Post-Yates Memorandum: Crafting Internal Investigation Practices and Strategies for Interacting with the Government

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1. To qualify for ANY cooperation credit, corporations must provide ALL relevant facts relating to individual misconduct;

2. Criminal and Civil investigations should focus on individuals from the beginning;

3. Criminal and Civil attorneys should work together;

4. No deals that release culpable individuals when settling with the company;

5. Resolution of company must include plan to deal with individuals; and

6. Civil attorneys should focus on individuals without regard of ability to pay.
Yates Memorandum: September 2015

- Changes DOJ’s corporate prosecution guidelines
- Empowers and emboldens DOJ’s Civil Division attorneys
- Puts new pressures on the attorney-client privilege
Corporate Liability

- *Respondeat Superior*: civil concept applied to criminal law
- Corporations are responsible for the criminal acts of their employees acting:
  - Within the *apparent* or *actual* scope of their employment
  - If agents intend at least *in part* to benefit the company
  - Even if actions are *contrary* to corporate policy or express corporate order
- If an employee is guilty – the company is guilty
Corporate Charging Factors: USAM

- The nature and seriousness of the offense
- The pervasiveness of wrongdoing within the corporation
- The corporation’s history of similar misconduct
- The corporation’s timely and voluntary disclosure of wrongdoing and its cooperation
- The existence and effectiveness of the corporation’s pre-existing compliance program
- The corporation’s remedial actions
- Collateral consequences of an indictment
- Adequacy of individual prosecutions
- Adequacy of civil and regulatory remedies
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Prosecutorial Discretion

**Company A**
- Public Company
- Provides services to millions
- No criminal history
- 17,000 Employees
- Thousands of shareholders
- Vast compliance department
- No executives charged
- Millions in remedial measures
- 5 dead contractors

**Company B**
- Public Company
- Provides redundant medical devices
- No criminal history
- 100 employees
- Hundreds of shareholders
- One compliance officer
- Every top executive involved and 3 charged
- Few remedial measures
- Unapproved devices implanted in humans
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Enlists the Company as a co-investigator
Internal Investigations

- End the bad behavior
- Provide facts to determine whether there are any affirmative reporting obligations
- Insulate corporate decision makers from allegations of complicity
- Begin building a defense for future litigation
- Promote a culture of transparency and compliance
- Obtain evidence of cooperation to avoid allegations being expanded to the company
Attorney-Client Privilege: Principles of Federal Prosecutions of Business Organizations

• Thompson Memorandum 2003:
  – Cooperation by waiving attorney-client privilege

• McNulty Memorandum 2006:
  – Approval from US Attorney and Deputy Attorney General before making a waiver demand

• Filip Memorandum 2008:
  – No waiver required to get cooperation credit
  – No inquiry into payment of legal fees or existence of joint defense agreements
  – No requirement of culpable employee punishment

1. Communications between company counsel and employees are privileged

2. Company owns the privilege, not the employee, and can waive it

3. Result = “Corporate Miranda” Warning, or confusion as to roles and possible bar on disclosure
The Warnings

1. I represent the company, not you
2. I am conducting an interview to gather facts to provide legal advice to the company
3. Your communications with me are privileged, but that privilege belongs to the company
4. The company can elect to waive the privilege and disclose
5. You must not disclose it to 3rd parties aside from your attorney
Waiver

- **Was**: Company *may* want to waive the privilege in order to get credit for cooperation
- **Now**: Company *must* waive the privilege (in certain circumstances) in order to get credit for cooperation
Yates Memo: Practical Implications

- Changes *UpJohn* impact: more likely that you will be disclosing employee’s conduct to government
- Ripens conflict between company and employee: more liberal in securing counsel for the employee
- Lessens the likelihood that the individual will cooperate, even when required under employment handbook
- JDAs: will become more complicated and less likely
- Makes obtaining cooperation credit more difficult and could increase the number of companies being prosecuted
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5th Amendment

• Doesn’t apply to companies
• Previously used the attorney-client privilege to achieve the same results
• Companies are responsible for the actions of their employees
• Implicating employees to the government will give the government what it needs to charge the company
• Implicating employees will require waiver of attorney-client privilege
• The company is left to rely on appropriate credit for “complete cooperation” and prosecutorial discretion
Completeness

- To get credit “company must completely disclose to the Department all relevant facts about individual misconduct.”

- The Department will judge you by their investigation

- If you don’t have an individual to hand over, you will have to explain why

- Impossible standard to meet?
Selective Waiver

- **Doctrine of Selective Waiver**: Can corporation waive privilege as to government while preserving privilege against other parties based upon agreement with government?
  - Recognized by Eighth Circuit
  - Rejected by majority of Circuits
  - Second Circuit determines on case-by-case basis

- Assume third parties will get the information
- **FREvid 502(d)**: Court Order but only in litigation
Changes to Consider

- Continue with your investigations
- Maintain control over investigative files and communications
- Be more sensitive to the new conflict between company and employees
- Consider using outside counsel more often
- Scrutinize individual actions more fully
- Be more aware on what pressures the government will apply to avoid company liability
- Approach waiver even more cautiously than before
Presenters

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