandum was discretionary, the Thompson Memorandum was not — it required that its provisions be followed by all federal prosecutors,⁵² and the Principles became a part of the USAM.⁵³ The Thompson Memorandum 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.”⁵⁴ The Thompson Memorandum was widely criticized by defense counsel and other observers.⁵⁵

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.⁵⁶ This one-page document made no substantive

⁵⁰ *Id.* at 1.

⁵¹ *Id.* at i.

⁵² See *id.* at 1; Stephanie A. Matz, *Report from the Front Lines: The Thompson Memorandum and the KPMG Tax Shelter Case*, 10 WALL STREET LAW.: SEC. ELECTRONIC AGE 5 (2006), <https://www.nacdl.org/criminaldefense.aspx?id=9994> (noting the “mandatory nature of the Thompson Memo”).

⁵³ Jim Letten & Carol T. Montgomery, *The Yates Memo: What New Challenges to Expect*, LAW360 (Jan. 3, 2016, 8:59 AM), <https://www.law360.com/articles/738741/the-yates-memo-what-new-challenges-to-expect>.

⁵⁴ Ty E. Howard & Todd Presnell, *In-House Counsel: Protecting the Privilege in a Post-Yates Memorandum World*, 31 CORP. COUNS., no. 3, June 2016, at 1, 10, http://files.bradley.com/files/Uploads/Documents/Publications/TCC_June2016.pdf.

⁵⁵ See, e.g., Mark J. Stein & Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?*, SIMPSON THACHER, Sept. 10, 2008, at 2, <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 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.”).

⁵⁶ Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney Gen., U.S. Dep’t of Justice, to Heads of Department Components and United States Attorneys (Oct. 21, 2005), http://federalevidence.com/pdf/Corp_Prosec/McCallum_

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.”⁵⁷ 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.⁵⁸ 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).”⁵⁹ Not surprisingly, criticism of the DOJ continued.⁶⁰

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.⁶¹ 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 the DOJ must follow when seeking waivers and (2) purported to bar prosecutors, except in exceptional circumstances, from considering the advancement of attorneys’ fees in evaluating cooperation.⁶² The new procedures were cumbersome. They included a multi-factor balancing test for line prosecutors to obtain waiver approvals that applied only

Memo_10_21_05.pdf.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Howard & Presnell, *supra* note 54, at 10-11 (“Whatever the intent, the McCallum Memo did nothing to quell criticism of the DOJ waiver policy.”).

⁶¹ Memorandum from Paul J. McNulty, Deputy Attorney Gen., U.S. Dep’t of Justice, to Heads of Department Components and United States Attorneys (Dec. 12, 2006), https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

⁶² *Id.* at 8-12.

to formal waiver requests by the DOJ and not to voluntary waivers.⁶³ The McNulty Memorandum — like its predecessors — both allowed prosecutors to seek waivers during investigations and created incentives for companies to comply with waiver requests.⁶⁴ Post-McNulty, business organizations felt pressured to voluntarily waive privilege in order to appear cooperative,⁶⁵ and waivers were prevalent.⁶⁶

5. The Filip Memorandum

The final pre-Yates eponymous revision of the Principles was issued in 2008 by then-Deputy Attorney General Mark Filip.⁶⁷ The Filip Memorandum — which enjoyed the longest shelf life of any of the memoranda in this sequence — is probably best known for its enumeration of the nine factors to be considered by the DOJ when exercising prosecutorial discretion in charging decisions (“Filip Factors”), even though most or all of these same factors had been listed in the predecessor documents. Prosecutorial discretion was expansive, because the Filip Factors were both broad and contextual.⁶⁸

The Filip Memorandum explicitly prohibited prosecutors from requesting attorney-client communications or non-factual work product⁶⁹ (except where defendants asserted an advice-of-counsel defense or counsel-corporation communications were in furtherance of a crime). The document also removed the Thompson

⁶³ See *id.* at 8-11.

⁶⁴ Jonathan S. Feld & Eric S. Klein, *The Yates Memo and the Push for Individual Accountability*, 10 J. HEALTH & LIFE SCI. L. 67, 73 (2017).

⁶⁵ Stein & Levine, *supra* note 55, at 3.

⁶⁶ See Michael J. Shepard et al., *The Future of Internal Investigations After the Yates Memorandum*, 12 White Collar Crime Rep. (BNA) 39 (Jan. 6, 2017), <http://www.hoganlovells.com/en/publications/-/media/e3a2be5bbbc44dcc8d780f82d98d3642.ashx>.

⁶⁷ Memorandum from Mark Filip, Deputy Attorney Gen., U.S. Dep’t of Justice, to Heads of Department Components and United States Attorneys (Aug. 28, 2008), <https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf> [hereinafter Filip Memorandum].

⁶⁸ Miriam Baer, *The Stick That Never Was: Parsing the Yates Memo and the Revised Principles of Federal Prosecution of Business Organizations*, N.Y.U.: COMPLIANCE & ENFORCEMENT (Aug. 31, 2016), https://wp.nyu.edu/compliance_enforcement/2016/08/31/the-stick-that-never-was-parsing-the-yates-memo-and-the-revised-principles-of-federal-prosecution-of-business-organizations (observing that the Filip Factors “lent prosecutors tremendous discretion to reach the outcome they considered most appropriate in a given case”).

⁶⁹ Filip Memorandum, *supra* note 67, at 9.

Memorandum's statement that prosecutors should consider a company's willingness to make witnesses available to the government, 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.⁷⁰ 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.⁷¹

C. Revisions to the USAM

The pre-Yates Memoranda were reflected in revisions to the USAM.⁷² Post-Yates the DOJ revised the USAM to align the Filip Memorandum with the Yates Memorandum and formally implement the guidance set forth in the latter document. The revisions 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.⁷³ 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.⁷⁴

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

⁷⁰ *Id.* at 9-11.

⁷¹ See Susan B. Heyman, *Corporate Privilege and an Individual's Right to Defend*, 85 GEO. WASH. L. REV. 1112, 1126 (2017) (asserting that pre-Yates Memorandum "corporations routinely cooperated with the government and waived privilege in exchange for leniency in the treatment of the corporation and high-level officers"); 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, xiv (2011).

⁷² Mike Koehler, *Yates on the Yates Memo*, FCPA PROFESSOR (Nov. 24, 2015), <http://fcpprofessor.com/yates-on-the-yates-memo> ("[T]he USAM has always been the final resting place for DOJ policy memos such as the previous Holder, Thompson, McNulty and Filip memos.").

⁷³ UNITED STATES ATTORNEYS' MANUAL, *supra* note 22, § 9-28.210.

⁷⁴ *Id.*

misconduct.”⁷⁵ 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.⁷⁶ 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. As explained by Sally Yates, this revision accounts for the difference “between a company raising its hand and voluntarily disclosing misconduct and a company simply agreeing to cooperate once it gets caught.”⁷⁷

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 in the misconduct.”⁷⁸

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.”⁷⁹ 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 the DOJ and adhering to

⁷⁵ *Id.* § 9.28.700.

⁷⁶ *Id.* § 9.28.900.

⁷⁷ Sally Q. Yates, Deputy Attorney Gen., U.S. Dep’t of Justice, Remarks at the New York City Bar Association White Collar Crime Conference (May 10, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association> [hereinafter NYC Bar Association].

⁷⁸ UNITED STATES ATTORNEYS’ MANUAL, *supra* note 22, § 9.28.720.

⁷⁹ *Justice Department Releases New Prosecution Policies: United States Attorneys’ Manual Revised to Incorporate Recently Announced Policies on Individual Liability and Cooperation in Corporate Prosecutions*, SULLIVAN & CROMWELL LLP (Nov. 18, 2015), <https://www.sullcrom.com/new-justice-department-policies-on-corporate-prosecutions>.

the laws of nations in which they operate.⁸⁰ Historically, the DOJ has not excused companies from disclosing information on the basis of data privacy concerns.⁸¹

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.”⁸² 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.”⁸³ This revision relaxes the prior requirement that a business organization plead to “the most serious, readily provable offense.”⁸⁴

D. *The Future of the Yates Memorandum in the Trump Administration*

Following the election of Donald Trump as President in November 2016, there was considerable speculation concerning his administration’s approach to regulation and enforcement. This speculation encompassed the fate of the Yates Memorandum. The DOJ consists mainly of career prosecutors, with a shallow layer of political appointees above them on the organization chart,⁸⁵ but the top appointees determine policy. During his confirmation hearings new Attorney General Jeff Sessions suggested that he expected to retain the Yates Memorandum,⁸⁶ and subsequent statements by Sessions⁸⁷ and

⁸⁰ *Id.*

⁸¹ Wendy Wysong et al., *Self-Reporting of Corporate Wrongdoing: The Yates Memo Seven Months on*, CLIFFORD CHANCE, Apr. 22, 2016, at 2, https://www.cliffordchance.com/briefings/2016/04/self-reporting_ofcorporatelongdoingtheyate.html (follow “Download PDF”).

⁸² UNITED STATES ATTORNEYS’ MANUAL, *supra* note 22, § 9.28.1300.

⁸³ *Id.*

⁸⁴ *Justice Department Updates United States Attorneys’ Manual to Emphasize Priority on Prosecuting Individuals in Corporate Criminal Cases*, AKIN GUMP (Nov. 19, 2015), <https://www.akingump.com/en/news-insights/justice-department-updates-u-s-attorney-s-manual-to-emphasize.html>.

⁸⁵ John F. Wood, *What Will the Appointment of Jeff Sessions as Attorney General Mean for Corporate Criminal Prosecutions?*, INSIDE COUNS., Nov. 30, 2016, at 1, <https://www.hugheshubbard.com/index.php?p=actions/vmgHhrUtils/download/asset&id=51704> (follow “Download PDF”).

⁸⁶ 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>.

⁸⁷ See Brian F. Saulnier et al., *The New Faces of FCPA Enforcement: The Transition*

other DOJ officials also supported retention.⁸⁸ As noted by Sally 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.”⁸⁹ However, in October 2017 the DOJ announced that it was reviewing and reevaluating numerous corporate enforcement policies, including the Yates Memorandum, and planned to consolidate those policies in official sources such as the USAM.⁹⁰

II. THE DOJ’S HISTORICAL FAILURE TO PROSECUTE HIGH-LEVEL INDIVIDUALS EMPLOYED BY CORPORATIONS ENGAGED IN CRIMINAL CONDUCT

There is widespread agreement that in recent years the DOJ has failed to prosecute high-level individuals employed by corporations engaged in misconduct.⁹¹ The DOJ secured only one conviction of an individual — a senior trader at Credit Suisse — in connection with the

to a Sessions-Clayton Regime Is Unlikely to Result in Drastic Changes, K&L GATES (May 15, 2017), <http://www.klgates.com/the-new-faces-of-fcpa-enforcement-the-transition-to-a-sessions-clayton-enforcement-regime-is-unlikely-to-result-in-drastic-changes-05-15-2017> (noting that post-confirmation speeches by Sessions suggest willingness to retain Yates Memorandum).

⁸⁸ See, e.g., *Senior Justice Department Official Reaffirms Yates Memorandum, Will “Reevaluate” FCPA Declination Program*, HUNTON & WILLIAMS, 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).

⁸⁹ Sally Q. Yates, Deputy Attorney Gen., U.S. Dep’t of Justice, 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> [hereinafter FCPA]. Yates also stated, “Just as the Filip factors endured a change in administration, we expect this approach to endure as well.” *Id.*

⁹⁰ See Rod J. Rosenstein, Deputy Attorney Gen., U.S. Dep’t of Justice, Keynote Address on Corporate Enforcement Policy (Oct. 6, 2017), https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017; *Deputy Attorney General Announces Comprehensive Review of DOJ Corporate Enforcement Policies*, LATHAM & WATKINS: CLIENT ALERT COMMENTARY, no. 2226, Oct. 12, 2017, at 1-3, <https://www.lw.com/thoughtLeadership/deputy-attorney-general-review-DOJ-corporate-enforcement-policies>.

⁹¹ 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 Crisis, have been unrelenting.”).

Great Recession of 2007-09.⁹² This failure has not been limited to federal criminal practice related to banks or banking. For example, the DOJ has rarely commenced criminal actions against executives of large corporations for violations of environmental laws⁹³ or the Foreign Corrupt Practices Act (“FCPA”).⁹⁴ During the period 2000 to 2016, the DOJ charged 150 individuals with FCPA criminal offenses,⁹⁵ but many of these prosecutions were clustered in a handful of cases. Forty-four percent of the individuals charged by the DOJ with crimes during the period 2006 to 2016 were defendants clustered in just six cases, and 63% were defendants in just twelve cases.⁹⁶ Of the 94 corporate FCPA actions commenced by the DOJ during the period 2006 to 2016, seventy-three (or 77%) had not resulted in any DOJ charges against company employees by January 2017.⁹⁷

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 DPAs and NPAs entered into with companies from 2001 to 2014. He found that among those, 34%, or 104 companies, had officers or employees prosecuted, with 414 total individuals prosecuted.⁹⁸ Most of these were middle managers.⁹⁹ Of the 414 individuals, 266, or 65%, pleaded guilty and forty-two were convicted at trial.¹⁰⁰ The average sentence for these individuals, including those who received probation but no jail time, was eighteen months.¹⁰¹ Only 42% of the 308 individuals convicted

⁹² See William D. Cohan, *How Wall Street’s Bankers Stayed Out of Jail*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368>.

⁹³ Arnold W. Reitze, Jr., *The Volkswagen Air Pollution Emissions Litigation*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10564, 10570 (2016).

⁹⁴ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff, 78m(b), (d)(1), (g)-(h) (2018)).

⁹⁵ Mike Koehler, *A Focus on DOJ Individual Actions*, FCPA PROFESSOR (Jan. 26, 2017), <http://fcpaprofessor.com/focus-doj-individual-actions>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Garrett, *supra* note 91, at 1791.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

received any jail time.¹⁰² As noted by Garrett, this is a modest incarceration rate.¹⁰³

A broad spectrum of theories has been offered to explain the DOJ's historical failure to prosecute individuals in corporate crime cases. These theories include the revolving door between the DOJ and white collar defense firms,¹⁰⁴ a lack of political will,¹⁰⁵ the rise of DPAs and NPAs,¹⁰⁶ the greater propensity of individuals to refuse to settle compared with corporations,¹⁰⁷ and proof problems. With respect to proof, 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."¹⁰⁸ This diffusion of organizational responsibility — in

¹⁰² *Id.* at 1792.

¹⁰³ *Id.*

¹⁰⁴ Christopher Modlish, Note, *The Yates Memo: DOJ Public Relations Move or Meaningful Reform That Will End Impunity for Corporate Criminals?*, 58 B.C. L. REV. 743, 747 (2017) (noting the revolving door theory).

¹⁰⁵ *But cf.* Jocelyn E. Strauber, *Aggressive Government Enforcement Continues: How Will Individual Prosecutions Impact Activity Against Institutions?*, SKADDEN (Jan. 2016), <https://www.skadden.com/insights/publications/2016/01/aggressive-government-enforcement-continues-how-wi> (“[I]n our view, the DOJ’s inability to prosecute corporate managers in the past has been the result of a lack of evidence, not a lack of focus or will.”).

¹⁰⁶ *See, e.g.*, Elkan Abramowitz & Jonathan Sack, *Deferred Prosecution Agreements in Decline? Enforcement Implications*, 255 N.Y. L.J., no. 2, Jan. 5, 2016, https://www.maglaw.com/publications/articles/2016-01-06-deferred-prosecution-agreements-in-decline-enforcement-implications/_res/id=Attachments/index=/Sack%20Abramowitz%20Yates.pdf (linking rise in DPAs to DOJ’s failure to prosecute individuals in corporate crime cases).

¹⁰⁷ *See, e.g.*, Stewart Bishop, *Feds in Balancing Act When Pursuing Individuals in FCPA Cases*, LAW360 (June 6, 2017, 6:53 PM), <https://www.law360.com/articles/931262/feds-in-balancing-act-when-pursuing-individuals-in-fcpa-cases> (“Companies are much less resource-intensive to prosecute, because they will conduct their own investigations quite often and because they will choose to settle rather than litigate.” (quoting Andrew B. Spalding, Professor, University of Richmond School of Law)); *The “Yates Memorandum”: Has DOJ Really Changed Its Approach to White Collar Criminal Investigations and Individuals Prosecutions?*, DEBEVOISE & PLIMPTON: CLIENT UPDATE, Sept. 15, 2015, https://www.debevoise.com/~media/files/insights/publications/2015/09/20150915_the_yates_memorandum_has_doj_really_changed_its_approach_to_white_collar_criminal_investigations_and_individual_prosecutions.pdf [hereinafter DEBEVOISE & PLIMPTON] (noting “fundamental dynamic in which corporations are far more likely to settle a DOJ proceeding than are individuals”).

¹⁰⁸ Eric H. Holder, Jr., Attorney Gen., U.S. Dep’t of Justice, 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>.

combination with the siloing of information flows¹⁰⁹ — has been underscored by many observers,¹¹⁰ including Yates herself.¹¹¹ A second aspect of the proof problem is that much managerial misconduct looks more like omissions than affirmative behavior, and the criminal law rarely sanctions the former.¹¹² Indeed, in most criminal cases the government must prove that the defendant knowingly and intentionally violated the law.¹¹³ Proving mens rea for high-level executives is especially difficult where the misconduct has occurred overseas, because the executives may be unaware of the specifics of doing business in the foreign country.¹¹⁴

FCPA cases present a unique set of challenges for prosecutors seeking to hold individuals accountable. Both individual defendants and witnesses often are foreign citizens, extradition of defendants can be very difficult, and inducing foreign witnesses to testify in the United States can be challenging and time-intensive.¹¹⁵ There are multiple serious problems with foreign witnesses. The witnesses often fear they will become targets for prosecution in the United States or elsewhere, they may be wary of an unfamiliar legal system, and they may fear ostracism in their own country if their culture discourages providing incriminating evidence against colleagues.¹¹⁶ Similarly, virtually all of the evidence in FCPA bribery cases is located abroad, United States courts have no subpoena power over such evidence, and obtaining it in a form admissible in an American court can be a

¹⁰⁹ See, e.g., 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, 53-54 (2015).

¹¹⁰ See, e.g., Heyman, *supra* note 71, at 1124 (“High-level officers are particularly difficult to pursue because they often insulate themselves from direct involvement in the misconduct.”); Stauffer & Pericak, *supra* note 3, at 3 (“[I]n 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.”).

¹¹¹ See Yates, NYC Bar Association, *supra* note 77 (“Blurred lines of authority make it hard to identify who is responsible for individual business decisions and it can be difficult to determine whether high-ranking executives, who appear to be removed from day-to-day operations, were part of a particular scheme.”).

¹¹² Joseph W. Yockey, *Beyond Yates: From Engagement to Accountability in Corporate Crime*, 12 N.Y.U. J.L. & BUS. 407, 414 (2016).

¹¹³ DEBEVOISE & PLIMPTON, *supra* note 107.

¹¹⁴ See Meyer, *supra* note 34.

¹¹⁵ DEBEVOISE & PLIMPTON, *supra* note 107.

¹¹⁶ Meyer, *supra* note 34.

laborious process,¹¹⁷ particularly where companies wrap themselves in the cloak of foreign data privacy laws.¹¹⁸

Whatever the cause — and most likely there are multiple causes — in recent years the DOJ has rarely prosecuted individuals in connection with corporate crimes. When individuals have been charged, they have typically been low-level employees.¹¹⁹ This failure generated a public backlash, and the DOJ responded with the Yates Memorandum.

III. THE IMPACT OF THE YATES MEMORANDUM

The next part of this Article examines the impact of the Yates Memorandum in six areas: waiver of the attorney-client privilege and work product protection, the conduct of internal investigations, the use of joint representation and joint defense agreements, civil enforcement by the DOJ, the use by the DOJ of DPAs and NPAs, and cross-border investigations and data privacy.

A. *Waiver of the Attorney-Client Privilege and Work Product Protection*

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. 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."¹²⁰ In this regard the Yates Memorandum is fully consistent with the Filip Memorandum, which repudiated the Thompson Memorandum's

¹¹⁷ DEBEVOISE & PLIMPTON, *supra* note 107.

¹¹⁸ See, e.g., Matthew E. Fishbein, *The DOJ's New Position on Corporate Cooperation*, 48 REV. SEC. & COMMODITIES REG. 185, 186 (Aug. 19, 2015), <https://www.debevoise.com/~media/files/insights/publications/2015/08/securities%20%20commodities%20regulation%20%20fishbein.pdf> (noting the DOJ's claim that companies hide behind over-expansive interpretations of foreign data privacy laws, instead of actively cooperating).

¹¹⁹ Brandon L. Garrett, *The Metamorphosis of Corporate Criminal Prosecutions*, 101 VA. L. REV. ONLINE 60, 71 (2016); Michael C. Gross et al., *Will Volkswagen Executives Be the Yates Memo's First Casualties?*, 1 Daily Envtl. Rep. (BNA) B-1 (Jan. 4, 2016, 12:00 AM), http://www.postschell.com/site/files/post_schell_will_volkswagen_executives_be_the_yates_memos_first_casualties_bloomberg_bna_dec_15.pdf ("[W]hen the government has charged individuals, the focus generally has been on mid- and lower-level employees, whose liability is easier to discern, while the more sophisticated residents of the C-suite escape unscathed.").

¹²⁰ Yates Memorandum, *supra* note 2, at 4.

directive that companies should waive privilege in order to establish their cooperation. The Filip Memorandum established that DOJ attorneys should not request waivers.¹²¹ In a speech she delivered two months after her 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.”¹²² And then-Assistant Attorney General Leslie Caldwell stated that post-Yates Memorandum, prosecutors will not request waivers.¹²³

After the Yates Memorandum was issued, a number of observers predicted that, notwithstanding its continuation of Filip’s prohibition on seeking waivers, as a practical matter the Yates Memorandum, in combination with the USAM’s revisions, will induce companies to surrender privilege.¹²⁴ First, a company may be unable to provide the DOJ with the requisite “all relevant facts” absent a waiver.¹²⁵ Sally Yates stated that while legal advice is privileged, facts are not,¹²⁶ but it is often difficult and sometimes impossible to separate pure facts from non-factual work product and attorney-client communications, with the result that “the Yates Memo effectively requires a *de facto* waiver.”¹²⁷ Second, even if the DOJ neither requests nor requires waivers, prosecutors “will certainly view such waivers positively

¹²¹ Filip Memorandum, *supra* note 67, at 9.

¹²² Sally Q. Yates, Deputy Attorney Gen., U.S. Dep’t of Justice, Remarks at American Banking Association and American Bar Association Money Laundering Enforcement Conference (Nov. 16, 2015), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0> [hereinafter American Banking Association].

¹²³ Leslie R. Caldwell, Assistant Attorney Gen., U.S. Dep’t of Justice, Remarks at the Second Annual Global Investigations Review Conference (Sept. 22, 2015), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-second-annual-global-0>.

¹²⁴ See, e.g., Scott R. Grubman & Samuel M. Shapiro, *The ‘Yates Era’ in Full Force*, 31 CRIM. JUST. 17, 19 (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.”).

¹²⁵ See Joseph W. Martini & Robert S. Hoff, *Individuals Face New Challenges Following Yates Memo*, N.Y. L.J. (Apr. 25, 2016, 12:00 AM), <https://www.law.com/newyorklawjournal/almID/1202755653648> (“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.”).

¹²⁶ See Yates, American Banking Association, *supra* note 122.

¹²⁷ Howard & Presnell, *supra* note 54, at 12. *But cf.* Yates, FCPA, *supra* note 89, at 3 (“No one’s been forced to waive the privilege.”).

should companies be inclined to curry favor.”¹²⁸ 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”¹²⁹ when it determines the extent of cooperation credit. Indeed, the all or nothing nature of cooperation credit under the Yates Memorandum raises the ante for corporations to waive the privilege.¹³⁰

In summary, the Yates Memorandum is likely to result in continued waivers of the attorney-client privilege and attorney work product protection, even if the DOJ does not make express requests. Waivers no doubt aid the DOJ in criminal and civil investigations,¹³¹ but they also undermine and weaken the attorney-client relationship and the ability of corporations to effectively negotiate with the DOJ during enforcement actions.

B. Upjohn Warnings and the Retention of Separate Counsel

Internal investigations of corporate misconduct are quite common¹³² and often prohibitively expensive.¹³³ These investigations are handled

¹²⁸ Lawler & Keeney, *supra* note 20, at 5; *see also* Shepard et al., *supra* note 66, at 3 (“[C]ompanies . . . 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.”).

¹²⁹ Shepard et al., *supra* note 66, at 3.

¹³⁰ *See* Katrice Bridges Copeland, *The Yates Memo: Looking for “Individual Accountability” in All the Wrong Places*, 102 IOWA L. REV. 1897, 1925 (2017) (“[T]he Yates Memo brings back the culture of waiver”); Martini & Hoff, *supra* note 125 (“[T]he ‘all or nothing’ nature of the directive put immense pressure on companies to serve up implicated employees to the government, regardless of whether the relevant evidence is privileged.”).

¹³¹ *See* Michael L. Seigel, *Corporate America Fights Back: The Battle over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1, 54 (2008) (“[R]etaining the ability of federal prosecutors to ask a corporation to waive its attorney-client privilege . . . is in the public’s best interest when waiver is necessary to conduct a complex criminal investigation efficiently.”).

¹³² *See, e.g.*, Am. Coll. 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 wrong-doing by corporate executives and employees. These investigations have included inquiries into suspected violations of

by the corporation's board of directors, the audit committee or other board committee, or a special committee of independent board members — often with the assistance of outside counsel.¹³⁴ Internal investigations tend to 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*.¹³⁵ *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.¹³⁶ Thus, during an internal investigation the company is the client and controls the decision whether to waive the privilege and disclose communications to the government.

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.¹³⁷ By March 2018, California was the only state that did not have professional conduct rules that follow the format of the Model Rules,¹³⁸ 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.¹³⁹ *Upjohn* warnings are generally regarded as tools to preserve the corporate privilege and

the Foreign Corrupt Practices Act; alleged options backdating activities; alleged violations of the antitrust, environmental, import/export, and other laws; and financial statement improprieties.”).

¹³³ John F. Savarese, *White Collar and Regulatory Enforcement: What to Expect in 2015*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 5, 2015), <https://corpgov.law.harvard.edu/2015/02/05/white-collar-and-regulatory-enforcement-what-to-expect-in-2015> (“[T]he costs of these massive investigations, particularly as many of them go on for years and often expand across borders, have become prohibitive.”).

¹³⁴ Gregory A. Markel & Heather E. Murray, *Internal Investigations Special Committees Resource*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 6, 2017), <https://corpgov.law.harvard.edu/2017/07/06/internal-investigations-special-committees-resource>.

¹³⁵ 449 U.S. 383 (1981).

¹³⁶ *See id.* at 394-96.

¹³⁷ *See* MODEL RULES OF PROF'L CONDUCT r. 1.13(f) (AM. BAR ASS'N 2002), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html.

¹³⁸ *Id.*

¹³⁹ *See id.*

avoid ethical conflicts of interest.¹⁴⁰ 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.¹⁴¹

The Model Rules require *Upjohn* warnings only in a subset of employee interviews — those where it appears the company's interests may differ from those of the constituents with whom the lawyer is dealing.¹⁴² 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 divergent interests.¹⁴³ Accordingly, attorneys now routinely deliver warnings at the start of employee interviews.¹⁴⁴ It typically suffices to give oral *Upjohn* warnings¹⁴⁵ and in practice they usually are oral, to ensure cooperation.¹⁴⁶ While *Upjohn* warnings have no statutory basis¹⁴⁷ and federal courts differ about the requisite content,¹⁴⁸ they typically consist of these admonitions: (1) the lawyer

¹⁴⁰ John E. Clabby & Jonathan C. Sterling, *Keep This Between Us — and the Government: Confidentiality of Witness Interviews in Corporate Internal Investigations*, CORP. L. & ACCOUNTABILITY REP. (Jan. 28, 2016), <https://www.carltonfields.com/confidentiality-witness-interviews-corporate-internal-investigations> (follow link “Keep This Between Us — and the Government: Confidentiality of Witness Interviews in Corporate Internal Investigations”).

¹⁴¹ JONES DAY, CORPORATE INTERNAL INVESTIGATIONS: BEST PRACTICES, PITFALLS TO AVOID (2013), <http://www.jonesday.com/files/upload/CIH%20Best%20Practices%20Pitfalls%20to%20Avoid2.pdf>.

¹⁴² See MODEL RULES OF PROF'L CONDUCT r. 1.13(f) cmt. 10.

¹⁴³ Paul Schoeman et al., *Separate Representation for Employees in Investigations: A Delicate Line*, N.Y. L.J., Nov. 10, 2014, at 2, <https://www.kramerlevin.com/images/content/1/6/v4/1649/NYLJNovember2014SchoemanTirschwellEllenbogen.pdf>.

¹⁴⁴ See Jeffrey P. Doss, *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* warning . . .”).

¹⁴⁵ Clabby & Sterling, *supra* note 140, at 2.

¹⁴⁶ AM. BAR ASS'N WHITE COLLAR CRIME WORKING GRP., *UPJOHN WARNINGS: RECOMMENDED BEST PRACTICES WHEN CORPORATE COUNSEL INTERACTS WITH CORPORATE EMPLOYEES* 33 (July 17, 2009), <https://www.crowell.com/PDF/ABAUpjohnTaskForceReport.pdf> [hereinafter ABA *UPJOHN WARNINGS*] (noting that written warnings can have a chilling effect on the employee's willingness to share information, which defeats the fact-finding purpose of the interview).

¹⁴⁷ John Rafael Perez et al., *Navigating Conflicting Roles: The Ethical Obligations of an Organization's Lawyers Post-Wells Fargo*, 34 YALE J. ON REG. ONLINE 9, 11 (2016).

¹⁴⁸ See *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014)

represents only the company 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.¹⁴⁹ Once those 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.¹⁵⁰

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, the delivery of defective *Upjohn* warnings risks the loss of cooperation credit eligibility.¹⁵¹ In this environment the provision of enhanced *Upjohn* warnings may be a best practice, whether or not it rises to the level of an ethical obligation.¹⁵² Recall the first directive of the Memorandum — to be eligible for any cooperation credit, corporations must provide to the

(“[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.”).

¹⁴⁹ See, e.g., ABA *UPJOHN WARNINGS*, *supra* note 146, at 4-5.

¹⁵⁰ *Id.* at 3; Lee G. Dunst & Daniel J. Chirlin, *A Renewed Emphasis on Upjohn Warnings*, 23 ANDREWS LITIG. REP.: WHITE-COLLAR CRIME, Sept. 2009, at 2, <https://www.gibsondunn.com/wp-content/uploads/documents/publications/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.”).

¹⁵¹ *The Need for Enhanced Upjohn Warnings After Yates*, HEALTH CARE COMPLIANCE & DEF. RESOURCE CTR., Feb. 17, 2016, at 3, <https://www.mwe.com/-/media/files/experience/health-care-resource-center/yates-memorandum/the-need-for-enhanced-upjo.pdf> [hereinafter *The Need for Enhanced Upjohn Warnings*].

¹⁵² See, e.g., Steven M. Kaufmann et al., *Three Key Takeaways from DOJ’s New Yates Memo on Individual Accountability for Corporate Wrongdoing*, MORRISON & FOERSTER CLIENT ALERT, Sept. 15, 2015, at 4, <https://media2.mofo.com/documents/150915dojindividualaccountability.pdf> (“[C]ompanies should be prepared to make and memorialize even more robust *Upjohn* warnings early on. . . .”).

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 the 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.¹⁵³ Indeed, it may be wise to make clear to the witness that if he or she discloses incriminating information during the interview that it is highly likely — and not just possible — that the corporation will disclose that information to the DOJ in order to obtain cooperation credit.¹⁵⁴

The provision of enhanced *Upjohn* warnings may chill the constituent's candor and thereby undermine the truth-finding function of an internal investigation.¹⁵⁵ Moreover, the DOJ may view enhanced *Upjohn* warnings as unnecessary and 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.¹⁵⁶ But this risk is likely unsubstantial, because constituents typically cooperate

¹⁵³ Peter Thomson, *Corporate Criminal Law Update: Enhanced Upjohn Warnings in the Wake of the Yates Memorandum*, STONE PIGMAN WALTHER WITTMAN LLC (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, *The Yates Memo and Individual Representation*, MCGUIREWOODS: 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).

¹⁵⁴ *See* Gary Grindler & Laura K. Bennett, *True Cooperation: DOJ's “Reshaped Conversation” and Its Consequences*, 30 CRIM. JUST. 32, 37 (2015), https://s3.amazonaws.com/kslaw-staging/attachments/000/003/782/original/07-01-15_Criminal_Justice.pdf?1494907172 (“The first modification of the *Upjohn* warning might be to indicate that it is *highly probable* that the company will disclose the information provided by the employee if there appears to be evidence that the employee is culpable.”); *see also* Yi An Pan, Note, *The Yates Memo: Watch Out, the DOJ Is Coming — or Is It?*, 69 RUTGERS U. L. REV. 791, 816 (2017) (suggesting that post-Yates, attorneys may have obligation to warn employees that anything they reveal to them during internal investigations will be disclosed to the DOJ).

¹⁵⁵ *See* Michael Li-Ming Wong & Asheesh Goel, *Beefing Up “Corporate Miranda Warnings”: Averting Misunderstandings & Detrimental Consequences in Internal Investigations*, 13 WALL STREET LAW. 1, 3 (Aug. 2009) (“The obvious downside risk of beefed up *Upjohn* warnings is a possible chilling effect on employees' cooperation with internal investigations.”).

¹⁵⁶ Shepard et al., *supra* note 66, at 4.

with investigations even when it is contrary to their self-interest — probably because many companies have “walk or talk” policies¹⁵⁷ that deem non-cooperation a fireable offense,¹⁵⁸ at least if the interview is conducted in the United States.¹⁵⁹ This situation is unlikely to change if enhanced *Upjohn* warnings are given,¹⁶⁰ unless employees decide that losing their jobs is a superior alternative to risking prison sentences that may result from disclosures during interviews. Conversely, if enhanced warnings are not provided, the constituent may be more likely to believe he or she has an attorney-client relationship with the company lawyer, which may lead the constituent to block disclosure to the government of information gleaned during the investigatory interview. In turn, this could both impede the company’s ability to comply with the Yates Memorandum’s requirement that all relevant facts be disclosed and “optically align the interests of the individual wrongdoer with the corporation.”¹⁶¹

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 is counterproductive to provide constituent witnesses with written warnings,¹⁶² it may be useful post-Yates to provide them with a written summary of the key points that comprise the oral warnings.

¹⁵⁷ See Garrett, *supra* note 91, at 1825.

¹⁵⁷ Shepard et al., *supra* note 66.

¹⁵⁸ See ABA *UPJOHN WARNINGS*, *supra* note 146, at 32 (“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. BRIEF 153, 160 (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. . .”).

¹⁵⁹ See Donald C. Dowling, Jr., *How to Conduct Internal Investigations Outside the United States*, K&L GATES: MULTINATIONAL EMPLOYER MONTHLY, Apr. 2015, at 12-13, <http://www.klgates.com/how-to-conduct-internal-investigations-outside-the-united-states-04-09-2015> (“Never assume that an employer will have ‘good cause’ to fire a non-U.S. employee who refuses to cooperate in an internal company investigation. When an overseas witness folds his arms, shuts his mouth and tells investigators he will not talk, labor law doctrines in many countries support him.”).

¹⁶⁰ See *The Need for Enhanced Upjohn Warnings*, *supra* note 151, at 3 (“The psychology underlying constituent cooperation is unlikely to be materially impacted by these enhanced *Upjohn* measures.”).

¹⁶¹ See *id.*

¹⁶² See Cokic, *supra* note 153 (reporting conclusion of panel of Securities Industry and Financial Markets Association that providing an employee with written *Upjohn* warnings is neither necessary nor recommended).

Third, it also may be useful to require constituent witnesses to acknowledge in writing that they received *Upjohn* warnings and they understand the basic scope of the attorney-client privilege.¹⁶³ 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 to 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.¹⁶⁴ 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.¹⁶⁵ But the provision of such an enhanced warning increases the chances of a substantial chilling effect, which may reduce the company's capacity to gather relevant facts or identify culpable individuals.

In addition to warranting modification of traditional *Upjohn* warnings, the Yates Memorandum has resulted in the retention by employees of separate counsel both more often and earlier in the investigative process. While the use by employees of counsel separate from counsel representing the business organization has typically been an option (albeit a costly one) during investigations, pre-Yates it was not commonly exercised.¹⁶⁶ 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.¹⁶⁷ Indeed, many European nations have

¹⁶³ See *The Need for Enhanced Upjohn Warnings*, *supra* note 151, at 3.

¹⁶⁴ Kelly & Mandelbaum, *supra* note 19, at 909.

¹⁶⁵ *Id.*; cf. Grindler & Bennett, *supra* note 154, at 37 (suggesting that post-Yates *Upjohn* warnings be modified "to include a *Miranda*-like warning notifying employees that their statements could be used by prosecutors to file personal charges against the employee, including obstruction charges if anything said turns out to be false").

¹⁶⁶ See Frank Sheeder, *DOJ's Pursuit of Individual Liability for Corporate Misconduct: The Yates Memo*, 2015 COMPLIANCE & ETHICS PROF. 71, 75, <http://documents.jdsupra.com/84354c2f-1016-4601-b4b8-c9665edbbf19.pdf> ("At the onset of an investigation, [corporations] do not usually secure, pay for, or recommend counsel for individuals, because they do not have enough information pointing toward that need.").

¹⁶⁷ Feld & Klein, *supra* note 64, at 82 ("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."); Anthony S. Barkow & Anne Cortina Perry, *The Value of Separate Employee Counsel After Yates*

domestic laws that require companies to utilize works councils to protect the interests of employees, and European or other foreign employees may be entitled to have an attorney or a works council representative present during their interviews.¹⁶⁸ This can restrict a company's ability to interview its foreign employees and collect personal data during internal investigations. Second, insofar as the provision of 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.¹⁶⁹

The overall result has been the increased retention of separate counsel, often at an early stage of the investigation,¹⁷⁰ and longer, more complicated, and more costly internal investigations.¹⁷¹ This can create a snowball effect — once a few employees obtain separate counsel, others in the same company are likely to seek the same protection¹⁷² — that can lead to exhaustion of directors' and officers' liability insurance policy limits.¹⁷³ One upside, at least from the

Memo, LAW360 (Dec. 9, 2015, 1:17 PM), <https://www.law360.com/articles/734845/the-value-of-separate-employee-counsel-after-yates-memo>.

¹⁶⁸ See Claudius O. Sokenu, *DOJ Issues Policy on Holding Individuals Accountable for Corporate Malfeasance*, N.Y. L.J. (Nov. 9, 2015), <http://www.newyorklawjournal.com/id=1202741689087/DOJ-Issues-Policy-on-Holding-Individuals-Accountable-for-Corporate-Malfeasance>.

¹⁶⁹ Barkow & Perry, *supra* note 167.

¹⁷⁰ See Cokic, *supra* note 153 (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”); Carmen Germaine, *Yates Memo Driving Wedge Between Companies and Workers*, LAW360 (July 20, 2016, 2:58 PM), <https://www.law360.com/articles/819250/yates-memo-driving-wedge-between-companies-and-workers> (“[E]mployees are increasingly demanding their own attorneys earlier in the investigation.”).

¹⁷¹ See Grindler & Bennett, *supra* note 154 (“Retention of separate counsel typically adds significant additional time and expense to the investigation, as each individual's counsel needs time to review relevant materials and prepare their client to discuss the facts.”).

¹⁷² Geoffrey M. Drake, *The Yates Memo and Parallel Products Liability Litigation*, LAW360 (Sept. 20, 2016, 7:17 PM), <https://www.law360.com/corporate/articles/842385/the-yates-memo-and-parallel-products-liability-litigation>.

¹⁷³ *The DOJ's New Focus on Individual Accountability: D&O Insurance Implications*, SIDLEY (Sept. 16, 2015), <https://www.sidley.com/en/insights/newsupdates/2015/09/do-insurance-implications-of-heightened-doj> (“[I]t is not unusual even now for one or more layers of [directors' and officers' insurance] coverage to be exhausted by defense costs. The problem will only get worse if more individuals are hiring separate counsel.”).

perspective of the DOJ, is that employees are more likely to give more complete and truthful answers during investigations when they have separate counsel.¹⁷⁴

C. Joint Representation and Joint Defense Agreements

Joint representation by company counsel of the corporation and one or more of its constituent employees during government investigations can yield multiple advantages — greater efficiency, enhanced coordination, less cumbersome development of a common strategy, and negation of the perception of divergent interests. Joint representation also presents multiple disadvantages and complex ethical issues — a reduced ability to focus on interests of the employees, the risk of loss of credibility with the government, the potential for divergent interests, and potential harm to client confidences. Joint representation may be ethical when a disinterested lawyer would conclude that multiple representation is in the interests of both the corporation and the employee and both clients provide informed consent following discussion.¹⁷⁵ The Model Rules suggest that the consent typically should be written.¹⁷⁶ If the employee does agree to joint representation, it is probably wise for the corporation to ensure that the employee had access to independent advice of counsel when the consent was granted.¹⁷⁷ Problems can unfold in a joint representation if one of the clients — typically, but not always, the corporation — desires to waive the attorney-client privilege and the other does not. Such problems 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 between defendants to extend an existing privilege to confidential communications between outside counsel and defendants.¹⁷⁸ JDAs are commonly used in corporate representations¹⁷⁹

¹⁷⁴ Bourtin, *supra* note 33, at 19.

¹⁷⁵ N.Y.C. Bar Ass’n Prof’l Ethics Comm., Formal Op. 2004-02 (2004), <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2004-02-representing-corporations-and-their-constituents-in-the-context-of-governmental-investigations> (discussing joint representation of corporations and their constituents in the context of government investigations).

¹⁷⁶ See MODEL RULES OF PROF’L CONDUCT r. 1.7(b) (AM. BAR ASS’N 2002).

¹⁷⁷ RUDOLPH ET AL., *supra* note 38, at 9.

¹⁷⁸ Ruth D. Kahn, *Relationships with Co-Counsel: The Joint Defense Privilege*, COMMITTEE NEWS: TORT, TRIAL & INS. PRAC., Spring 2007, at 14, <http://www.stepto.com/assets/attachments/3264.pdf>.

¹⁷⁹ See Kathryn M. Fenton, *Conflict and Ethics Issues Arising from Joint*

because they offer numerous advantages — they permit multiple parties to pool resources, coordinate strategy, and avoid duplicative work, and, in the context of alleged corporate misconduct, they facilitate internal investigations.¹⁸⁰ 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.¹⁸¹ Privilege is maintained even if the parties to the JDA later become adverse.¹⁸²

While it is often asserted that JDAs are based on a joint defense or common interest privilege,¹⁸³ and that such a privilege is widely recognized,¹⁸⁴ 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 the work product doctrine.¹⁸⁵ Protection normally is lost via waiver when the privileged communication is disclosed to a third party. A JDA can help solve that problem — when there is such an agreement parties may disclose their

Defense/Common Interest Relationships, ANTITRUST SOURCE, Dec. 2009, at 1, 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.”); Patrick Linehan & William Drake, *BNA Insights: The Yates Memo and the Future of Joint Defense Agreements*, 48 Sec. Reg. & L. Rep. (BNA) 954, 954 (May 9, 2016), <http://www.stepto.com/assets/htmldocuments/spyates%20srlr%205916.pdf>.

¹⁸⁰ See Linehan & Drake, *supra* note 179, at 1.

¹⁸¹ Mark Mermelstein, *Hanging Together: Well-Crafted Joint Defense Agreements Can Avoid Conflicts of Interest and Obstruction of Justice Charges*, 27 L.A. LAW. 38, 38 (Oct. 2004), <https://www.lacba.org/docs/default-source/lal-back-issues/2004-issues/october-2004.pdf>.

¹⁸² Jerold S. Solovy & Robert Byman, *What’s a Swell Litigant Like You Doing in a Joint Agreement Like This?*, JENNER & BLOCK, May 28, 2001, at 1-2, https://www.jenner.com/system/assets/assets/4572/original/05_28_2001_Joint_Defense_Agreements.pdf?1320179255.

¹⁸³ See, e.g., Fenton, *supra* note 179, at 1.

¹⁸⁴ 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 joint defense privilege in some form. In roughly half the states the privilege has been legislatively codified.”).

¹⁸⁵ Solovy & Byman, *supra* note 182, at 1 (“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.”).

otherwise privileged communications and materials to their joint defense allies without fear of waiver.

All fifty states and a majority of the federal circuits have recognized the joint defense or common interest doctrine, and no federal circuit has rejected it.¹⁸⁶ Application of the doctrine has been inconsistent¹⁸⁷ but courts generally require satisfaction of three conditions: (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.¹⁸⁸ The umbrella protection of a JDA applies to both civil and criminal cases.¹⁸⁹ 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.¹⁹⁰

Prosecutors generally dislike JDAs — the agreements can shield relevant and probative evidence, may serve to obstruct justice, and may permit the continuation of criminal conspiracies.¹⁹¹ The Holder Memorandum and most of its successors allowed prosecutors to consider a company's participation in JDAs with employees in determining whether to grant cooperation credit.¹⁹² 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.”¹⁹³ The USAM further specifies that to avoid the prospect of a business organization

¹⁸⁶ Linehan & Drake, *supra* note 179, at 3.

¹⁸⁷ See Bruce Kelly & Meredith Esser, *What to Know About the Common Interest Privilege*, LAW360 (June 25, 2013, 12:02 PM), <https://www.law360.com/articles/451580/what-to-know-about-the-common-interest-privilege> (“Particularly in the prelitigation context, courts in different jurisdictions (and indeed in the same jurisdiction) apply the common interest doctrine inconsistently.”).

¹⁸⁸ Lerner, *supra* note 184, at 1493-94.

¹⁸⁹ See, e.g., *United States v. Am. Tel. & 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).

¹⁹⁰ JONES DAY, *supra* note 141, at 14-15.

¹⁹¹ Bartel, *supra* note 189, at 879; accord Sarah Kropf, *Will the New DOJ Policy End Joint Defense Agreements?*, GRAND JURY TARGET (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.”).

¹⁹² See, e.g., Holder Memorandum, *supra* note 40, at 6.

¹⁹³ UNITED STATES ATTORNEYS' MANUAL, *supra* note 22, § 9-28.730.

losing cooperation credit eligibility, the DOJ should not bar the company “from providing some relevant facts to the government”¹⁹⁴

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,¹⁹⁵ actual agreements are likely to become less frequent.¹⁹⁶ JDAs, like 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 synchronized with those of its employees.¹⁹⁷ 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 unilaterally disclosing joint defense materials to the government. In the years before the Yates Memorandum was issued it was fairly common for companies to include in joint defense agreements language expressly allowing the company to make unilateral disclosures.¹⁹⁸ If companies continue to insist on anti-blocking provisions — and it appears that such provisions are being included in post-Yates JDAs¹⁹⁹ — then constituents will have less incentive to join a joint defense agreement as their fears of being

¹⁹⁴ *Id.*

¹⁹⁵ Shepard et al., *supra* note 66, at 4.

¹⁹⁶ *Does Yates Sound the Death Knell for Joint Defense Agreements?*, HEALTH CARE COMPLIANCE & DEF. RESOURCE CTR. (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> [hereinafter *Does Yates Sound*].

¹⁹⁷ See Linehan & Drake, *supra* note 179, at 5 (“[G]iven the clear ‘all or nothing’ threat posed by the [Yates] Memo, companies will no doubt begin to balance the benefits of joint defense agreements against the potential loss of cooperation credit that may result if the government decides a company has not sufficiently implicated individual employee wrongdoers.”).

¹⁹⁸ Ed Magarian & Surya Saxena, *Joint Defense Agreements: What is a Responsible Company to Do?*, 22 ANDREWS LITIG. RPTR: WHITE-COLLAR CRIME, Sept. 2008, at 1, 3, https://www.dorsey.com/~media/files/newsresources/publications/2008/09/joint-defense-agreements-what-is-a-responsible-c_/files/jda/fileattachment/wcc2212_magariancomm.pdf.

¹⁹⁹ Linehan & Drake, *supra* note 179, at 5 (“Indeed, companies conducting internal investigations are already beginning to include in joint defense agreements provisions permitting the company to turn over to the government facts it receives from the employee through joint defense communications.”).

sacrificed by the leniency-seeking corporation are magnified.²⁰⁰ Indeed, the DOJ may seek to leverage the Yates Memorandum to discourage JDAs expressly or impliedly, given prosecutors' general aversion to such agreements.²⁰¹ 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 by divulging all facts about individual employee misconduct in order to obtain credit. This cooperation would undercut or destroy an alleged common interest between the company and an individual target.²⁰² Employees could make the same argument and then freely use against the company confidential or privileged information obtained through the joint defense relationship.

Second, those JDAs which do form post-Yates Memorandum are likely to be more complex than those which previously formed. 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.²⁰³ 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."²⁰⁴

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

²⁰⁰ *Does Yates Sound*, *supra* note 196.

²⁰¹ *See Kropf*, *supra* note 191 (predicting such an effect).

²⁰² Linehan & Drake, *supra* note 179, at 1 (noting that the Yates Memorandum "may make it difficult — or even impossible — for companies and their officers to establish joint defense agreements by destroying any common interest between a company seeking cooperation credit and an individual officer fighting allegations of wrongdoing"); Michael A. Brockland, *Unsteady Bedfellows: Joint Defense Agreements After the Yates Memo*, AM. B. ASS'N: COM. & BUS. LITIG. COMMITTEE (Feb. 14, 2017), <https://www.americanbar.org/groups/litigation/committees/commercial-business/articles/2017/unsteady-bedfellows-joint-defense-agreements-after-yates-memo.html>.

²⁰³ *See Kropf*, *supra* note 191 (noting that the Yates Memorandum "may encourage JDAs among individuals that exclude companies").

²⁰⁴ *Does Yates Sound*, *supra* note 196.

order to receive any consideration in the negotiation.”²⁰⁵ Pursuant to this directive a new section entitled “Pursuit of Claims against Individuals” has been added to the USAM to implement the six standards set forth in the Yates Memorandum, as applied to civil matters.²⁰⁶ 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.²⁰⁷

This represents a significant policy change. Pre-Yates, attorneys in the DOJ’s Civil Division focused to a substantial or exclusive degree on how much money could be recovered in an enforcement action.²⁰⁸ That focus has been re-directed. It remains to be seen whether the re-direction — in the form of civil lawsuits against judgment-proof individuals — will materially advance the DOJ’s law enforcement objectives, which include accountability for, and deterrence of, individual misconduct.²⁰⁹

The revised USAM also makes clear that individuals will not be released from civil liability based on corporate settlement releases absent undefined “extraordinary circumstances,” which must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.²¹⁰ 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.²¹¹

The emphasis of the Yates Memorandum on civil enforcement is widely expected to yield an increase in the number and depth of civil investigations and resulting claims under a variety of statutes with

²⁰⁵ See Yates Memorandum, *supra* note 2, at 3.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Kirk Ogrosky & Ted Lotchin, *Cooperation or Accountability? Yates Memo Puts Spotlight on Pharmaceutical and Medical Device Executives*, 14 *Pharmaceutical L. & Industry Rep. (BNA)* 1, 3 (Jan. 1, 2016).

²⁰⁹ See Yates, NYC Bar Association, *supra* note 77, at 4 (“There is a real deterrent value in the prospect of being named in a civil suit or having a civil judgment. And this kind of deterrence can change corporate conduct.”).

²¹⁰ Jodi L. Avergun et al., *The U.S. Department of Justice’s New Policy Emphasizing Individual Civil and Criminal Accountability for Corporate Wrongdoing*, 21 *World Sec. L. Rep. (BNA)* 3 (Mar. 16, 2016), <http://www.mondaq.com/unitedstates/x/474586/Corporate+Crime/The+US+Department+of+Justices+New+Policy>.

²¹¹ *Id.*

civil enforcement provisions, including the False Claims Act (“FCA”).²¹² Post-Yates statements by DOJ officials have confirmed this likely outcome,²¹³ which reflects another significant change. Pre-Yates enforcement of the FCA, FCPA, and federal antitrust laws was robust, but there was minimal civil enforcement against individuals under the foregoing statutes.²¹⁴

How will the DOJ approach future civil cases? Approximately one year after the Yates Memorandum was issued the DOJ issued internal guidance that sets forth its expectations concerning cooperation.²¹⁵ The new guidance provides that cooperation credit in civil cases is only available where an entity has satisfied the provisions of the Yates Memorandum. This is the threshold requirement.²¹⁶ Once this standard has been met, the steps that may earn cooperation credit will vary. Common steps include the following conduct.

First, cooperation should be proactive, in the sense that a company discloses facts relevant to the investigation, even when not specifically asked to do so. This could include the company describing its own conduct, directing the DOJ to inculpatory documentary evidence (such as emails and text messages), providing documents or access to witnesses that the DOJ might not have obtained through compulsory process, summarizing evidence and compiling data to assist the DOJ, and encouraging witnesses to cooperate with the DOJ’s investigation.²¹⁷ This sounds like the DOJ plans to outsource investigations to companies and their outside counsel,²¹⁸ but DOJ officials have disavowed any such intent.²¹⁹

²¹² False Claims Act, 31 U.S.C. §§ 3729-3733 (2018); see Bourtin, *supra* note 33, at 18 (predicting uptick in civil FCA prosecutions).

²¹³ See, e.g., Bill Baer, Acting Assoc. Attorney Gen., U.S. Dep’t of Justice, Remarks on Individual Accountability to American Bar Association’s 11th National Institute on Civil False Claims Act and Qui Tam Enforcement (June 6, 2016), <https://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-individual-accountability> (noting that Yates Memorandum’s focus on individual accountability and corporate cooperation applies “with equal force and logic to the department’s civil enforcement”).

²¹⁴ Lawler & Keeney, *supra* note 20, at 7.

²¹⁵ See Bill Baer, Principal Deputy Assoc. Attorney Gen., U.S. Dep’t of Justice, Remarks at Society of Corporate Compliance and Ethics Conference (Sept. 16, 2016), <https://www.justice.gov/opa/speech/principal-deputy-associate-attorney-general-bill-baer-delivers-remarks-society-corporate> [hereinafter Baer September 2016 Remarks].

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See Sharon Oded, *Coughing Up Executives or Rolling the Dice?: Individual Accountability for Corporate Corruption*, 35 YALE L. & POL’Y REV. 49, 78 (2016) (arguing that the Yates Memorandum “effectively enlists corporations as members of

Second, cooperation should be timely, insofar as cooperation that alerts the DOJ to a problem it did not previously know about during the early stages of an investigation is substantially more useful than cooperation provided much later.²²⁰ Third, cooperation will be more readily granted where it yields information that allows the DOJ to secure more significant case resolutions. This may involve detailing relevant conduct by different parties participating in the same or a similar scheme, or disclosing information enabling the DOJ to net greater recoveries.²²¹

Civil enforcement can be particularly attractive to the DOJ when pursuing individuals in corporate misconduct cases, given the lower standard of proof and the vexing diffused responsibility in large organizations. Ultimately, however, civil enforcement by the DOJ has a natural cap, because only a limited number of statutes and torts provide for federal civil liability enforceable by the Department.²²²

E. Deferred Prosecution Agreements and Non-Prosecution Agreements

As noted above,²²³ the DOJ's failure to prosecute individuals in connection with corporate crimes has often been linked to its increasing use of DPAs and NPAs. How will the Yates Memorandum affect the use of these agreements? In order to address this issue, it is essential to first consider some background information. In a DPA the prosecutor files charges with the relevant court, where they remain on the docket until the end of the contemplated term of the agreement, at which point the federal government dismisses the charges.²²⁴ In an NPA the government and the corporation agree that the government will not file charges if the corporation complies with the specified terms of the agreement.²²⁵ Both devices enable companies to avoid formal convictions and their adverse collateral consequences, such as debarment or de-licensing.²²⁶ The USAM expressly provides that the

DOJ enforcement teams and places them in a confrontational position with regard to their own employees and executives”).

²¹⁹ See, e.g., Caldwell, *supra* note 123 (“As I have said before, it is not our intent to outsource our investigation of corporate wrongdoing to companies and their outside advisors.”).

²²⁰ See Baer September 2016 Remarks, *supra* note 215.

²²¹ *Id.*

²²² See Zwiebel, *supra* note 35.

²²³ See *supra* text accompanying note 106.

²²⁴ Garrett, *supra* note 91, at 1800.

²²⁵ *Id.*

²²⁶ Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through*

collateral consequences of a corporate conviction can justify use of a DPA or NPA.²²⁷ Neither device enables the avoidance of criminal sanctions — most such agreements require firms to pay criminal fines and restitution often is required.²²⁸ Total payouts under DPAs and NPAs during the period 2010 to 2016 were more than \$35 billion, excluding payments made to resolve parallel civil administrative actions, state and foreign actions involving the same or similar conduct, and follow-on civil lawsuits.²²⁹ Moreover, most DPAs and NPAs mandate companies to undertake specific reforms concerning some combination of (1) the structure and dimensions of the firm's compliance program, (2) the structure and composition of the firm's board and managerial oversight committees, (3) the form and dimensions of external oversight of the firm's operations (typically by appointment of a corporate compliance monitor), and (4) the scope of the firm's business practices.²³⁰

Both DPAs and NPAs invariably result from a corporation's decision to cooperate with the DOJ,²³¹ and both devices have been subjected to very modest judicial supervision.²³² DPAs are filed in federal court, but

Nonprosecution, 84 U. CHI. L. REV. 323, 333 (2017).

²²⁷ UNITED STATES ATTORNEYS' MANUAL, *supra* note 22, § 9-28.1100.

²²⁸ Arlen & Kahan, *supra* note 226, at 335.

²²⁹ JAMES R. COPLAND & RAFAEL A. MANGUAL, MANHATTAN INST., THE SHADOW REGULATORY STATE AT THE CROSSROADS: FEDERAL DEFERRED PROSECUTION AGREEMENTS FACE AN UNCERTAIN FUTURE 6 (June 2017), <https://www.manhattan-institute.org/html/shadow-regulatory-state-crossroads-federal-deferred-prosecution-agreements-face-uncertain>.

²³⁰ Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 199 (2016).

²³¹ *New DOJ Policy Regarding Individual Accountability for Corporate Wrongdoing*, CADWALADER (Sept. 10, 2015), <http://www.cadwalader.com/resources/clients-friends-memos/new-doj-policy-regarding-individual-accountability-for-corporate-wrongdoing>.

²³² See Alexander A. Zende, Note, *Can Congress Authorize Judicial Review of Deferred Prosecution and Nonprosecution Agreements? And Does It Need to?*, 95 TEX. L. REV. 1451, 1463 (2017) ("District courts rarely reject or modify proposed DPAs. They typically approve of the DPA without any published ruling.").

judges have limited authority to review or modify them,²³³ and NPAs typically are maintained by the parties rather than being filed.²³⁴

As described below, the use of DPAs and NPAs exploded after 2004, likely as a reaction to extensive negative publicity about the collateral consequences of Arthur Andersen's criminal conviction in 2002 and the subsequent issuance of the Thompson Memorandum. To recap, accounting giant Andersen was indicted for obstruction of justice in connection with its auditing work for Enron Corporation and convicted following a jury trial. The conviction was overturned by the Supreme Court in 2005 on the ground of improper jury instructions.²³⁵ But by then Andersen had already collapsed — because federal regulations bar felons from providing services to public companies and numerous clients had fired the firm — and an estimated 28,000 employees lost their jobs.²³⁶

During the period 2000 to 2002 the government entered into seven corporate DPAs or NPAs.²³⁷ In 2003, the DOJ issued the Thompson Memorandum, which encouraged federal prosecutors to use pretrial diversion agreements (i.e., DPAs and NPAs) to address corporate misconduct.²³⁸ Thereafter the use of such agreements accelerated — jumping to fifteen in 2005 and forty in 2007, and then fluctuating between twenty-two and forty every year until 2014, the year before the Yates Memorandum was issued.²³⁹ During the period of 2004 to

²³³ See *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 747 (D.C. Cir. 2016) (holding that a court is not authorized to reject a DPA based on a finding that the charging decisions and conditions agreed to in the agreement are inadequate); cf. *United States v. Saena Tech. Corp.*, 140 F. Supp. 3d 11, 31 (D.D.C. 2015) (stating that the court's authority necessarily involves limited review of fairness and adequacy of DPA); *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at *7 (E.D.N.Y. July 1, 2013) (holding that the court's approval of DPA "is subject to a continued monitoring of its execution and implementation").

²³⁴ Arlen, *supra* note 230, at 195.

²³⁵ *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005).

²³⁶ Julie R. O'Sullivan, *How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What that Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29, 53 (2014).

²³⁷ See F. Joseph Warin et al., *2016 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON DUNN (Jan. 4, 2017), <http://www.gibsondunn.com/publications/Pages/2016-Year-End-Update-Corporate-NPA-and-DPA.aspx>.

²³⁸ See Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 550 (2015) ("The Thompson memo . . . encouraged the use of NPAs and DPAs in lieu of prosecution, something the Holder memorandum did not do.").

²³⁹ See Warin et al., *supra* note 237, at 2.

2016, DPAs and NPAs became federal prosecutors' primary tool for imposing sanctions on publicly held corporations for numerous major offenses.²⁴⁰ During the period of 2010 to 2016, the federal government entered into DPAs or NPAs with the parent companies or subsidiaries of eighteen of the 100 largest United States companies (ranked by revenue), and many large foreign companies also entered into DPAs or NPAs during this period.²⁴¹ The foregoing trends likely reflect a response to Andersen's collapse²⁴² and encouragement from the Thompson Memorandum²⁴³ and its successors. The Filip Memorandum "fully endorsed DPAs and NPAs as central to DOJ prosecution."²⁴⁴

The DOJ's common use of DPAs and NPAs since 2004 has coincided with a sharp decline in several sectors in the percentage of corporate criminal cases involving related prosecutions of employees. This phenomenon is most pronounced with regard to foreign corruption cases. The FCPA was enacted in December 1977 and the statute's slice of the DPA/NPA enforcement pie has become the largest of any statutory slice.²⁴⁵ On average, 54% of annual corporate FCPA resolutions during the period 2004 to 2016 involved at least one DPA or NPA.²⁴⁶ From its enactment to December 2004, 83% of FCPA corporate enforcement actions involved related criminal prosecutions of company employees, but during the period 2005 to 2015 the ratio flipped — 77% of FCPA enforcement actions did *not* involve related individual prosecutions.²⁴⁷ This phenomenon is further illustrated by

²⁴⁰ Arlen & Kahan, *supra* note 226, at 334.

²⁴¹ COPLAND & MANGUAL, *supra* note 229, at 5.

²⁴² O'Sullivan, *supra* note 236, at 52 ("It seems clear to me that the heightened awareness of the collateral consequences of an organizational conviction forced on the DOJ in the Arthur Andersen case was the primary impetus for the shift to DPAs and NPAs."). Alternative explanations for the rise of DPAs and NPAs have been offered. These include a desire by the DOJ to obtain privilege waivers, the promotion of a business friendly political climate, and efficiencies. See Modlish, *supra* note 104, at 754-55 (discussing alternative theories).

²⁴³ See COPLAND & MANGUAL, *supra* note 229, at 6 (observing that the explosive growth in DPAs and NPAs dates to 2004, two years after Andersen's collapse and one year after the issuance of the Thompson Memorandum); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1719 (2007) (linking Thompson Memorandum to rise of DPAs and NPAs).

²⁴⁴ Modlish, *supra* note 104, at 752.

²⁴⁵ See Warin et al., *supra* note 237, at 4.

²⁴⁶ *Id.*

²⁴⁷ Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 UC DAVIS L. REV. 497, 541 (2015).

comparing (a) the percentage of FCPA enforcement actions resolved with a DPA or NPA that resulted in related criminal charges against employees with (b) the percentage of enforcement actions against business organizations that were the result of a criminal indictment or resulted in a guilty plea by an organization that resulted in related criminal charges against company employees. During the period of 2008 to 2015, the former number was 9% and the latter number was 75%.²⁴⁸

Given the foregoing facts, what is the likely fate of DPAs and NPAs in the Yates Memorandum era? The issuance of the Memorandum produced conflicting early predictions. One was that the document's increased focus on individual criminal prosecutions would result in an all-or-nothing enforcement strategy by the DOJ that eschews such alternative methods of case resolution as DPAs and NPAs.²⁴⁹ A competing hypothesis was that, insofar as the Memorandum could be interpreted to require that organizational and individual defendants be treated alike, the result would be an increased number of individual DPAs and NPAs negotiated in tandem with their organizational counterparts.²⁵⁰ A third perspective was that the Memorandum would yield no significant change with regard to DPAs or NPAs, insofar as the document merely enshrined existing DOJ practices concerning such agreements.²⁵¹

So far the available evidence tends to support the third hypothesis. In 2017 the DOJ entered into only twenty-two DPAs and NPAs (and the SEC entered into none), but it is possible this low number is attributable to the DOJ's distraction during the early months of the Trump administration with pending investigations into Russia's interference with the 2016 election and post-election delay in selecting top enforcement officials at the DOJ and SEC.²⁵² In 2016, the first full

²⁴⁸ *Id.* at 546.

²⁴⁹ See, e.g., Matthew E. Fishbein, *Yates Memo Could Bring Balance to Prosecutions*, NAT'L L.J. (Nov. 2, 2015, 12:00 AM), <http://www.nationallawjournal.com/id=1202741212059/Yates-Memo-Could-Bring-Balance-to-Prosecutions>.

²⁵⁰ See, e.g., F. Joseph Warin et al., *2015 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON DUNN (Jan. 5, 2016), <http://www.gibsondunn.com/publications/Pages/2015-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx>.

²⁵¹ See, e.g., *id.*

²⁵² F. Joseph Warin et al., *2017 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON DUNN (July 11, 2017), <http://www.gibsondunn.com/publications/Pages/2017-Mid-Year-Update-Corporate-NPA-and-DPA.aspx> [hereinafter *2017 Mid-Year Update*]; F. Joseph Warin et al., *2017 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and*

year after the Yates Memorandum was issued, there were thirty-five corporate DPAs and NPAs, compared with forty in 2010, thirty-four in 2011, thirty-eight in 2012, twenty-nine in 2013, and thirty in 2014.²⁵³ There were 102 such agreements in 2015, but this is an obvious outlier — attributable to agreements reached under the DOJ's 2013 Swiss Bank Program,²⁵⁴ which provided a path for Swiss banks to resolve potential tax-related criminal liabilities in the United States. The Program resulted in seventy-five NPAs during the period March to December 2015.²⁵⁵

In retrospect it is unsurprising that the number of DPAs and NPAs has not declined precipitously post-Yates. The Memorandum is silent regarding both forms of agreement and they are not among the government's potential remedies listed where the document encourages criminal and civil attorneys within the DOJ to cooperate more closely with each other.²⁵⁶ But the revised USAM continues to foster the use of both DPAs and NPAs for corporations, recommending their use as a middle ground between a declination and a conviction.²⁵⁷ And the prospect of a DPA or an NPA provides a substantial incentive for corporations to provide the full range of cooperation contemplated by the Yates Memorandum.

The failure of the Yates Memorandum to address either DPAs or NPAs, in combination with the revised USAM's continued endorsement of both devices, threatens to undermine the efficacy of the DOJ's new approach to holding individuals accountable. The government's sharply expanded use of DPAs and NPAs since the demise of Arthur Andersen and the issuance of the Thompson Memorandum dovetails with the historical decline in individual prosecutions associated with corporate crimes (except in certain sectors, including antitrust). If the DOJ continues its recent practice of commonly entering into such agreements — and thus far it appears that it intends to do so — then whatever benefits the Yates Memorandum is designed to yield could be diminished or lost, as individuals continue to evade accountability and prosecution.²⁵⁸

Deferred Prosecution Agreements (DPAs), GIBSON DUNN (Jan. 4, 2018), <https://www.gibsondunn.com/2017-year-end-npa-dpa-update>.

²⁵³ See Warin et al., *2017 Mid-Year Update*, *supra* note 252, at 2.

²⁵⁴ See *id.*

²⁵⁵ See *Swiss Bank Program*, U.S. DEP'T JUST., <https://www.justice.gov/tax/swiss-bank-program> (last visited Dec. 18, 2017).

²⁵⁶ See Yates Memorandum, *supra* note 2, at 5.

²⁵⁷ See UNITED STATES ATTORNEYS' MANUAL, *supra* note 22, § 9.28.1100(B).

²⁵⁸ See Modlish, *supra* note 104, at 768-69 ("By not explicitly limiting the use of

F. Cross-Border Investigations and Data Privacy

Cross-border criminal investigations are increasingly common²⁵⁹ and data privacy issues often arise as they proceed. This is most often the case where European business entities or activities are involved in the investigation, because the European Union (“EU”), EU member states, and non-EU nations in Europe deploy a robust set of data privacy measures. However, the issues do not arise exclusively in Europe. More than seventy-five countries or legal jurisdictions have enacted comprehensive national data privacy laws.²⁶⁰ Pre-Yates Memorandum, the DOJ rarely excused companies from providing requested information on the basis of data privacy concerns.²⁶¹ Instead, the DOJ often dealt with such concerns by encouraging cooperating companies to obtain consent from their employees to transfer data, to produce correspondence in redacted form, and to utilize various exceptions that permit disclosures.²⁶² Post-Yates, European data protection measures and efforts to work around them will acquire even greater importance.

The EU’s Data Protection Directive (“Directive”)²⁶³ is the principal legal instrument concerning data protection in Europe. The EU adopted the Directive in 1995 to harmonize data protection law at the national level and safeguard European citizens’ fundamental right to

DPAs and NPAs, the Yates Memo fails to ensure effective prosecution of the individuals responsible for corporate crime, fails to deter corporate actors from breaking the law, denies victims of corporate crime a fair chance at any semblance of justice, and calls into question the United States’ promise of equal justice to all citizens regardless of wealth, status, or influence.”); Rena Steinzor, *White-Collar Reset: The DOJ’s Yates Memo and Its Potential to Protect Health, Safety, and the Environment*, 7 WAKE FOREST J.L. & POL’Y 39, 56 (2017) (“Unfortunately, the Yates Memo makes no attempt to deal with DPAs and the damaging perception that their primary usefulness is as a vehicle for implementing decisions that an institution is too big to jail. If the DOJ continues to use them in cases where public scrutiny is intense, it could sacrifice the palliative effects it seeks by re-emphasizing individual prosecutions.”).

²⁵⁹ Dowling, *supra* note 159, at 2.

²⁶⁰ Deena Coffman & Nina Gross, *Data Privacy: Navigating Data Privacy Laws in Cross-Border Investigations*, 5 FCPA REP., Dec. 21, 2016, at 2-4, <https://www.bdo.com/getattachment/2afc1478-64bd-4c13-b115-4ef29d8ff29a/attachment.aspx?2016-12-21-Navigating-Data-Privacy-Laws-in-Cross-Border-Investigations.pdf>.

²⁶¹ Wysong, *supra* note 81.

²⁶² MATTHEW S. MINER, U.S. CHAMBER INST. FOR LEGAL REFORM, DOJ’S NEW THRESHOLD FOR “COOPERATION”: CHALLENGES POSED BY THE YATES MEMO AND USAM REFORMS 20 (May 2016), http://www.instituteforlegalreform.com/uploads/sites/1/YatesMemoPaper_Web.pdf.

²⁶³ Council Directive 95/46/EC, 1995 O.J. (L 281) 31.

privacy.²⁶⁴ Member states were required to enact implementing legislation by 1998 and all of them have done so, albeit inconsistently.²⁶⁵ The Directive sets forth a mandatory, comprehensive regulatory scheme designed to protect “personal data,” which is defined as any information relating to an identified or identifiable natural person.²⁶⁶ This sweeping definition encompasses not only data ordinarily considered personal, but also business data that refers to employees, customers or clients, or other parties by an identifying characteristic.²⁶⁷ Thus, for example, personal data includes a business email sent by an employee from the office if the email directly or indirectly identifies an individual, which in virtually every instance it will, insofar as the email address and signature will identify the recipient and sender.²⁶⁸

Access to personal data, in the form of collection, retrieval, disclosure, or other activity, is significantly constrained by the Directive. Persons whose data are processed must be given notice of the processing and access to their data on demand,²⁶⁹ even if they are targets or witnesses in the investigation for which the processing is occurring.²⁷⁰ The Directive also establishes a few fairly narrow categories of permissible processing: (1) when the data subject has unambiguously consented to having her personal data processed; (2) when processing is necessary for the performance of a contract to which the data subject is party, to comply with a legal obligation, to protect the vital interests of the data subject, or to perform a task in the public interest; and (3) when processing “is necessary for the

²⁶⁴ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HANDBOOK ON EUROPEAN DATA PROTECTION LAW 18 (2014), <http://fra.europa.eu/en/publication/2014/handbook-european-data-protection-law> [hereinafter EUROPEAN DATA PROTECTION].

²⁶⁵ Beryl A. Howell & Laura S. Wertheimer, *Data Detours in Internal Investigations in EU Countries: Part I*, WILMERHALE, https://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/O2_Data%20Detours_Part%20I.pdf (last visited August 1, 2017).

²⁶⁶ Council Directive 95/46/EC, art. 2(a), 1995 O.J. (L 281) 31, 38.

²⁶⁷ Philip Urofsky & Grace Harbour, *U.S. Internal Investigations and Foreign Data Protection Laws*, 2 BLOOMBERG LAW REP.: RISK & COMPLIANCE 19, 21 (Sept. 2009), http://www.shearman.com/~media/Files/NewsInsights/Publications/2009/09/US-Internal-Investigations-and-Foreign-Data-Prot_/Files/Click-here-to-view-full-article-US-Internal-Inve_/FileAttachment/LT092209USInternalInvestigationsandForeignDataPr_.pdf.

²⁶⁸ Carol A.F. Umhoefer, *How EU Data Protection Laws Impact Cross-Border FCPA Investigations*, DLA PIPER (Sept. 24, 2014), <https://www.dlapiper.com/en/us/insights/publications/2014/09/the-global-anticorruption-perspective-q3-2014/how-eu-data-protection-laws-impact>.

²⁶⁹ *Id.*

²⁷⁰ Dowling, *supra* note 159, at 5.

purposes of the legitimate interests pursued by the . . . parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject”²⁷¹

At least one of the foregoing categories would appear to cover both internal investigations into potential illegal activity by a company’s employees or agents and compliance with evidence requests from the DOJ, but this is not always the case. For example, EU data protection authorities often are reluctant to accept the consent of employees (on the basis that it has not been freely given),²⁷² consent can be withdrawn at any time, even though the Directive does not specifically so provide,²⁷³ and consent for one use does not imply consent for all other uses.²⁷⁴ Moreover, data processing obstacles often arise in connection with domestic enforcement in EU member states and European countries that are not members of the EU but have enacted data privacy laws. The Directive sets forth minimum data privacy standards that domestic legislation must satisfy, “but often domestic data privacy laws are more restrictive than the Directive.”²⁷⁵ For example, France, Germany, and Italy have enacted data privacy laws that are significantly more stringent than the Directive requires.²⁷⁶

The Directive addresses trans-border data flows. It provides that personal data may be freely transferred within the European Economic Area and to persons located in countries that, according to the European Commission (“EC”), afford adequate protection to such data.²⁷⁷ Because the United States lacks comprehensive privacy legislation it has not qualified for a finding of adequacy.²⁷⁸ Until 2015, this obstacle was primarily dealt with by a Safe Harbor Framework —

²⁷¹ Council Directive 95/46/EC, art. 7(a)-(d), (f), 1995 O.J. (L 281) 31, 40; EUROPEAN DATA PROTECTION, *supra* note 264, at 81-85.

²⁷² David J. Kessler et al., *The Potential Impact of Article 48 of the General Data Protection Regulation on Cross Border Discovery from the United States*, 17 SEDONA CONF. J. 575, 579 (2016).

²⁷³ EUROPEAN DATA PROTECTION, *supra* note 264, at 60 (“The Data Protection Directive does not mention a general right to withdraw consent at any time. It is widely presumed, however, that such a right exists and that it must be possible for the data subject to exercise it at his or her discretion.”).

²⁷⁴ Coffman & Gross, *supra* note 260.

²⁷⁵ Urofsky & Harbour, *supra* note 267, at 21.

²⁷⁶ PAUL CALLAGHAN, RESOLVING DATA-PRIVACY CONFLICTS IN CROSS-BORDER INVESTIGATIONS AND LITIGATION 2-3 (Aug. 8, 2014), https://www.americanbar.org/content/dam/aba/events/labor_law/am/2014/7a_callaghan.authcheckdam.pdf.

²⁷⁷ See Council Directive 95/46/EC, art. 25, 1995 O.J. (L 281) 31, 45-46 (requiring that third countries ensure an adequate level of protection).

²⁷⁸ Umhoefer, *supra* note 268.

operated in the United States by the Department of Commerce and enforced by the Federal Trade Commission — that allowed American companies who voluntarily adhered to certain data protection measures to transfer data from the EU to the United States.²⁷⁹ Law firms, accounting firms, and document processing vendors that were safe harbor compliant were permitted to process personal data.²⁸⁰ In October 2015, the fifteen-year-old Safe Harbor Framework was invalidated by a judgment of the Court of Justice of the European Union,²⁸¹ and the safe harbor can no longer be utilized to accomplish data transfers to the United States.²⁸² Subsequently, the United States reached agreement with the EU in 2016 and with Switzerland in 2017 on successors to the Safe Harbor Framework, in the form of an EU-U.S. Privacy Shield Framework²⁸³ and a Swiss-U.S. Privacy Shield Framework.²⁸⁴ These successor Frameworks are more formal than the Safe Harbor Framework and they created additional obstacles to data transfer. For example, the EU-U.S. Privacy Shield Framework created a mechanism for individuals to file complaints asserting that their personal data have been misused.²⁸⁵

Violations of or non-compliance with the Directive and its implementing domestic laws can result in penalties, fines, civil litigation, criminal sanctions, and data embargoes,²⁸⁶ and the overall coercive effect of the Directive and domestic laws can significantly impede both internal investigations and compliance with DOJ evidence requests.²⁸⁷ Companies can be placed in an untenable

²⁷⁹ Urofsky & Harbour, *supra* note 267, at 21 (discussing safe harbor exception).

²⁸⁰ *Id.*

²⁸¹ Case C-362/14, Schrems v. Data Protection Comm'r, ¶ 1, <http://curia.europa.eu/juris/documents.jsf?num=C-362/14>.

²⁸² Kessler et al., *supra* note 272, at 581.

²⁸³ See *Privacy Shield Program Overview*, PRIVACY SHIELD FRAMEWORK, <https://www.privacyshield.gov/Program-Overview> (last visited Aug. 1, 2017).

²⁸⁴ See *U.S., Switzerland Finalize Data Transfer Framework*, INT'L TRADE ADMIN. (Jan. 11, 2017), <https://www.trade.gov/press/press-releases/2017/us-switzerland-finalize-data-transfer-framework-1112017.asp>.

²⁸⁵ Steven R. Chabinsky et al., *Privacy Shield: Recent Developments*, WHITE & CASE (Apr. 10, 2017), <https://www.whitecase.com/publications/article/privacy-shield-recent-developments>.

²⁸⁶ Ashish S. Joshi, *Expanding Globalization Leads to Increasingly Aggressive Cross-Border Investigations*, in UNDERSTANDING INTERNATIONAL CRIMINAL LAW: LEADING LAWYERS ON RECENT TRENDS IN INTERNATIONAL CRIMINAL LAW AND THE FRAMEWORK FOR ITS ENFORCEMENT (2014) (available on Westlaw, 2014 WL 4785238, at *13).

²⁸⁷ See, e.g., Christopher W. Madel, *Essential Considerations for Cross-Border Internal Investigations*, 39 AM. J. TRIAL ADVOC. 577, 580 (2016) (“Many countries have adopted data protection laws that potentially restrict access to essential information

position because United States federal courts have held that foreign data protection statutes implementing the Directive do not deprive them of authority to order parties subject to their jurisdiction to produce evidence, even if that production may violate the foreign statutes.²⁸⁸

In May 2018, the General Data Protection Regulation (“GDPR”)²⁸⁹ will replace the Directive and become law in all EU member states without the need for implementing national legislation.²⁹⁰ The GDPR significantly expands the scope and enforceability of the EU’s data privacy regime²⁹¹ and it imposes several stricter privacy requirements.²⁹² However, the new document is not expected to materially alter the data privacy obligations of companies in most instances involving discovery and evidence requests originating in the United States.²⁹³ For example, the GDPR’s definition of “personal data” is essentially unchanged from the expansive definition set forth in the Directive.²⁹⁴ The EU-U.S. Privacy Shield Framework has been

during internal investigations.”).

²⁸⁸ See, e.g., *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 452-53 (C.D. Cal. 2007) (rejecting argument that Netherlands data privacy law precluded court from ordering data production); see also *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.29 (1987) (“It is well settled that [foreign] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.”).

²⁸⁹ Commission Regulation 2016/679, 2016 O.J. (L 119) 1 (EU).

²⁹⁰ Kessler et al., *supra* note 272, at 576.

²⁹¹ Coffman & Gross, *supra* note 260.

²⁹² See Beata A. Safari, Comment, *Intangible Privacy Rights: How Europe’s GDPR Will Set a New Global Standard for Personal Data Protection*, 47 SETON HALL L. REV. 809, 811 (2017) (noting that the GDPR will “impose greater requirements for data privacy, for example, the provisions on ‘profiling,’ the right to data portability, and the ‘right to be forgotten’”); Peter Swire & DeBrae Kennedy-Mayo, *How Both the EU and the U.S. Are “Stricter” than Each Other for the Privacy of Government Requests for Information*, 66 EMORY L.J. 617, 633 (2017) (noting that the GDPR extends individual rights).

²⁹³ Kessler et al., *supra* note 272, at 591; see ALLEN & OVERY, LLP, THE EU GENERAL DATA PROTECTION REGULATION 7 (2017), <http://www.allenoverly.com/SiteCollectionDocuments/Radical%20changes%20to%20European%20data%20protection%20legislation.pdf> (commenting on international transfers of data that “[t]hose who had hoped for a complete revamp [for international transfers of data] in this area will be disappointed as the GDPR contains essentially the same toolkit”).

²⁹⁴ See Detlev Gabel & Tim Hickman, *Chapter 5: Key Definitions — Unlocking the EU General Data Protection Regulations*, WHITE & CASE (Sept. 13, 2017), <https://www.whitecase.com/publications/article/chapter-5-key-definitions-unlocking-eu-general-data-protection-regulation>.

the subject of multiple legal challenges²⁹⁵ and it will require modification to conform to the provisions of the GDPR.²⁹⁶

Cross-border criminal conduct is increasingly common.²⁹⁷ Not surprisingly, then, the frequency and magnitude of cross-border investigations have increased dramatically in recent years in the civil and criminal arenas.²⁹⁸ Data privacy issues in these trans-border investigations were recurrent before the Yates Memorandum was issued, and post-Yates they are likely to acquire even greater importance. If companies seek full cooperation credit they must conduct comprehensive investigations focusing at the onset on individual conduct. Such investigations may involve processing vast quantities of personal data, and for “any business with operations in the EU this will inevitably put that process in conflict with EU privacy laws.”²⁹⁹

The revised USAM states that if “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.”³⁰⁰ This requirement is primarily directed at foreign data privacy and bank secrecy laws and is likely to manifest in greater expense for companies as they seek viable workarounds to the Directive, country-specific laws, and, beginning in 2018, the GDPR. Moreover, the revised USAM also may result in more frequent decisions by the DOJ that companies under investigation have not earned cooperation credit, in situations where they fail to satisfy their burden of convincingly explaining the data processing obstacles presented in Europe and elsewhere.³⁰¹ The DOJ has been clear that it will not give

²⁹⁵ See Swire & Kennedy-Mayo, *supra* note 292, at 626-27.

²⁹⁶ Safari, *supra* note 292, at 820.

²⁹⁷ See 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>.

²⁹⁸ Joshi, *supra* note 286, at *1.

²⁹⁹ Toby Duthie & Simon Taylor, *Avoiding Data Protection Pitfalls: Spotlight on Cross-Border Investigations*, GLOBAL INVESTIGATIONS REV. (Jan. 7, 2016), <http://globalinvestigationsreview.com/article/1024621/avoiding-protection-pitfalls-spotlight-cross-border-investigations>.

³⁰⁰ UNITED STATES ATTORNEYS' MANUAL, *supra* note 22, § 9-28.700 n.1.

³⁰¹ See MINER, *supra* note 262, at 20-21 (“It is unclear how a company can satisfy [the requirements of the Yates Memorandum and revised USAM] when the law of a foreign jurisdiction prohibits the transfer of personal data, including emails and other documents that contain personally identifiable information.”); Coffman & Gross, *supra* note 260 (“Investigators find themselves caught between a rock and a hard place: Meet U.S. federal prosecutors’ high standards for self-reporting and timely

full cooperation credit to companies it determines have improperly hidden behind the shield of foreign data privacy laws. As noted by former Assistant Attorney General Leslie R. Caldwell, “Foreign data privacy laws exist to protect individual privacy, not to shield companies that purport to be cooperating in criminal investigations.”³⁰²

IV. APPLYING THE YATES MEMORANDUM

The Yates Memorandum was issued in part in response to the subprime mortgage crisis, but its application is not limited to the financial services sector. The document applies to the full range of the DOJ’s civil and criminal investigation and enforcement activities. The next part of this Article examines the application of the Yates Memoranda in two separate subject areas — foreign corruption and export control and economic sanctions.

By October 2017 — more than two years after the Memorandum was issued — there had been no substantial increase in the number of executives charged in cases involving corporate crimes.³⁰³ However, that snapshot presents a fragmentary picture. Major investigations can take years to complete. Thus, many investigations opened by the DOJ after the Memorandum was issued may not be resolved until 2018 or later,³⁰⁴ and by late-2017 there had already been a number of significant enforcement developments, as described below. The first such development to be discussed is the DOJ’s adoption of a new FCPA Corporate Enforcement Policy.

disclosure, or comply with the local data privacy regime. Doing both is not always an option.”).

³⁰² See Leslie R. Caldwell, Assistant Attorney Gen., U.S. Dep’t of Justice, Speech at American Conference Institute’s 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st>.

³⁰³ Jody Godoy, *Deputy AG Vows Policy Review in Lieu of ‘Rosenstein Memo,’* LAW360 (Oct. 12, 2017, 10:38 PM) (citing Professor Brandon Garrett), https://www.law360.com/securities/articles/973394/deputy-ag-vows-policy-review-in-lieu-of-rosenstein-memo-?nl_pk=8b240a19-db95-4ea6-91e0-b797c8600de2&utm_source=newsletter&utm_medium=email&utm_campaign=securities.

³⁰⁴ See C. Ryan Barber, *DOJ’s Sally Yates Is ‘Optimistic’ Trump Won’t Trash Namesake Enforcement Memo*, NAT’L L.J. (Nov. 30, 2016, 1:51 PM), <http://www.nationallawjournal.com/id=1202773476363/DOJs-Sally-Yates-Is-Optimistic-Trump-Wont-Trash-Namesake-Enforcement-Memo>.

A. FCPA Corporate Enforcement Policy

The FCPA, enacted in 1977, regulates international corruption using both accounting and anti-bribery provisions. The accounting provisions mandate regular reporting to the Securities and Exchange Commission (“SEC”), maintenance of accurate books, records, and accounts, and the establishment of internal accounting controls aimed at detecting and preventing FCPA violations.³⁰⁵ These requirements apply to securities issuers whose shares trade on a national securities exchange in the United States, companies whose stock trades on over-the-counter markets in the United States and which file periodic reports with the SEC, and certain individuals.³⁰⁶ The anti-bribery provisions criminalize the transfer of money or other gifts to foreign officials and political actors with intent to influence or obtain or retain business.³⁰⁷ These provisions apply to issuers; domestic concerns; officers, directors, employees, agents, and shareholders of issuers and domestic concerns; and certain persons and entities acting while in the territory of the United States.³⁰⁸ “Domestic concerns” include any United States citizen, national, or resident, as well as any business entity that is organized under the laws of a U.S. state or that has its principal place of business in the United States.³⁰⁹ Both the SEC and DOJ have enforcement authority, but there is no private right of action under the FCPA.³¹⁰

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”).³¹¹ The Fraud Section is part of the DOJ’s Criminal Division and has sole authority to investigate and prosecute criminal violations of the FCPA. The Section’s Pilot Program had two components — it delineated the DOJ’s expectations for how a company should manage an FCPA investigation and the potential benefits if a company chooses to follow

³⁰⁵ 15 U.S.C. § 78d (2018).

³⁰⁶ See U.S. DEP’T OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 42-45 (Nov. 14, 2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.

³⁰⁷ 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2018).

³⁰⁸ See U.S. DEP’T OF JUSTICE, *supra* note 306, at 10-11.

³⁰⁹ *Id.* at 11.

³¹⁰ See Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 419 (2012) (arguing in favor of a private right of action in FCPA cases).

³¹¹ U.S. DEP’T OF JUSTICE, THE FRAUD SECTION’S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 2 (Apr. 5, 2016), <https://www.justice.gov/archives/opa/blog-entry/file/838386/download> [hereinafter FCPA ENFORCEMENT PLAN].

the FCPA Guidance. The Program was intended to complement the Yates and Filip Memoranda by offering companies increased transparency about the benefits of early self-disclosure and complete cooperation with the DOJ.³¹² Self-disclosure — which is an important part of the Filip Factors — is critical to effective enforcement of the FCPA, insofar as the government rarely discovers violations of the statute unless companies³¹³ or whistleblowers³¹⁴ step forward. The DOJ favors early self-reporting primarily to avoid statute of limitations issues, whereas companies often are wary because they operate with imperfect information and uncertain outcomes. Historically, the benefits of self-reporting FCPA violations were mostly opaque,³¹⁵ the decision whether to self-report was usually very difficult,³¹⁶ and the business community and defense bar consistently urged greater transparency.³¹⁷ The next part of this Article examines the operation of the Pilot Program.

³¹² SHEARMAN & STERLING, LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 23-24 (Jan. 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>.

³¹³ See Mike Koehler, *It Is Pure Speculation to Say that Nortek/Akamai Benefited or Received an Excellent Result from Its Disclosure*, FCPA PROFESSOR (June 14, 2016, 12:03 AM), <http://fcpprofessor.com/it-is-pure-speculation-to-say-that-nortek-akamai-benefited-from-its-disclosure-and-cooperation> (asserting that FCPA enforcement agencies never discover underlying misconduct in the absence of a voluntary disclosure). *But cf.* Cheryl Scarboro & Diana Wielocha, *40 Years of FCPA: The Rise in International Enforcement*, LAW360 (Dec. 5, 2017, 2:38 PM), <https://www.law360.com/articles/988813/40-years-of-fcpa-the-rise-in-international-enforcement> (arguing that U.S. prosecutors now rely less on self-reporting by companies and more on information provided by foreign regulators).

³¹⁴ See F. Joseph Warin et al., *2016 Year-End FCPA Update*, GIBSON DUNN (Jan. 3, 2017), <https://www.gibsondunn.com/2016-year-end-fcpa-update> (noting recent FCPA enforcement actions stemming from whistleblower tips).

³¹⁵ See, e.g., Peter R. Reilly, *Incentivizing Corporate America to Eradicate Transnational Bribery Worldwide: Federal Transparency and Voluntary Disclosure Under the Foreign Corrupt Practices Act*, 67 FLA. L. REV. 1683, 1683 (2015) (arguing that FCPA self-disclosure does not result in penalty reductions).

³¹⁶ See David W. Simon & John E. Turlais, *Evolving FCPA Enforcement Strategy — U.S. Regulators Are Talking; Are You Listening?*, FOLEY & LARDNER LLP (Mar. 10, 2016), <https://www.foley.com/evolving-fcpa-enforcement-strategy—us-regulators-are-talking-are-you-listening-03-10-2016> (“The decision whether to self-disclose has historically been one of the most difficult decisions for companies dealing with FCPA violations.”).

³¹⁷ See *DOJ Pilot Program: A Cap on Cooperation Credit?*, KING & SPALDING: CLIENT ALERT, Apr. 12, 2016, at 2, <http://www.jdsupra.com/legalnews/doj-pilot-program-a-cap-on-cooperation-20628> (follow “Download PDF”).

1. Operation of the Pilot Program and Common Objections

The FCPA Guidance stated that the DOJ expected 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.³¹⁸ Remediation encompassed employee termination and compliance improvements. No emphasis was given to pre-existing compliance.³¹⁹ In combination, the three elements placed a tangible face on both the Yates Memorandum's threshold requirement to receive credit and the revised USAM which separates self-disclosure from cooperation. The Pilot Program extended the Yates Memorandum by making the disclosure of all relevant facts related to individual liability a condition of obtaining a penalty reduction. The DOJ would consider a company's claim that satisfaction of one or more of the three requirements was impossible because of such impediments as foreign data privacy laws or blocking statutes (which can limit or bar the production of discovery abroad for use in United States litigation),³²⁰ but the company bore the burden of proving impossibility and that no alternative basis for disclosure exists.³²¹

Similarly, the burden of proving satisfaction of the three requirements was on the cooperating company³²² and the primary requirement was self-disclosure.³²³ If, during the course of an investigation, a company established that it had satisfied all three elements, it might receive a 50% reduction off the bottom of the fine range set forth in the Federal Sentencing Guidelines for Organizations

³¹⁸ See FCPA ENFORCEMENT PLAN, *supra* note 311, at 4-8.

³¹⁹ See Andrew Spalding, *Restoring Pre-Existing Compliance Through the FCPA Pilot Program*, 48 U. TOL. L. REV. 519, 520 (2017) (criticizing the Pilot Program for emphasizing remedial compliance while de-emphasizing pre-existing compliance).

³²⁰ See, e.g., *Foreign Blocking Statutes and Cross-Border Discovery*, ARENT FOX (Mar. 10, 2014), <https://www.arentfox.com/newsroom/alerts/foreign-blocking-statutes-and-cross-border-discovery>.

³²¹ See FCPA ENFORCEMENT PLAN, *supra* note 311, at 5 n.3.

³²² DOJ Announces Continuation and Ongoing Review of FCPA Pilot Program, LATHAM & WATKINS: CLIENT ALERT COMMENTARY, no. 2103, Mar. 24, 2017, at 2, <https://www.lw.com/thoughtLeadership/DOJ-announces-continuation-ongoing-review-FCPA-pilot-program>.

³²³ See Brian F. Saulnier & Luke T. Cadigan, *The First 90 Days of DOJ's FCPA Pilot Program*, LAW360 (July 11, 2016, 11:26 AM), <https://www.law360.com/articles/815464/the-first-90-days-of-doj-s-fcpa-pilot-program> (“[T]he credit system turns almost entirely on self-disclosure . . .”).

(“Sentencing Guidelines”),³²⁴ it would generally avoid appointment of a compliance monitor, and the DOJ would consider declining prosecution altogether (provided that the company disgorged all of the profits generated by the misconduct).³²⁵ If a company failed to voluntarily self-disclose wrongful conduct but later cooperated and remediated it might receive at most a 25% reduction from the bottom of the Sentencing Guidelines fine range.³²⁶ The foregoing was stricter than the post-Yates revised USAM, which encourages self-disclosure and remediation — and both are factors to consider when the DOJ decides whether to indict — but does not require them for cooperation credit.³²⁷ The FCPA Guidance also failed to set a minimum penalty discount — only a maximum (50%) was specified.

When the Program was announced it was greeted with a fair amount of skepticism, for multiple reasons. First, one of the Program’s primary goals — the encouragement of voluntary self-disclosures to permit the DOJ to prosecute individuals — was undercut by the recent history of the FCPA. In the five years before the Pilot Program was adopted, only 26% of the corporate DOJ FCPA enforcement actions that originated with voluntary disclosures included a related DOJ prosecution of individuals.³²⁸ Given this low percentage, it seemed unlikely that the Pilot Program could accomplish its goal.

Second, the two incentives that the Pilot Program offered were nothing new. The DOJ had previously offered companies that voluntarily disclosed, cooperated, and remediated up to and sometimes more than a 50% reduction from the minimum amount suggested by the Sentencing Guidelines. Examples include Avon Products, Inc. in December 2014 (58% discount) and Pride International, Inc. in November 2010 (55% discount).³²⁹ And the DOJ had previously offered companies that cooperated and remediated but did not voluntarily disclose at least 25% reductions from the minimum

³²⁴ See U.S. SENTENCING GUIDELINES MANUAL ch. 8 (U.S. SENTENCING COMM’N 2015), <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf>.

³²⁵ See, e.g., Mark Mendelsohn, Alex Oh & Farrah Berse, *Shedding Further Light on the FCPA Pilot Program*, LAW360 (July 29, 2016, 2:12 PM), <https://www.law360.com/articles/822817/shedding-further-light-on-the-fcpa-pilot-program>.

³²⁶ FCPA ENFORCEMENT PLAN, *supra* note 311, at 8.

³²⁷ UNITED STATES ATTORNEYS’ MANUAL, *supra* note 22, §§ 9-28.700, .900, .1000.

³²⁸ Mike Koehler, *Grading the DOJ’s Foreign Corrupt Practices Act ‘Pilot Program,’* 11 White Collar Crime Rep. (BNA) 353, 354 (Apr. 29, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2772105.

³²⁹ Mike Koehler, *The Numbers Prove that the DOJ’s FCPA Pilot Program Is Really Nothing New*, FCPA PROFESSOR (Apr. 12, 2016, 2:04 AM), <http://fcpaprofessor.com/the-numbers-prove-that-the-dojs-fcpa-pilot-program-is-really-nothing-new>.

amount suggested by the Sentencing Guidelines.³³⁰ One example is VimpelCom, Ltd. in February 2016 (45% discount).³³¹ In short, the Pilot Program's quantification of cooperation credit merely made explicit what the federal government was already doing.

Third, the FCPA Pilot Program — like the USAM — was non-binding, and committed the DOJ to nothing.³³² Indeed, the FCPA Guidance stated: “This memorandum is for internal use only and does not create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, organization, party or witness in any administrative, civil, or criminal matter.”³³³

Fourth, whereas both the DOJ and SEC are authorized to enforce the FCPA — the DOJ has both criminal and civil enforcement jurisdiction and the SEC has only the latter — and cooperation during their parallel investigations is quite common,³³⁴ the FCPA Guidance was applicable only to the FCPA Unit of the DOJ's Fraud Section. It did not apply to any other part of the Fraud Section, the Criminal Division, the U.S. Attorneys' Offices, any other part of the DOJ, or any other agency³³⁵ — such as the SEC. The Yates Memorandum likewise does not apply to the SEC. Thus, self-reporting could lead to a DOJ declination — which occurs when a viable criminal investigation or prosecution exists, but the DOJ determines that no further action should be taken³³⁶ — but the risk of SEC sanctioning for the same conduct remained.³³⁷ Similarly, conduct constituting both an FCPA

³³⁰ DOJ Pilot Program, *supra* note 317, at 2 (“Indeed, several companies have recently resolved cases with DOJ under terms equally or more favorable than those prescribed by the Program.”).

³³¹ See *VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More than \$795 Million; United States Seeks \$850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme*, U.S. DEP'T JUST. (Feb. 18, 2016), <https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million>.

³³² 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).

³³³ See FCPA ENFORCEMENT PLAN, *supra* note 311, at 1 n.1.

³³⁴ Meghan Hansen & Carolyn Wald, *100 Days of FCPA Under Trump: 10 Takeaways*, LAW360 (Apr. 27, 2017, 5:33 PM), <https://www.law360.com/articles/917416/100-days-of-fcpa-under-trump-10-takeaways>.

³³⁵ FCPA ENFORCEMENT PLAN, *supra* note 311, at 9.

³³⁶ Nathaniel Edmonds et al., *FCPA Declinations: How to Maximize Your Chance to Get a Pass When a Corruption Problem Occurs*, PAUL HASTINGS: STAY CURRENT, May 2013, at 1, https://www.paulhastings.com/docs/default-source/PDFs/fcpa_declinations_-_how_to_maximize_your_chance_to_get_a_pass_when_a_corruption_problem_occurs.pdf.

³³⁷ Mark F. Mendelsohn, *DOJ Declination Letters and the FCPA*, HARV. L. SCH. F. ON

violation and an antitrust violation under the purview of the DOJ's Antitrust Division raised thorny issues for companies seeking a comprehensive resolution. This was not merely speculative — bribery and cartelization are linked. The globalization of business creates an environment in which bribery and cartel conduct are likely to occur in tandem.³³⁸

Fifth, under the Pilot Program only corporations could receive leniency for self-reporting misconduct. The Program's failure to provide any analogous provision for granting leniency to cooperating employees might undermine the stated goal of self-disclosure.³³⁹

Sixth, the Pilot Program included a deconfliction provision, pursuant to which companies might be expected to halt internal investigations to permit the DOJ to interview employees before the company did so.³⁴⁰ Implementation of this provision might be unwise for multiple reasons, including the fact that deconfliction could keep company directors, officers, and shareholders in the dark about critical on-going investigations.

2. The Benefits of Self-Reporting Under the Pilot Program

The FCPA Pilot Program marked its one-year anniversary in April 2017. What were the results to that point, and how accurate were the predictions of the Program's early skeptics? The results suggest that only some of the initial objections were warranted.

CORP. GOVERNANCE & FIN. REG. (July 4, 2016), <https://corpgov.law.harvard.edu/2016/07/04/doj-declination-letters-and-the-fcpa>.

³³⁸ See Josh Goodman, *The Anti-Corruption and Antitrust Connection*, ANTITRUST SOURCE, Apr. 2013, at 6-7, https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr13_goodman.authcheckdam.pdf; Gary R. Spratling, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, *International Cartels: The Intersection Between FCPA Violations and Antitrust Violations* (Dec. 9, 1999), <https://www.justice.gov/atr/speech/international-cartels-intersection-between-fcpa-violations-and-antitrust-violations> ("The fact is that in today's global economy there is a recurring intersection of conduct that violates both the Sherman Antitrust Act and the Foreign Corrupt Practices Act."). *But cf.* Adam Dobrik, *Debunking the Myth: The Link Between Cartels and Foreign Corruption*, GLOBAL INVESTIGATIONS REV. (June 14, 2016) <http://globalinvestigationsreview.com/article/1036119/debunking-the-myth-the-link-between-cartels-and-foreign-corruption> ("[T]he DOJ has not brought a case covering both violations since 2011.").

³³⁹ 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>.

³⁴⁰ FCPA ENFORCEMENT PLAN, *supra* note 311, at 5.

Between April 2016 and April 2017, the DOJ resolved eighteen FCPA cases.³⁴¹ Seven of the eighteen cases involved companies that self-reported misconduct and five of the seven received a declination, which was the Pilot Program's maximum reward — unlike NPAs, declinations typically do not involve admissions of criminal conduct.³⁴² The five publicly reported declinations represented an uptick from the prior year, when only two companies received this reward. The two companies that self-disclosed but did not receive declinations received 50% and 30% penalty discounts. Of the eleven companies that did not self-report, nine received a penalty discount of 25% or less.³⁴³ The level of cooperation appeared to impact the discount, regardless of whether a company self-reported. Of the eleven NPA and DPA resolutions in cases with no self-disclosure, nine required the company to appoint a compliance monitor.³⁴⁴ No company that self-reported was required to engage a monitor,³⁴⁵ but all seven self-disclosing companies were required to disgorge profits pursuant to the Pilot Program's provisions.³⁴⁶ The SEC has used disgorgement in most of its FCPA enforcement actions since 2004,³⁴⁷ and in 2016 twenty of the SEC's twenty-four FCPA corporate settlements imposed disgorgement.³⁴⁸ In contrast, declinations with disgorgement embodied a new category of enforcement action for the DOJ³⁴⁹ and probably constituted the Program's most innovative and controversial feature.³⁵⁰

³⁴¹ Ryan J. Rohlfen & Sarah Kimmer, *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>.

³⁴² Roger M. Witten et al., *DOJ Launches FCPA Pilot Program to Encourage Corporate Voluntary Disclosure and Cooperation*, WILMERHALE (Apr. 8, 2016), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179881469>.

³⁴³ Rohlfen & Kimmer, *supra* note 341.

³⁴⁴ *Id.*

³⁴⁵ For discussions of many of the problems associated with monitors, see generally Veronica Root, *Modern-Day Monitorships*, 33 YALE J. ON REG. 109 (2016) [hereinafter *Modern-Day Monitorships*]; Veronica Root, *The Monitor-“Client” Relationship*, 100 VA. L. REV. 523 (2014) [hereinafter *The Monitor-“Client” Relationship*].

³⁴⁶ Rohlfen & Kimmer, *supra* note 341.

³⁴⁷ Karen E. Woody, *No Smoke and No Fire: The Rise of Internal Controls Absent Anti-Bribery Violations for FCPA Enforcement*, 38 CARDOZO L. REV. 101, 121-22 (2017).

³⁴⁸ Iris Bennett et al., *FCPA Disgorgement: Putting the SEC to Its Burden of Proof*, LAW360 (Aug. 4, 2017, 11:30 AM), <https://www.law360.com/articles/948538/fcpa-disgorgement-putting-sec-to-its-burden-of-proof>.

³⁴⁹ See Jessica Mussallem & Kurt Oldenburg, *Declinations with Disgorgement: The DOJ's New Enforcement Category*, VINSON & ELKINS (Oct. 3, 2016),

The foregoing results serve to underscore one of the chief advantages of the Program — to a greater degree than before, companies were able to perceive the benefits of self-reporting (and cooperation). While the Fraud Section had encouraged self-reporting of FCPA violations prior to the inception of the Program, the fine reductions and other incentives offered by the Program had not previously been articulated in a written framework by the DOJ. Instead, companies could identify the range of available sentencing discounts only by reviewing non-precedential corporate plea agreements and DPAs (but not NPAs, which do not include a calculation section) — and even these documents failed to identify which factors the government found to be compelling when imposing specific penalties. The pre-Program lack of transparency contributed to a low rate of self-reporting,³⁵¹ which no doubt spurred the DOJ to act.

The Guidance represented the first formal quantification by the DOJ of the penalty reduction available to a company that violated the FCPA. This enhanced transparency — which was one of the Pilot Program's express core goals³⁵² — was aided in part by the DOJ's break with precedent by publicly disclosing numerous declinations and posting them on its website.³⁵³ At the close of nearly every FCPA investigation a declination request is made to prosecutors by the company under investigation.³⁵⁴ Many of these requests are granted,³⁵⁵

<https://www.velaw.com/Insights/Declinations-with-Disgorgement—The-DOJ-s-New-Enforcement-Category>.

³⁵⁰ *But cf.* John M. Hillebrecht et al., *White Collar Alert: New EFCPA Enforcement Mechanism from the DOJ?*, DLA PIPER (Oct. 18, 2016), <https://www.dlapiper.com/en/us/insights/publications/2016/10/a-new-enforcement-mechanism> (“It is not yet clear whether these declinations with disgorgement are really of much substantive difference from the DOJ's past non-prosecution agreements with disgorgement or are simply form over substance in aid of marketing the pilot program.”).

³⁵¹ Kelly A. Moore et al., *DOJ Issues New FCPA Guidance and Launches Self-Reporting Pilot Program*, MORGAN LEWIS (Apr. 6, 2016), <https://www.morganlewis.com/pubs/doj-issues-new-fcpa-guidance-and-launches-self-reporting-pilot-program> (“The Guidance comes after what has been a growing perception that voluntary disclosures have slowed significantly due to a lack of transparency, consistency, and clarity as to what the benefits are, if any, to self-disclosing.”).

³⁵² Mona Patel, *Evaluating FCPA Pilot Program: A Shift in Company Thinking?*, LAW360 (Apr. 11, 2017, 2:17 PM), <https://www.law360.com/articles/912000/evaluating-fcpa-pilot-program-a-shift-in-company-thinking>.

³⁵³ *See Declinations*, U.S. DEP'T JUST., <https://www.justice.gov/criminal-fraud/pilot-program/declinations> (last visited Feb. 19, 2018) (listing seven declinations as of June 29, 2017).

³⁵⁴ Edmonds et al., *supra* note 336, at 5.

³⁵⁵ *See* James G. Tillen & Marc Alain Bohn, *Declinations During the FCPA Boom*, 2 BLOOMBERG L. REP.: CORP. COUNS. (Aug. 2011), <https://www.millerchevalier.com/>

but there is no DOJ policy requiring the target or subject of an investigation to be notified once a declination decision has been made.³⁵⁶ Moreover, before the FCPA Pilot Program commenced the DOJ did not commonly publicize FCPA declinations³⁵⁷ and they became public only if disclosed by the companies involved, usually via public filings or press releases.³⁵⁸ The new publicity practice differed.

While the DOJ stated that it would not publicize all of its Pilot Program declinations,³⁵⁹ and it made numerous non-public declinations after the Program began,³⁶⁰ more frequent public releases helped companies understand the Program's benefits. Self-reporting and cooperating companies were likely to receive a declination (or at least a significant penalty discount), and they were highly unlikely to receive a compliance monitor.³⁶¹ In contrast, companies which failed to self-report would not receive a declination, would receive a lesser penalty discount, and were quite likely — but not guaranteed³⁶² — to

sites/default/files/news_updates/attached_files/miller_chevalier_tillen_bohn_article.pdf (“Enforcement officials routinely suggest that declinations are commonplace, but provide few concrete details as to how often they occur . . .”).

³⁵⁶ GEORGE J. TERWILLIGER, III & MATTHEW S. MINER, LEGAL LIMBO: SEEKING CLARITY IN HOW AND WHEN THE DEPARTMENT OF JUSTICE DECLINES TO PROSECUTE 2 (Oct. 2012), <http://www.instituteforlegalreform.com/uploads/sites/1/DeclinationsBooklet.pdf>.

³⁵⁷ Bruce E. Yannett et al., *The Difficulty of Defining a Declination: An Update on the DOJ's Pilot Program*, N.Y.U.: COMPLIANCE & ENFORCEMENT (Nov. 16, 2016), https://wp.nyu.edu/compliance_enforcement/2016/11/16/the-difficulty-of-defining-a-declination-an-update-on-the-dojs-pilot-program.

³⁵⁸ Tillen & Bohn, *supra* note 355.

³⁵⁹ Marc Alain Bohn & James G. Tillen, *Evaluating FCPA Pilot Program: Declinations on the Rise*, LAW360 (Apr. 10, 2017, 5:10 PM), <https://www.law360.com/articles/905127/evaluating-fcpa-pilot-program-declinations-on-the-rise>.

³⁶⁰ See Andy Spalding, *The Pilot Program's Missing Piece*, FCPA BLOG (Sept. 18, 2017, 8:08 AM), <http://www.fcpablog.com/blog/2017/9/18/andy-spalding-the-pilot-programs-missing-piece.html> (noting that by mid-September 2017 the DOJ had made seven public declinations under the Pilot Program and a number of non-public declinations). There is no public DOJ policy guiding the latter category of declinations.

³⁶¹ See Ann Sultan, *What Recent DOJ Corporate Enforcement Actions Mean for Cooperating Companies*, 167 Corp. L. & Accountability Rep. (BNA) (Aug. 29, 2016), <https://www.millerchevalier.com/sites/default/files/resources/BloombergBNA-DOJ-Corporate-Enforcement-Actions.pdf> (noting that under FCPA Pilot Program, companies that self-disclose, fully cooperate, remediate, and disgorge profits can obtain declinations and “are less likely than other companies to receive a monitor”).

³⁶² In September 2017, the DOJ, the SEC, and authorities in the Netherlands reached a global \$965 million settlement with Sweden-based telecommunications firm Telia Company AB (a U.S. issuer during the relevant time period) to resolve an investigation into bribes paid in Uzbekistan. See Mark Mendelsohn & Alex Oh, *Telia's \$965 Million Global Bribery Settlement*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN.

receive a monitor. The last point is pivotal. Pre-Pilot Program the Fraud Section often failed to impose a monitor on firms that did not self-report FCPA violations.³⁶³ The Program corrected that failure. The imposition of a compliance monitor at the conclusion of a lengthy FCPA investigation represents a substantial expense for companies that may even exceed the value of a penalty discount.³⁶⁴ Monitor appointments in FCPA cases have lasted from a few months to several years (thereby effectively extending portions of the investigation and the associated business disruption),³⁶⁵ and at the high end monitor fees — which the company generally bears responsibility for paying³⁶⁶ — can reach tens of millions of dollars.³⁶⁷ Monitors are typically former government enforcement lawyers.³⁶⁸ The monitor appointment process has been described as “rather murky”³⁶⁹ and historically there has been minimal judicial involvement in the appointment or oversight of these individuals and their staff.³⁷⁰

The foregoing Pilot Program results are qualified, because many of the eighteen FCPA cases resolved during the first year of the

REG. (Oct. 11, 2017), <https://corpgov.law.harvard.edu/2017/10/11/telias-965-million-global-bribery-settlement>. Telia signed a three-year DPA with the DOJ, but no monitor was appointed even though Telia failed to self-disclose. *Id.*

³⁶³ See Jennifer Arlen, *Assessing the Fraud Section’s FCPA Pilot Program*, N.Y.U.: COMPLIANCE & ENFORCEMENT (Apr. 28, 2016), https://wp.nyu.edu/compliance_enforcement/2016/04/28/assessing-the-fraud-sections-fcpa-pilot-program (“[I]n most years since 2010, [the] FCPA Unit has not imposed monitors on most firms that did not self-report.”).

³⁶⁴ Rohlfsen & Kimmer, *supra* note 341.

³⁶⁵ See F. Joseph Warin et al., *Somebody’s Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321, 347 (2011).

³⁶⁶ Caelah E. Nelson, *Corporate Compliance Monitors Are Not Superheroes with Unrestrained Power: A Call for Increased Oversight and Ethical Reform*, 27 GEO. J. LEGAL ETHICS 723, 731 (2014).

³⁶⁷ See Root, *The Monitor-“Client” Relationship*, *supra* note 345, at 80.

³⁶⁸ Gil Soffer, *40 Years of FCPA: A View from the Monitorship Trenches*, LAW360 (Dec. 11, 2017, 2:54 PM), <https://www.law360.com/articles/981665/40-years-of-fcpa-a-view-from-the-monitorship-trenches>.

³⁶⁹ Steven Davidoff Solomon, *In Corporate Monitor, a Well-Paying Job but Unknown Results*, N.Y. TIMES: DEALBOOK (Apr. 15, 2014, 6:33 PM), <https://dealbook.nytimes.com/2014/04/15/in-corporate-monitor-a-well-paying-job-but-unknown-results/?mcubz=2>; see also Root, *Modern-Day Monitorships*, *supra* note 345, at 159 (noting that scholars, policymakers, reporters, and courts “have lamented the processes by which monitors are selected”).

³⁷⁰ Andrew M. Levine et al., *Judicial Scrutiny of Corporate Monitors: Additional Uncertainty for FCPA Settlements?*, 8 FCPA UPDATE, Apr. 2017, at 18, http://www.debevoise.com/~media/files/insights/publications/2017/04/fcpa_update_april_2017.pdf.

Program³⁷¹ — including all five public declinations³⁷² — involved self-disclosure that occurred prior to the Program's inception. And while FCPA declinations have increased,³⁷³ in several of the Program's early reported declinations the alleged misconduct occurred exclusively at the level of the companies' Chinese subsidiaries. There was no allegation of a United States nexus, which would have been required to establish a violation of the FCPA's anti-bribery provisions.³⁷⁴ More definitive conclusions about the Pilot Program probably awaited a larger universe of cases involving allegations of less self-contained bribery handled exclusively within the Program's framework.

3. Declinations with Disgorgement

For multiple reasons it was unclear that the Pilot Program represented a bargain for companies which may have violated the FCPA. The DOJ's publication of declinations with even moderately detailed factual statements creates reputational damage.³⁷⁵ Internal investigation costs were often exorbitant before the Yates Memorandum was issued — one notorious example is the \$550 million in investigative fees and expenses Avon Products incurred to resolve FCPA enforcement actions with the DOJ and SEC for \$135 million in December 2014.³⁷⁶ Investigation costs have continued to rise post-Memorandum and this inflation should be balanced against possible penalty reductions in assessing the true value of voluntary disclosures.³⁷⁷ Moreover, from the DOJ's perspective, absolute certainty is undesirable³⁷⁸ and this perspective took concrete form.

³⁷¹ Rohlfesen & Kimmer, *supra* note 341.

³⁷² Yannett et al., *supra* note 357.

³⁷³ See Bohn & Tillen, *supra* note 359.

³⁷⁴ Andrew M. Levine et al., *Early Thoughts on the DOJ's Pilot Program, the Continued Breadth of the Accounting Provisions, and Possible Implications for Self-Reporting*, 7 FCPA UPDATE, July 2016, at 20-21, <http://www.debevoise.com/insights/publications/2016/07/fcpa-update-july-2016>.

³⁷⁵ See Yannett et al., *supra* note 357.

³⁷⁶ Koehler, *supra* note 328.

³⁷⁷ See Paul R. Berger et al., *U.S. Department of Justice Issues New FCPA Guidance and Launches Pilot Enforcement Program*, 7 FCPA UPDATE, Apr. 2016, at 5, http://www.debevoise.com/~media/files/insights/publications/2016/04/fcpa_update_april_2016.pdf (“Moreover, the full cooperation factors will almost certainly require incurring significant investigation expenses which could exceed any reduction in fines.”).

³⁷⁸ SHEARMAN & STERLING, LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 13 (July 2016), <http://www.shearman.com/~media/Files/NewsInsights/Publications/2016/06/Shearman—>

The potential 50% penalty discount was not guaranteed and was the subject of considerable prosecutorial discretion.³⁷⁹ It remained difficult or impossible to determine why one cooperating company received a 15% discount but another cooperating company received a 20% discount. It was similarly unclear exactly why one company received a penalty discount but another received a declination,³⁸⁰ or when a self-disclosing company would be considered for a declination rather than a DPA or NPA. Before the Pilot Program commenced most known FCPA declinations were issued in response to conduct that was voluntarily self-disclosed, but that was not always true.³⁸¹ During the Pilot Program the same disconnect remained. The Program stopped short of a default rule that self-reporting would yield a declination or other major form of leniency. A declination neither relieved companies from the obligation to disgorge profits nor reduced the amount of profits that must be disgorged, which is usually a number subject to interpretation and much negotiation.³⁸² The DOJ's new enforcement category of declinations with disgorgement was a harsher result than a mere declination,³⁸³ even if it was less onerous than an NPA or DPA,³⁸⁴ and there were no public standards applicable to the disgorgement process.³⁸⁵

Finally, there is considerable doubt as to whether declinations with disgorgement are permissible. Four of the DOJ's seven Pilot Program public declinations by mid-2017 involved disgorgement. Prior to the inception of the Program these cases likely would have been resolved with DPAs or NPAs.³⁸⁶ In June 2017, the United States Supreme Court

Sterings-Recent-Trends-and-Patterns-in-the-Enforcement-of-t.pdf.

³⁷⁹ See Berger et al., *supra* note 377 (“The many contingencies built into the Guidance prevent any company from gaining any greater clarity in outcome analysis than in the ‘pre-Guidance’ era.”).

³⁸⁰ Erin G.H. Sloane et al., *Evaluating FCPA Pilot Program: Lessons and Expectations*, LAW360 (Apr. 14, 2017, 3:13 PM), <https://www.law360.com/articles/912437/evaluating-fcpa-pilot-program-lessons-and-expectations>.

³⁸¹ See Tillen & Bohn, *supra* note 355 (“It is not clear how often the DOJ declines to pursue [FCPA] enforcement in the face of a self-disclosure.”).

³⁸² Mussallem & Oldenburg, *supra* note 349.

³⁸³ See Yannett et al., *supra* note 357 (“The benefits of a Pilot Program declination are therefore muted by the requirement to pay disgorgement . . .”).

³⁸⁴ See, e.g., Mary Miller, Note, *More than Just a Potted Plant: A Court's Authority to Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power*, 115 MICH. L. REV. 135, 141-42 (2016) (noting criticism that NPAs and DPAs are excessively punitive).

³⁸⁵ Sloane et al., *supra* note 380.

³⁸⁶ 2017 *Mid-Year Update*, *supra* note 252.

unanimously held in *Kokesh v. SEC*³⁸⁷ that disgorgement as a sanction in SEC enforcement actions is subject to a five-year statute of limitations because it operates as a penalty within the meaning of 28 U.S.C. § 2462, which governs an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture.³⁸⁸ While the SEC has used disgorgement as a primary remedial measure in FCPA settlements — and it may be the SEC enforcement tool with the greatest potential impact on a company’s financial viability³⁸⁹ — the holding may lack great practical significance insofar as most SEC enforcement actions target conduct that occurred well within the five-year limitations period.³⁹⁰ However, in a footnote, the Supreme Court expressly left open the question of whether courts have authority to order disgorgement at all as a remedy in SEC enforcement actions.³⁹¹ This footnote is significant because several Justices posed questions during oral argument that focused on the absence of any statutory basis for the SEC to seek disgorgement as an equitable remedy in civil actions.³⁹² The SEC has clear statutory authority under 18 U.S.C. § 3571 to seek disgorgement from convicted defendants,³⁹³ but there is no obvious statutory authority for disgorgement from a company that the government has declined to prosecute.³⁹⁴ Thus, it may be only a

³⁸⁷ *Kokesh v. SEC*, 137 U.S. 1635, 1645 (2017).

³⁸⁸ 28 U.S.C. § 2462 (2018).

³⁸⁹ See Matthew T. Martens et al., *Why Kokesh Really Matters*, LAW360 (Sept. 22, 2017, 11:26 AM), <https://www.law360.com/articles/966419/why-kokesh-really-matters> (“[T]he SEC each year obtains orders for disgorgement in amounts that far outstrip ordered monetary penalties.”).

³⁹⁰ Bennett et al., *supra* note 348 (“[O]nly on rare occasions will companies facing an SEC enforcement action have a viable statute-of-limitations argument.”); Lucinda Low, Tom Best & Jessica Megaw, *In the Wake of Kokesh v. SEC: Whither Disgorgement in FCPA Cases*, STEPTOE & JOHNSON LLP (July 13, 2017), <http://www.steptoelaw.com/publications-12058.html>. *But cf.* Michael Skopets & Marc Bohn, *A Summer Update on FCPA: Part 2*, LAW360 (Aug. 15, 2017, 12:12 PM), <https://www.law360.com/articles/953425/a-summer-update-on-fcpa-part-2> (noting that more than one-quarter of the FCPA investigations closed by the DOJ and SEC during the period 2006 to 2017 lasted five years or more).

³⁹¹ *Kokesh*, 137 U.S. at 1640 n.3.

³⁹² Alex Young K. Oh & Mark F. Mendelsohn, *Kokesh Raises Questions About Declinations with Disgorgement Under the FCPA Pilot Program*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 15, 2017), <https://corpgov.law.harvard.edu/2017/07/15/kokesh-raises-questions-about-declinations-with-disgorgement-under-the-fcpa-pilot-program>.

³⁹³ This statute allows the DOJ to seek fines, including twice the gross gain to the defendant from the offense, or twice the pecuniary loss to a victim, from defendants who have been “found guilty of an offense.” 18 U.S.C. § 3571(a), (d) (2018).

³⁹⁴ See Oh & Mendelsohn, *supra* note 392 (“[T]here is no indication in [18 U.S.C.

matter of time before federal courts rule that such disgorgement is disallowed.³⁹⁵ *Kokesh* did not involve the FCPA or the DOJ, but if federal courts hold that the SEC cannot seek disgorgement as a remedy in declination cases then it is probable that the DOJ would be similarly barred in FCPA cases. In this scenario, most cases that would have been resolved as declinations with disgorgement under the Pilot Program instead will be resolved with DPAs or NPAs.³⁹⁶

Even if declinations with disgorgement are permissible, *Kokesh* still may have ramifications for FCPA enforcement. The specific holding of *Kokesh* probably does not apply to the DOJ, because federal prosecutors can toll the FCPA's five-year statute of limitations while they seek evidence abroad.³⁹⁷ Under 18 U.S.C. § 3292 the DOJ may suspend the statute for a period of up to three years, with court approval,³⁹⁸ and the DOJ has often exercised this option during FCPA investigations.³⁹⁹ Nevertheless, *Kokesh* still may impact FCPA enforcement in several respects: (1) the SEC (and possibly the DOJ) will either abandon ongoing investigations where the conduct in question falls outside the five-year limitations period or seek tolling agreements with cooperating companies at the start of most FCPA

§ 3571] — or in any other federal statutes — that this alternative fines provision can be triggered against a company whom DOJ is declining to prosecute.”).

³⁹⁵ See Martens et al., *supra* note 389 (“*Kokesh* didn’t just limit the availability of disgorgement in federal court, it eliminated it. No court has so held as of yet, but it is only a matter of time.”).

³⁹⁶ There is an alternative scenario. In *Kokesh* the Supreme Court treated disgorgement as a penalty in large part because the funds were ultimately paid to the United States Treasury, rather than to the victims of the crimes. *Kokesh*, 137 U.S. at 1645. The SEC could surmount this obstacle by structuring a disgorgement sanction so that the funds do go to the victims. See SHEARMAN & STERLING, LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 14 (July 2017), <http://www.shearman.com/~media/Files/NewsInsights/Publications/2017/07/Shearman—Sterlings-Recent-Trends-and-Patterns-in-the-Enforcement-of-t.pdf> [hereinafter RECENT TRENDS AND PATTERNS 2017].

³⁹⁷ Kara Novaco Brockmeyer et al., *U.S. Supreme Court’s Ruling on Disgorgement Has Broad Implications for FCPA Matters*, 8 FCPA UPDATE, June 2017, at 4, https://www.debevoise.com/~media/files/insights/publications/2017/06/fcpa_update_june_2017a.pdf (“Although *Kokesh* limits SEC disgorgement, it does not impact the DOJ, which has the ability to suspend its five-year statute of limitations . . .”).

³⁹⁸ See 28 U.S.C. § 3292(c)(1) (2018); Steven R. Glaser & Maria Cruz Melendez, *Statute of Limitations on Obtaining Evidence in Foreign Jurisdictions*, N.Y. L.J., Feb. 16, 2010, at 1, https://files.skadden.com/sites%2Fdefault%2Ffiles%2Fpublications%2FPublications1986_0.pdf.

³⁹⁹ See, e.g., Richard L. Cassin, *DOJ Declinations for Newmont Mining*, FCPA BLOG (July 26, 2017, 7:28 AM), <http://www.fcpablog.com/blog/2017/7/26/doj-declination-for-newmont-mining.html> (noting 2016 tolling agreement entered into between Newmont Mining Corporation, DOJ, and SEC).

investigations that are expected to be lengthy⁴⁰⁰ — and companies will seek to narrow or tailor such agreements;⁴⁰¹ (2) the DOJ may seek disgorgement that the SEC would be time-barred under *Kokesh* from seeking;⁴⁰² and (3) parties whose misconduct occurred primarily beyond the statute of limitations may be reluctant to self-report, knowing that the DOJ's disgorgement authority will not be limited.⁴⁰³

4. Deconfliction of Investigations

Another early objection to the Pilot Program focused on its deconfliction provision, pursuant to which companies might be expected to halt internal investigations to permit the DOJ to interview employees before the company does so. The number of deconfliction requests by the DOJ increased following the inception of the Program.⁴⁰⁴ One example involves Teva Pharmaceuticals Industries — the world's largest manufacturer of generic pharmaceutical products. In December 2016, Teva resolved FCPA enforcement actions with the DOJ and SEC for a combined \$519 million, in connection with the company's bribery of foreign officials in Russia, Ukraine, and Mexico.⁴⁰⁵ The DOJ cited Teva's willingness to defer witness

⁴⁰⁰ See Andrew M. Lawrence et al., *Supreme Court Applies Statute of Limitations to SEC Disgorgement Orders*, SKADDEN (June 6, 2017), <https://www.skadden.com/insights/publications/2017/06/supreme-court-applies-statute-of-limitations> (positing post-*Kokesh*, SEC staff will “request tolling agreements in any investigation that is expected to continue for a significant amount of time”).

⁴⁰¹ See Brockmeyer et al., *supra* note 397, at 4.

⁴⁰² *Id.* at 5 (“We can envision a situation where a company is required to disgorge profits from Years 1–5 to the SEC and Years 6–8 to the DOJ.”).

⁴⁰³ See RECENT TRENDS AND PATTERNS 2017, *supra* note 396, at 13 (“*Kokesh* will almost inevitably factor into companies' decisions of whether to voluntarily disclose misconduct. In theory, although not advisable, a company could withhold information regarding misconduct from the SEC until the statute of limitations period expired to avoid liability.”); Rebecca Gantt, *U.S. Supreme Court Indirectly Limits Important Component of DOJ's FCPA Pilot Program*, MCGUIREWOODS: SUBJECT TO INQUIRY (June 7, 2017), <http://www.subjecttoinquiry.com/enforcement-and-prosecution-policy-and-trends/u-s-supreme-court-indirectly-limits-important-component-of-doj-s-fcpa-pilot-program/#page=1>.

⁴⁰⁴ Lanny A. Breuer & Mark T. Finucane, *DOJ 'Deconfliction' Requests: Considerations and Concerns*, LAW360 (Mar. 1, 2017, 1:52 PM), <https://www.law360.com/articles/897040/doj-deconfliction-requests-considerations-and-concerns>.

⁴⁰⁵ See Press Release, U.S. Dep't of Justice, *Teva Pharmaceuticals Industries Ltd. Agrees to Pay More than \$283 Million to Resolve Foreign Corrupt Practices Act Charges* (Dec. 22, 2016), <https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt>.

interviews to deconflict with the Fraud Section's investigation as a relevant consideration in the company's three-year DPA, which required the appointment of an independent compliance monitor.⁴⁰⁶ The strategic rationale for the Fraud Section's invasive deconfliction requests appeared to be that company counsel "will educate or prepare witnesses in a manner that will disadvantage the government."⁴⁰⁷ This rationale may be valid, but deconfliction raises a number of thorny issues. First, deconfliction may be inconsistent with the fiduciary duty of oversight owed by a deconflicting company's officers and directors.⁴⁰⁸ Second, deconfliction may impair a company's ability to comply with its other regulatory obligations. An example is the obligation of financial institutions to file Suspicious Activity Reports with the Financial Crimes Enforcement Network following a suspected incident of money laundering or fraud, pursuant to the Bank Secrecy Act.⁴⁰⁹ Violations of that statute can constitute both civil and criminal offenses,⁴¹⁰ so deconfliction may have the unintended consequence of increasing exposure to criminal liability. Third, deconfliction may significantly impede the ability of external counsel to conduct internal investigations and provide informed legal advice to their corporate clients.⁴¹¹

To summarize, the FCPA Pilot Program was flawed, but it proved effective in encouraging self-disclosure, cooperation, and remediation, in exchange for flexibility in charging decisions and leniency at sentencing.⁴¹² The Pilot Program was designed to implement the Yates Memorandum in the specific context of FCPA enforcement and the Memorandum was designed to increase individual accountability for corporate crimes. Did the Program accomplish its objective of increasing individual accountability for FCPA violations, by emphasizing individual enforcement actions? Early results were inconclusive. In 2016, the DOJ charged eight individuals with FCPA criminal violations.⁴¹³ During the five-year period of 2011 to 2015, the

⁴⁰⁶ See RECENT TRENDS AND PATTERNS 2017, *supra* note 396, at 24.

⁴⁰⁷ Breuer & Finucane, *supra* note 404.

⁴⁰⁸ *Id.*

⁴⁰⁹ United States Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114-2.

⁴¹⁰ See 31 U.S.C. § 5322 (2018) (establishing criminal liability for willful violations of requirement that financial institutions establish and maintain adequate anti-money laundering systems).

⁴¹¹ Breuer & Finucane, *supra* note 404.

⁴¹² Sloane et al., *supra* note 380.

⁴¹³ Mike Koehler, *A Focus on Individual Actions*, FCPA PROFESSOR (Jan. 26, 2017), <http://fcpprofessor.com/focus-doj-individual-actions>.

DOJ charged a total of forty-two individuals with FCPA criminal violations, or an annual average of approximately eight.⁴¹⁴ While there was no change in this metric in 2016 (the year the Pilot Program was adopted),⁴¹⁵ the Program was not operational long enough to draw definitive conclusions, especially given the standard long duration of FCPA investigations.

Other metrics were somewhat more encouraging. The Program was designed to increase individual accountability by providing increased transparency and thereby encouraging self-disclosure. The extent to which transparency increased is subject to debate. The Program did provide the DOJ's first quantification of the benefits attaching to self-disclosure, cooperation, and remediation in FCPA cases. If a company accomplished all three tasks it might receive a 50% reduction off the bottom of the fine range set forth in the Sentencing Guidelines. However, the primary factor determining a company's financial penalty in federal fraud cases is not the reduction — it is the base fine established by the Guidelines, which represents either the loss or unlawful gain in the case.⁴¹⁶ Determining the base fine in FCPA cases typically requires calculating the net final benefit received from the bribes paid to the foreign officials, and this calculation is unscientific and often opaque.⁴¹⁷ In short, the Program's increased transparency may be overstated.

Nevertheless, self-disclosures increased. While thirteen companies self-disclosed the year before the Pilot Program was implemented, that number increased to twenty-two in the first year of the Program.⁴¹⁸ The Fraud Section probably could have bumped the incidence of self-disclosure even higher. Companies that cooperated and remediated

⁴¹⁴ *Id.*

⁴¹⁵ See Kristen Savelle, *FCPA Criminal Prosecutions One Year After the Yates Memo*, WALL ST. J.: RISK & COMPLIANCE J. (Oct. 7, 2016, 6:00 AM), <https://blogs.wsj.com/riskandcompliance/2016/10/07/fcpa-criminal-prosecutions-one-year-after-the-yates-memo> (suggesting that FCPA individual prosecutions will increase in future years as DOJ incorporates directives of Yates Memorandum into its policies and procedures).

⁴¹⁶ Robert Anello, *FCPA Pilot Program: Missing the Big Picture*, FORBES (May 5, 2016, 1:08 PM), <https://www.forbes.com/sites/insider/2016/05/05/fcpa-pilot-program-missing-the-big-picture/#1ff98f362239>.

⁴¹⁷ *Id.*; *DOJ Pilot Program*, *supra* note 317, at 3 (“The significance of any set percentage ‘discount’ is therefore limited by the awkward reality that profits, loss, pervasiveness, duration, and other factual issues critical to the [base] calculation are often difficult to determine with any degree of certainty.”).

⁴¹⁸ Trevor N. McFadden, Acting Principal Deputy Attorney Gen., U.S. Dep't of Justice, Speech at American Conference Institute's 7th Brazil Summit on Anti-Corruption (May 24, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american>.

without self-reporting were eligible to receive 50% of the penalty reduction granted to firms that did self-report. Numerous firms might have decided that this significant reduction more than offset the enhanced liability risk stemming from self-reporting undetected FCPA violations. The Fraud Section could have favorably modified the reward/risk calculus by expressly mandating self-reporting as a condition for obtaining a declination or NPA.⁴¹⁹ This would have more closely harmonized with the SEC's Enforcement Division, which generally will not recommend a DPA or NPA for a company absent both self-reporting and significant cooperation.⁴²⁰ Of course, there is a natural upper limit to self-disclosures. FCPA violations differ substantially on various dimensions — nature (bribery or accounting), magnitude, recidivism, scope (systemic or isolated), and level of executive involvement. It may be unwise for a company to self-disclose misconduct, as a function of these factors.⁴²¹

5. The DOJ Makes the Pilot Program Permanent

The 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.⁴²² The Program's prospects were uncertain during the review period, notwithstanding the benefits discussed above. Following the November 2016 presidential election many commentators predicted that Trump's DOJ would relax enforcement of the FCPA,⁴²³ but this was far from a uniform view.⁴²⁴ 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."⁴²⁵ Additional statements by

⁴¹⁹ See Arlen, *supra* note 363.

⁴²⁰ See Claudius O. Sokenu et al., *To Self-Report or Not to Self-Report Under New FCPA Pilot*, LAW360 (May 5, 2016, 1:23 PM), <https://www.law360.com/articles/792157/to-self-report-or-not-to-self-report-under-new-fcpa-pilot>.

⁴²¹ See *id.*

⁴²² See Jody Godoy, *DOJ to 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>.

⁴²³ 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>.

⁴²⁴ See *id.* ("We remain skeptical that FCA enforcement will wane . . .").

⁴²⁵ 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>.

Sessions and other DOJ officials suggested that FCPA enforcement would remain a priority in the Trump administration.⁴²⁶ These statements did not bear early fruit. In 2017 there were thirty-nine FCPA enforcement actions by the DOJ and SEC, compared with fifty-three in 2016, twenty in 2015, twenty-six in 2014, twenty-seven in 2013, and twenty-three in 2012,⁴²⁷ but very few of the 2017 actions began after Trump took office. Indeed, between January 21 and December 31, 2017, the DOJ and SEC resolved a mere five corporate FCPA cases.⁴²⁸ Some observers interpreted this development as reflective of a “strategic pivot away from aggressive enforcement towards voluntary self-disclosure and settlement as the preferred means of enforcing the FCPA.”⁴²⁹

The foregoing interpretation received a boost when the DOJ announced in November 2017 that it had implemented a permanent revised version of the eighteen-month FCPA Pilot Program in the form of a new FCPA Corporate Enforcement Policy (“FCPA Policy”).⁴³⁰ This new policy was incorporated into the USAM,⁴³¹ pursuant to the DOJ’s new approach — announced in October 2017 — of consolidating and codifying corporate enforcement policies in official sources.⁴³² The FCPA Policy largely tracks the elements of the Pilot Program, including the enshrinement of such features as declinations with disgorgement and the deconfliction of internal investigations.⁴³³ However, the FCPA Policy also includes four key changes — all of

⁴²⁶ See Andrew M. Levine & Dana Roizen, *DOJ and SEC Officials Signal that Active FCPA Enforcement Will Continue Under Trump Administration*, FCPA UPDATE 10 (May 2017), <http://www.debevoise.com/insights/publications/2017/05/fcpa-update-may-2017> (“Recent public statements from senior DOJ officials indicate that the Obama administration’s focus on active investigation and criminal prosecution of FCPA violations will likely continue under the Trump administration.”).

⁴²⁷ F. Joseph Warin et al., *2017 Year-End FCPA Update*, GIBSON DUNN (Jan. 2, 2018), <https://www.gibsondunn.com/2017-year-end-fcpa-update>.

⁴²⁸ *FCPA 2017 Year in Review*, JONES DAY (Jan. 2018), <http://www.jonesday.com/fcpa-2017-year-in-review-01-31-2018>.

⁴²⁹ Steven M. Witzel & Arthur Kutoroff, *FCPA Standstill*, N.Y. L.J. (Sept. 6, 2017, 2:05 PM), <https://www.law.com/newyorklawjournal/almID/1202797372471/?slreturn=20171117013509>.

⁴³⁰ Rod Rosenstein, Deputy Attorney Gen., U.S. Dep’t of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>.

⁴³¹ See UNITED STATES ATTORNEYS’ MANUAL, *supra* note 22, § 9-47.120.

⁴³² See *supra* text accompanying note 90.

⁴³³ See UNITED STATES ATTORNEYS’ MANUAL, *supra* note 22, § 9-47.120.3(c).

which are designed to create additional incentives for corporations to voluntarily self-report FCPA violations to the DOJ.

First, when a company meets the DOJ's expectations with respect to a voluntary self-disclosure (including full cooperation and timely and appropriate remediation), there will be a presumption that the matter will be resolved with a declination.⁴³⁴ This differs from the Pilot Program, which merely instructed prosecutors to consider issuing a declination to companies meeting the same conditions. The new presumption is not a guarantee of a declination, and companies will not receive a declination if there are aggravating circumstances related to the nature and seriousness of the offense. Aggravating circumstances include, but are not limited to, "involvement by executive management of the company in the misconduct, a significant profit to the company from the misconduct, pervasiveness of the misconduct within the company, and criminal recidivism."⁴³⁵ This non-exhaustive list may end up swallowing the presumption.

Second, if a company voluntarily discloses wrongdoing and satisfies all other requirements, but there are aggravating circumstances, the DOJ will still recommend a 50% reduction off the low end of the Sentencing Guidelines — except in the case of criminal recidivists.⁴³⁶ The Pilot Program provided less certainty, by allowing prosecutors to award *up to* a 50% reduction, but uncertainty remains. The FCPA Policy does not explicitly state that a recidivist is ineligible for a discount of up to 25%, it does not specify whether a "criminal recidivist" refers to a company that previously violated the FCPA or committed some other crime,⁴³⁷ and it provides a non-exhaustive list of aggravating circumstances.

Third, the FCPA Policy provides additional details regarding how the DOJ evaluates an appropriate anti-corruption compliance program.

⁴³⁴ See *id.* § 9-47.120.1. Such a presumption has been described as "unprecedented." See SHEARMAN & STERLING, LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 19 (Jan. 2018), <https://www.shearman.com/-/media/Files/Perspectives/2018/01/January-2018-FCPA-Digest-Recent-Trends.pdf?la=en&hash=1D8B46F8B2855CD7D3B2E43CD4E9A5AC0DB570BE> [hereinafter RECENT TRENDS AND PATTERNS 2018].

⁴³⁵ UNITED STATES ATTORNEYS' MANUAL, *supra* note 22, § 9-47.120.1.

⁴³⁶ *Id.*

⁴³⁷ See RECENT TRENDS AND PATTERNS 2018, *supra* note 434, at 19-20 ("It is not clear whether the DOJ will consider only prior FCPA cases, or whether criminal cases in other contexts will result in a company being considered a recidivist, a question that could be of particular importance for financial institutions that in recent years have been penalized in a number of criminal matters (e.g., money laundering and sanctions).").

Consistent with the Pilot Program, the FCPA Policy provides that prosecutors should consider a company's compliance program when evaluating whether the company engaged in timely and appropriate remediation.⁴³⁸ The FCPA Policy provides more detail than the Pilot Program, by identifying eight core elements of an effective compliance program. These include fostering a culture of compliance, dedicating sufficient resources to compliance activities, and ensuring that experienced compliance personnel have appropriate access to management and the board of directors.⁴³⁹

Fourth, the DOJ will publicize all declinations with disgorgement — and possibly even declinations without disgorgement — awarded under the FCPA Policy.⁴⁴⁰ The release of declination letters had expanded under the Pilot Program, but this development maximizes publicity.

The new FCPA Policy reinforces the focus of the Yates Memorandum on investigating and penalizing individual wrongdoers. Many of the Policy's requirements revolve around companies identifying and furnishing evidence to the DOJ that could be used to support the prosecution of individuals.⁴⁴¹ The FCPA Policy also reflects the DOJ's belief that the FCPA Pilot Program successfully incentivized and rewarded companies that voluntarily disclosed misconduct. Indeed, voluntary disclosures increased more than 50% during the Pilot Program's tenure, compared with the prior eighteen-month period.⁴⁴² The FCPA Policy builds upon the Program's success and makes some key improvements, as noted above. Another revision, likely made in response to common criticism of the Pilot Program, is that deconfliction requests "will be made for a limited period of time

⁴³⁸ UNITED STATES ATTORNEYS' MANUAL, *supra* note 22, § 9-47.120.3(c).

⁴³⁹ *Id.*

⁴⁴⁰ *See id.* § 9-47.120.4.

⁴⁴¹ *See Pilot Program No Longer: DOJ Makes FCPA Pilot Program Permanent Policy*, VINSON & ELKINS (Nov. 30, 2017), <https://www.velaw.com/Insights/Pilot-Program-No-Longer—DOJ-Makes-FCPA-Pilot-Program-Permanent-Policy>; *see also* David W. Brown et al., *DOJ Issues New FCPA Corporate Enforcement Policy*, PAUL WEISS, Nov. 30, 2017, at 1, <https://www.paulweiss.com/media/3977501/30nov17-doj.pdf> (describing the new FCPA Policy as a "redoubled effort to bring criminal prosecutions against individual offenders"); *cf.* RECENT TRENDS AND PATTERNS 2018, *supra* note 434, at 20 ("[T]he Policy essentially calls upon companies to provide the government with a case on a silver platter, including evidence that the government might never have discovered, or, if it did discover it, might not have easily acquired, or, if it did acquire it, might not be able to use in court.").

⁴⁴² *See* Rosenstein, *supra* note 430.

and will be narrowly tailored to a legitimate investigative purpose.”⁴⁴³ Moreover, once the justification dissipates, the DOJ will notify the deconflicting company that it is lifting its request.⁴⁴⁴ The FCPA Policy makes clear that cooperation credit is not predicated on a waiver of attorney-client privilege or work product protection.⁴⁴⁵ Finally, while the FCPA Policy retains the Pilot Program’s definitions, the former provides additional clarity by defining “declinations” to mean those cases “that would have been prosecuted or criminally resolved except for the company’s voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution.”⁴⁴⁶ Restated, declinations under the FCPA Policy exclude cases not brought for other reasons, such as lack of jurisdiction, expiration of the statute of limitations, or inability to prove the FCPA violation beyond a reasonable doubt.⁴⁴⁷

Nothing in the FCPA, the FCPA Pilot Program, or the FCPA Policy requires companies to voluntarily self-disclose, cooperate, or remediate FCPA violations. However, the Pilot Program provided incentives to do so, and the FCPA Policy amplifies those incentives. Still, the calculus for companies remains difficult, for multiple reasons. First, the FCPA Policy applies only to DOJ criminal prosecutions and does not bind the SEC, which expressly opted out of the Pilot Program⁴⁴⁸ and does not regard a DOJ declination as a bar to its own enforcement action.⁴⁴⁹ Second, information that companies voluntarily disclose to the DOJ may be shared with foreign regulators, who are not required to furnish the same benefits arising under the FCPA Policy.⁴⁵⁰ This is significant, because international cooperation is a prominent feature of modern FCPA enforcement. In 2016, for example, more

⁴⁴³ UNITED STATES ATTORNEYS’ MANUAL, *supra* note 22, § 9-47.120.4.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ Charles E. Duross et al., *Building on Pilot Program, DOJ Announces New FCPA Corporate Enforcement Policy*, MORRISON & FOERSTER (Dec. 4, 2017), <https://www.mofo.com/resources/publications/171204-doj-new-fcpa-policy.html>.

⁴⁴⁸ *DOJ Expands and Codifies Policy Incentivizing Corporations to Voluntarily Self-Disclose FCPA Violations*, LATHAM & WATKINS: CLIENT ALERT COMMENTARY, no. 2250, Nov. 30, 2017, at 3, <https://www.lexology.com/library/document.ashx?g=30be319e-a228-4835-883d-a624dc90e79c> [hereinafter *DOJ Expands and Codifies*].

⁴⁴⁹ *Rosenstein Announces Permanent FCPA “Pilot Program,” Presumption of Declination When Self-Reporting, but Difficult Choices Remain*, ROPES & GRAY (Dec. 5, 2017), <https://www.ropesgray.com/newsroom/alerts/2017/12/Rosenstein-Permanent-FCPA-Pilot-Program-Presumption-Declination-Self-Reporting-Difficult-Choices.aspx>.

⁴⁵⁰ *DOJ Expands and Codifies*, *supra* note 448.

than 40% of FCPA enforcement actions brought by the DOJ and SEC involved international cooperation.⁴⁵¹ Accordingly, companies self-reporting under the FCPA Policy incur the substantial risk that their disclosures will trigger overseas enforcement. Third, the DOJ still retains considerable discretion to reward companies seeking to take advantage of the Policy's benefits. As noted, the presumption of declination is rebuttable in the case of aggravating circumstances, and the application of the relevant factors no doubt will be highly case-specific.⁴⁵²

B. Export Control 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 ("NSD Guidance").⁴⁵³ As described below, it is substantially similar to the FCPA Pilot Program. The Guidance confirms the NSD's expanded commitment to criminal enforcement of export control and sanctions laws and seeks to encourage business organizations to self-disclose, cooperate, and remediate in DOJ investigations of criminal violations of such laws. The document — which is particularly relevant to federal government contractors — applies the Yates Memorandum to NSD investigations and thus further institutionalizes the Memorandum. The NSD Guidance specifically states that one of its primary purposes is to implement the Yates Memorandum.⁴⁵⁴

Export control and economic sanctions are widely regarded as indispensable weapons in the United States foreign policy arsenal.⁴⁵⁵

⁴⁵¹ OECD WORKING GRP. ON BRIBERY, 2016 DATA ON ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION: SPECIAL FOCUS ON INTERNATIONAL CO-OPERATION 8 (Nov. 2017), <http://www.oecd.org/daf/anti-bribery/Anti-Bribery-Convention-Enforcement-Data-2016.pdf>.

⁴⁵² See, e.g., *DOJ Releases FCPA Corporate Enforcement Policy*, CLEARY GOTTlieb, Dec. 1, 2017, at 1, <https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/2017/publications/alert-memos/doj-releases-fcpa-corporate-enforcement-policy-12-1-17.pdf> (noting that the FCPA Policy leaves the DOJ "with considerable leeway in assessing key threshold questions for eligibility even for companies that do self-report").

⁴⁵³ 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 (2016), <https://www.justice.gov/nsd/file/902491/download> [hereinafter DOJ GUIDANCE].

⁴⁵⁴ See *id.*

⁴⁵⁵ Jeremy Zucker et al., *Recent Developments and Trends in Economic Sanctions and*

Exports of sensitive equipment, software, and technology are primarily controlled by the Arms Export Control Act (“AECA”),⁴⁵⁶ the International Emergency Economic Powers Act (“IEEPA”),⁴⁵⁷ and regulations promulgated thereunder. Multiple federal regulatory agencies are charged with enforcing export control and economic sanctions, including the Office of Foreign Assets Control (“OFAC”) within the Treasury Department (which enforces sanctions requirements),⁴⁵⁸ the Bureau of Industry and Security (“BIS”) within the Commerce Department (which enforces dual-use export control),⁴⁵⁹ and the Directorate of Defense Trade Controls (“DDTC”) within the State Department (which handles defense trade matters).⁴⁶⁰ Criminal enforcement jurisdiction has been given to the NSD,⁴⁶¹ which brought charges in approximately sixty cases in 2015.⁴⁶²

The NSD Guidance recognizes that companies typically self-disclose violations of the AECA and IEEPA to OFAC, BIS, and DDTC, but it also encourages companies that identify willful and therefore potentially criminal violations⁴⁶³ to self-disclose to NSD. The Guidance does not apply to financial institutions, by virtue of their unique compliance and reporting obligations.⁴⁶⁴ It provides that a company that (1) voluntarily self-discloses the wrongdoing at issue to NSD’s Counterintelligence and Export Control Section (“CES”), (2) cooperates fully with CES, and (3) engages in timely and appropriate remediation may be eligible for avoidance of an independent monitor,

Export Controls Enforcement and Expected Changes Ahead, BLOOMBERG INT’L TRADE DAILY BULL., Jan. 27, 2017, at 2.

⁴⁵⁶ Act of June 30, 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified as amended at 22 U.S.C. § 2278 (2018)).

⁴⁵⁷ Act of Dec. 28, 1977, Pub. L. No. 95-223, 91 Stat. 1626 (codified as amended at 50 U.S.C. § 1705 (2018)).

⁴⁵⁸ See *About*, U.S. DEP’T TREASURY, <https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx> (last visited Dec. 18, 2017).

⁴⁵⁹ See *Enforcement*, U.S. DEP’T COMMERCE: BUREAU INDUSTRY & SECURITY, <https://www.bis.doc.gov/index.php/enforcement> (last visited Dec. 18, 2017).

⁴⁶⁰ See *Compliance*, U.S. DEP’T STATE: DIRECTORATE DEF. TRADE CONTROLS, <https://www.pmddtc.state.gov/compliance/index.html> (last visited Dec. 18, 2017).

⁴⁶¹ See *About the Division*, U.S. DEP’T JUST., <https://www.justice.gov/nsd/about-division> (last visited Dec. 18, 2017).

⁴⁶² Zucker et al., *supra* note 455, at 5.

⁴⁶³ See *Bryan v. United States*, 524 U.S. 184, 204 (1998); Mary Carter Andruus, *Update on Intent Standard for Criminal Export Violations*, LAW360 (Feb. 28, 2014, 1:39 PM), <https://www.law360.com/articles/514358/update-on-intent-standard-for-criminal-export-violations>.

⁴⁶⁴ DOJ GUIDANCE, *supra* note 453, at 2 n.3.

reduced financial penalties (possibly limited to disgorgement and a diminished fine), and/or resolution of the matter with an NPA or DPA instead of a criminal plea.⁴⁶⁵

The NSD Guidance defines in detail NSD's criteria for most of these requirements,⁴⁶⁶ and explicitly states that companies failing to meet the applicable standards will be ineligible for the full credit offered.⁴⁶⁷ While the Yates Memorandum and the USAM set forth the threshold requirements for cooperation, the NSD Guidance sets forth an enhanced definition of full cooperation. Pursuant to the Yates Memorandum, companies are required to disclose information concerning involvement by the company's officers, employees, or agents in the alleged misconduct. Full cooperation under the NSD Guidance is broader and will require actions not typically involved in most disclosures to the agencies involved in administering the AECA and IEEPA. The NSD Guidance sets forth eleven required actions — as does the FCPA Guidance — including disclosure of all facts related to individuals' involvement in the criminal activity at issue, making company officers and employees available for interviews, and deconfliction of the company's internal investigation and the government's investigation.⁴⁶⁸

The NSD Guidance contemplates that companies will make voluntary self-disclosures of willful misconduct to CES. This is much easier said than done. Determining whether or not a violation of the AECA or IEEPA was willful is rarely simple. Very often debates between the government and private parties as to whether activity was criminal constitute the most contentious and extended aspects of investigations and settlement negotiations in export control and economic sanctions cases.⁴⁶⁹

The NSD Guidance, FCPA Guidance, and new FCPA Policy are subject matter specific manifestations of the Yates Memorandum. The NSD Guidance closely tracks the FCPA Guidance with respect to setting goals (increased prosecution of individuals); defining the voluntariness of a disclosure, full cooperation, and appropriate

⁴⁶⁵ *Id.* at 3.

⁴⁶⁶ *Id.* at 4-8.

⁴⁶⁷ *Id.* at 9.

⁴⁶⁸ *Id.* 5-6.

⁴⁶⁹ *US Department of Justice Guidance Seeks to Encourage Voluntary Self-Disclosure of Export Controls and Sanctions Violations*, LATHAM & WATKINS: CLIENT ALERT COMMENTARY, no. 2032, Nov. 14, 2016, at 4, <https://www.lw.com/thoughtLeadership/US-department-justice-guidance-voluntary-self-disclosure-export-controls-sanctions-violations> [hereinafter LATHAM & WATKINS].

remediation; and focusing on enhancement of corporate compliance programs as a condition of receiving rewards.⁴⁷⁰ One example of the close tracking is the requirement of investigatory deconfliction, which appears in both documents and remains a feature in the new FCPA Policy. As noted above, deconfliction may be problematic in FCPA cases.⁴⁷¹ The same is true with regard to export control and economic sanctions. Deconfliction could result in companies delaying disclosures to other regulatory agencies — such as OFAC and BIS — and delaying reports to boards of directors regarding the status of investigations.⁴⁷²

However, the NSD and FCPA Guidance have some key differences. First, even where full credit is allowed, the NSD Guidance — unlike the FCPA Pilot Program and the new FCPA Policy — 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 possible resolution, and relevant regulatory authorities may still bring civil enforcement actions.⁴⁷³ Second, the NSD Guidance — unlike its counterpart — lists aggravating circumstances that could lead to enhanced penalties for self-disclosing parties. Such circumstances include exports of items controlled for nuclear proliferation or missile technologies; exports of items known to be used in building weapons of mass destruction; exports to a terrorist organization; exports of military items to a hostile foreign power; corporate recidivism; knowing involvement of upper management in the criminal conduct; and significant profits from the criminal conduct, whether intended or realized.⁴⁷⁴ (Conversely, the new FCPA Policy does list aggravating circumstances that may rebut a presumption of declination.)⁴⁷⁵

The foregoing two differences probably primarily reflect the DOJ's perception that sticks (harsher penalties) should be emphasized in the trade controls arena — where this country's national security is at risk — whereas carrots (leniency) should be used to motivate self-

⁴⁷⁰ 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>.

⁴⁷¹ See *supra* text accompanying notes 408–11.

⁴⁷² Zucker et al., *supra* note 455, at 6.

⁴⁷³ DOJ GUIDANCE, *supra* note 453, at 8-9.

⁴⁷⁴ *Id.* at 8.

⁴⁷⁵ See *supra* text accompanying notes 434–35.

disclosure of FCPA violations.⁴⁷⁶ The differences also may reflect the DOJ's perspective that government contractors are gatekeepers of technology, software, and know-how.

Third, the NSD Guidance does not specify how soon after discovering a potential violation a company must self-disclose in order for the disclosure to be considered timely. The DOJ indicated that under the FCPA Pilot Program a disclosure was timely if made within three months of discovering an FCPA violation.⁴⁷⁷ CES may look to this provision and adopt a similar approach.⁴⁷⁸

Fourth, 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.⁴⁷⁹ As noted above, the Pilot Program provided up to a 50% penalty reduction for companies that voluntarily disclosed, cooperated, and remediated (and in most cases provided 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.⁴⁸⁰ The new FCPA Policy largely tracks the foregoing, but 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 factors the Division may consider in assessing cooperation by companies and individuals in the context of CFTC enforcement proceedings.⁴⁸¹ The January 2017 CFTC Enforcement Advisories — one for companies and one for individuals — were the first update to

⁴⁷⁶ See *Recent Developments in Enforcement of U.S. Export Controls and Sanctions Laws*, COVINGTON, Jan. 13, 2017, at 2, <https://www.cov.com/-/media/files/corporate/publications/2017/01/recentdevelopmentsinenforcementofusexportcontrolsandsanctionslaws.pdf>.

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

⁴⁷⁹ LATHAM & WATKINS, *supra* note 469.

⁴⁸⁰ See *supra* text accompanying notes 322–26.

⁴⁸¹ See U.S. COMMODITY FUTURES TRADING COMM'N, ENFORCEMENT ADVISORY: COOPERATION FACTORS IN ENFORCEMENT DIVISION SANCTION RECOMMENDATIONS FOR COMPANIES 1 (Jan. 19, 2017), <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf> [hereinafter COMPANIES ADVISORY]; U.S. COMMODITY FUTURES TRADING COMM'N, ENFORCEMENT ADVISORY: COOPERATION FACTORS IN ENFORCEMENT DIVISION SANCTION RECOMMENDATIONS FOR INDIVIDUALS 1 (Jan. 19, 2017), <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf> [hereinafter INDIVIDUALS ADVISORY].

the CFTC's corporate cooperation guidelines since 2007 and the Division's first statement of its policy specifically concerning cooperating individuals.

The January 2017 Advisories outlined four sets of factors the Division may use in evaluating a party's cooperation. They are the same for both the Companies and Individuals Advisories, with slight differences in the sub-factors. The four sets of factors are: (1) the value of the cooperation to the Division's investigation(s) or enforcement action(s); (2) the value of the cooperation in the context of the Division's broader law enforcement interests; (3) the balance of culpability and any history of misconduct against acceptance of responsibility and mitigation or remediation; and (4) any uncooperative conduct, including actions taken to mislead, obstruct, or delay the division's investigation.⁴⁸² The Advisories provide numerous examples of both cooperative and uncooperative conduct. The former includes the materiality of the cooperation to the investigation, the timeliness of the initial cooperation (including whether the issue was self-reported to the CFTC), the degree to which cooperation credit encourages high-quality cooperation from others, whether the cooperation represents a CFTC priority, the duration and egregiousness of the conduct, and for companies, the level of the organization at which the conduct occurred.⁴⁸³ The latter includes failing to respond to subpoenas and withholding or misrepresenting information.⁴⁸⁴ The consideration of the four sets of factors in a particular matter is subject to the discretion of the CFTC enforcement attorneys handling that matter.⁴⁸⁵

The January 2017 Advisories echoed the Yates Memorandum by emphasizing the identification of culpable individuals⁴⁸⁶ — which prior iterations of the Advisories did not — but unlike Yates they did not explicitly require a corporation to provide all relevant facts relating to these individuals as a prerequisite to qualify for any

⁴⁸² COMPANIES ADVISORY, *supra* note 481, at 2-7; INDIVIDUALS ADVISORY, *supra* note 481, at 2-5.

⁴⁸³ COMPANIES ADVISORY, *supra* note 481, at 2-6; INDIVIDUALS ADVISORY, *supra* note 481, at 2-4.

⁴⁸⁴ COMPANIES ADVISORY, *supra* note 481, at 6-7; INDIVIDUALS ADVISORY, *supra* note 481, at 5.

⁴⁸⁵ Paul Pantano, Jr. et al., *CFTC Cooperation Advisories Prescribe High Burdens — Has the Expectation of Above-and-Beyond Cooperation Across Federal Agencies Reached Its Apex?*, WILLKIE FARR & GALLAGHER LLP, Mar. 15, 2017, at 2, http://www.willkie.com/~media/Files/Publications/2017/03/CFTC_Cooperation_Advisories_Prescribe_High_Burdens.pdf.

⁴⁸⁶ *See id.*

cooperation credit.⁴⁸⁷ Instead, this was merely one factor that the CFTC might take into consideration.

The January 2017 Companies Advisory differed in at least three other key respects from the 2007 version. First, the Division will now assess the value of the company's cooperation with regard to both the effect of the cooperation on the Division's ability to prosecute a case against the company itself and the effect of the cooperation on the Division's ability to take action with regard to other actors. This likely reflects the CFTC's continued interest in prioritizing investigations of industry-wide market manipulation.⁴⁸⁸ Second, the January 2017 Advisory established that some misconduct will be so egregious that no cooperation credit will be granted.⁴⁸⁹ Third, whereas the 2007 Advisory suggested that the CFTC would reward companies if they avoided entering into joint defense agreements with their employees or other entities, the 2017 Advisory was silent on this issue.⁴⁹⁰

Unlike the FCPA Pilot Program and the new FCPA Policy the January 2017 Advisories failed to quantify the financial benefits that might attach to voluntary cooperation.⁴⁹¹ Indeed, the January 2017 Advisories provided "no assurance that a company providing a particular amount of credit will receive a particular amount of credit — or any credit — in return."⁴⁹² The failure of both the NSD Guidance and the 2017 CFTC Enforcement Advisories to provide clarity and transparency regarding the benefits companies can expect to receive in return for self-reporting information threatened to limit their effectiveness.⁴⁹³

⁴⁸⁷ *CFTC Releases New Enforcement Cooperation Guidelines*, LATHAM & WATKINS: CLIENT ALERT COMMENTARY, no. 2076, Feb. 14, 2017, at 2, <https://www.lw.com/thoughtLeadership/CFTC-new-enforcement-cooperation-guidelines>.

⁴⁸⁸ David Meister et al., *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>.

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ *CFTC's Demanding New Cooperation Guidelines for Companies and Individuals*, CLEARY GOTTlieb, Jan. 24, 2017, at 5, <https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/alert-memos/2017/alert-memo-201716.pdf>.

⁴⁹² Robert Houck et al., *CFTC Gives Guidance on Cooperation*, CLIFFORD CHANCE (Jan. 29, 2017), https://www.cliffordchance.com/briefings/2017/01/cftc_gives_guidanceoncooperation.html.

⁴⁹³ See, e.g., Meister et al., *supra* note 488 ("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.").

In September 2017, the CFTC altered its approach when it issued a further updated advisory that modified but did not supplant the January 2017 Advisories.⁴⁹⁴ This update contemplated a multistep process of self-reporting, cooperation, and remediation. Like the Yates Memorandum, it emphasized that voluntary self-reporting is independent of cooperation and clarified that in order to obtain full credit the disclosure of all relevant facts about the individuals involved in the misconduct is required.⁴⁹⁵ Voluntary disclosure is now the most significant driver in the program, in a nod to the CFTC's recognition of its limited enforcement resources. A disclosure is voluntary only if it predates an imminent threat of enforcement and is independent of any other legal duty, and self-reporting can lead to a more substantial penalty reduction than if there is merely cooperation.⁴⁹⁶

In other respects, the September 2017 update falls short. The update, like the January 2017 Advisories, failed to quantify the financial benefits that may attach to self-reporting and cooperation. In extraordinary circumstances the Division of Enforcement may recommend a declination — as where misconduct is pervasive across an industry and the company or individual is the first to self-report⁴⁹⁷ — but otherwise there is no formula or benchmark for calculating benefits.⁴⁹⁸ The failure to quantify is especially troublesome given that the cost of an investigation may exceed the penalty, further reducing the incentive to self-report.⁴⁹⁹

Like the FCPA Pilot Program and the new FCPA Policy, the NSD Guidance was designed to implement the Yates Memorandum.

⁴⁹⁴ See U.S. COMMODITY FUTURES TRADING COMM'N, ENFORCEMENT ADVISORY: UPDATED ADVISORY ON SELF REPORTING AND FULL COOPERATION 2-3 (Sept. 25, 2017), <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf> [hereinafter UPDATED ADVISORY].

⁴⁹⁵ See *id.*

⁴⁹⁶ *New CFTC Director of Enforcement Incentivizes Self-Reporting, Counts on 'Buy-in' from Market Participants*, KING & SPALDING: CLIENT ALERT, Sept. 27, 2017, at 1, <https://www.kslaw.com/attachments/000/005/371/original/ca092717.pdf?1506523427>.

⁴⁹⁷ See UPDATED ADVISORY, *supra* note 494, at 3.

⁴⁹⁸ See, e.g., Paul J. Pantano, Jr. et al., *CFTC Enforcement Division Dangles Self-Reporting Carrot: Is It Worth Taking a Bite?*, WILLKIE FARR & GALLAGHER LLP: CLIENT ALERT, Sept. 28, 2017, at 1-2, http://www.willkie.com/~media/Files/Publications/2017/09/CFTC_Enforcement_Division_Dangles_SelfReporting_Carrot_Is_it_worth_taking_a_bite.pdf (questioning whether the CFTC Enforcement Division's promise of undefined substantial penalty reductions provides sufficient incentive for companies to self-report).

⁴⁹⁹ See Douglas Yatter et al., *CFTC Self-Reporting Policy Leaves Open Several Questions*, LAW360 (Oct. 5, 2017, 6:25 PM), <https://www.law360.com/articles/966575/cftc-self-reporting-policy-leaves-open-several-questions>.

Historically, companies with potential export control or sanctions violations self-disclosed to OFAC, BIS, or DDTC, which rarely made criminal referrals to the DOJ.⁵⁰⁰ Referrals were made only in egregious cases.⁵⁰¹ Post-NSD Guidance, these criminal referrals are likely to spike, as the regulatory agencies seek to implement both the Guidance and the Yates Memorandum and to encourage companies to make separate self-disclosures to the CES.⁵⁰² Whether this incentive will suffice is an open question, given the failure of the NSD Guidance to provide transparency regarding the quantitative benefits of such self-reporting. Indeed, it is possible the NSD Guidance's lack of transparency will be counterproductive. If, as expected, criminal referrals to the DOJ by OFAC, BIS, and DDTC increase, companies failing to perceive the benefit of self-disclosure will be increasingly reluctant to bring export control and sanctions violations to the attention of any federal agency. This reluctance may be amplified by two other factors. First, the hypothetical examples set forth in the NSD Guidance describe stringent resolutions of cases where corporations have cooperated.⁵⁰³ Second, whereas the NSD will be taking a much more active role in investigations of export control and economic sanctions violations, it may have less technical expertise than the regulatory agencies which historically have resolved these matters. OFAC, BIS, and DDTC have many years of experience in administering the applicable regulations for the AECA and IEEPA, but the NSD does not.

⁵⁰⁰ Lisa Prager et al., *DOJ's New Guidance for Voluntary Self-Disclosures of Willful Export Controls and Sanctions Violations*, 50 REV. SEC. & COMMODITIES REG. 53, 55-56 (Mar. 8, 2017), <https://www.hklaw.com/files/Uploads/Documents/Articles/PragerCovingtonCourtRSCRFinal.pdf>.

⁵⁰¹ Judith A. Lee & Kin L. Yoo, *DOJ's New Guidance Urges Exporters to Self-Disclose Potential Export and Sanctions Violations: Disclosures to Regulatory Agencies Alone Not Enough for Maximum Credit*, GIBSON DUNN (Oct. 28, 2016), <https://www.gibsondunn.com/dojs-new-guidance-urges-exporters-to-self-disclose-potential-export-and-sanctions-violations>.

⁵⁰² Ed Krauland et al., *DOJ Sanctions and Export Controls Guidance Focuses on Companies, Parallels FCPA Pilot Program*, STEPTOE & JOHNSON LLP (Oct. 26, 2016), <http://www.steptoel.com/publications-11585.html> ("The net result will almost certainly be more criminal investigations and possibly prosecutions . . .").

⁵⁰³ John P. Barker et al., *Self-Disclosing Criminal Export Violations: The New Guidance*, LAW360 (Oct. 26, 2016, 2:26 PM), <https://www.law360.com/articles/855849/self-disclosing-criminal-export-violations-the-new-guidance>.

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 more than two years. 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. 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 paramount 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 FCPA Pilot Program proved effective in encouraging self-disclosure, cooperation, and remediation, in exchange for flexibility in charging decisions and leniency at sentencing. The success of the Pilot Program was recognized when the DOJ made the Program permanent, by adopting the FCPA Policy in November 2017. The basic format of the Pilot Program has been adopted in the area of export control and economic sanctions, and similar positive effects can be expected.

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 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 DOJ wisely retained the FCPA Pilot Program when it adopted the FCPA Policy. But the Policy also could benefit from some modifications, primarily by providing clarity as to how the DOJ determines the amount of a penalty reduction and how it calculates the amount of required disgorgement. In the area of export control and economic sanctions, the DOJ should consider adopting some

additional features of the FCPA Pilot Program and FCPA Policy. The NSD Guidance does not offer the possibility of a declination, specify how quickly a disclosure must be made in order to be timely, or quantify the savings a company can realize by self-disclosing, cooperating, and remediating. Nor does it permit companies to ascertain the credit NSD assigns specifically to each of the foregoing tasks. The NSD should consider adopting some of the FCPA Policy's approaches to these issues.