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Four attorneys with BuckleySandler LLP discuss the impacts of the Yates Memorandum. The authors specifically examine two areas of concern for general counsel—planning for individuals with exposure and safeguarding constitutional rights—and they describe the benefits of identifying separate counsel in addressing those concerns.

# Has the Game Changed? New Considerations for General Counsel Post-Yates




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On Sept. 9, 2015, the Department of Justice (DOJ) issued a memorandum from Deputy Attorney General Sally Quillian Yates announcing that the DOJ would require a company to fully disclose all relevant facts about individuals responsible for the misconduct at issue in order to receive any cooperation credit in a criminal investigation or prosecution.

Under the so-called ''Yates Memo,'' a company will lose eligibility for any cooperation credit if it appears to be shielding any information about individual wrongdoers. The DOJ is now reportedly asking some companies to certify that they have fully disclosed all information about individuals involved in wrongdoing as a precondition to securing cooperation credit, though the DOJ has denied that written certifications will be a formal requirement in every case.

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The Yates Memo is not exactly a sea change, given the DOJ's focus in recent years on prosecuting individual executives for corporate misconduct. However, the new requirement that companies identify individual wrongdoers and turn over all evidence of their wrongdoing as a threshold condition for cooperation credit does change the calculus for general counsel overseeing internal investigations. Below, we describe two areas of concern for general counsel—planning for individuals with exposure and ensuring that no constitutional rights are violated—and describe the benefits of identifying separate counsel in addressing those concerns.

## Planning for Individuals with Exposure

Before the Yates Memo, an internal investigation's first steps often included interviewing key executives and employees potentially involved with the alleged misconduct to assess the scope of the issues and guide next steps in the investigation. The question of whether any of those individuals were culpable and faced expo-

sure was always present. But companies could typically avoid the question of whether those individuals needed their own counsel until the investigation was in its later stages and the government sought to conduct employee interviews. Now, however, the Yates Memo forces a company to consider its approach to dealing with potential individual liability even before beginning any interviews of key executives or employees.

Under the conventional wisdom, if the government rewards a company for identifying in detail executives or employees who engaged in misconduct, then the company may be well served to catch potential wrongdoers by surprise and interview them before they can evaluate exposure with their own counsel. This would be a disturbing result of the Yates Memo. It also may not serve the interests of companies or individuals, and may have constitutional implications as we discuss in more detail below.

Especially after the Yates Memo, it very well may be in a company's interest to identify at the outset the individuals with potential exposure and consider providing separate counsel for them early in the investigation. If an individual whose testimony and information will be significant for the investigation has met and prepared with counsel in advance of any internal interview, this will increase the likelihood that an employee's recollection is refreshed on the key issues, and that the information he or she provides is not inaccurate, incomplete, or misleading. All parties have an interest in gathering the most precise and accurate information in an internal investigation.

Ultimately, the Yates Memo clearly raises the stakes of internal investigations for companies and individuals, such that companies need to consider at the outset of an investigation what approach they will take with individuals potentially implicated in the investigation, and whether any of them should retain separate counsel. We are not suggesting that a company must retain separate counsel for every employee interviewed in an investigation; this could be costly, and may have other negative consequences, such as demoralizing employees who infer that the company sees them as culpable.

In some cases, it may be apparent which individuals should have separate counsel, such as investigations triggered by detailed whistle-blower complaints lodging allegations against specific executives. In other investigations, including those that focus on a broad range of the company's actions over an extended timeframe, it may take longer to determine whether any individuals face exposure. In either case, general counsel should now be thinking of a plan for dealing with individual liability from the beginning of any internal inquiry of potentially criminal conduct.

## Safeguarding Constitutional Rights

Another reason to consider separate counsel is to protect the constitutional rights of executives and employees. The Yates Memo certainly raised the stakes of internal investigations for the individuals involved in the conduct being investigated. Indeed, it may have raised the stakes too high without putting appropriate constitutional safeguards in place for individuals swept into internal investigations—for instance, for their Fifth Amendment right to remain silent in the face of questioning by law enforcement.

Under the Yates Memo, the government, more so than ever, outsources its investigation to the company. It asks the company to conduct a comprehensive and thorough investigation, and then turn over to the government all non-privileged information from the investigation, including all facts about individual culpability. In these circumstances, the company may be found to have engaged in ''state action,'' such that an employee's constitutional rights are at issue.

Courts find a company's cooperation with the government to constitute state action where there is a ''sufficiently close nexus'' between the government and the specific conduct at issue, such that the private conduct may be ''fairly treated'' as the government's conduct. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). Courts typically find this nexus where the government ''exercises coercive power'' or provides ''significant encouragement'' to the private actor; it is also sufficient if the private actor is a ''willful participant in joint activity'' with the government, ''has been delegated a public function,'' or is ''entwined with governmental policies.'' *United States v. Stein*, 541 F.3d 130, 147 (2d Cir. 2008). Some courts apply the ''instrument or agent'' test instead of, or in addition to, the ''sufficiently close nexus'' test. *See, e.g., United States v. Malbrough*, 922 F.2d 458 (8th Cir. 1990). Under that test, one can generally show state action if the government ''knew of and acquiesced in'' the conduct, and the private actor ''intended to assist law enforcement officials or to further [its] own ends.'' *Id.* at 462. Other considerations include whether there was a government reward or a specific government request. *Id.* In practice, the outcomes of both tests are generally the same.

**The Holy Grail.** Although courts have yet to rule on whether the Yates Memo specifically impacts the state action analysis, there is a substantial argument that it does. Cooperation credit is the Holy Grail—a company will be hard pressed to survive or come to a satisfactory resolution in a DOJ investigation without it—and the Yates Memo ensures that companies will now do more, and turn over more information to the government, in order to get it. Indeed, in a November 2015 speech at an American Banking Association conference, Yates herself acknowledged that even with the Yates Memo's heightened requirements, companies would likely continue to cooperate:

> I have a hard time imagining that it will truly be in a company's best interest to forego the substantial benefits accorded for cooperation solely to avoid having to provide all the facts about individual conduct. That would seem to be a particularly difficult call for the board of directors of a publicly traded company given the fiduciary duty to the shareholders.

Notably, for potential Foreign Corrupt Practices Act violations, the DOJ recently sweetened the pot in April 2016 with a new, one-year pilot program that promises up to a 50 percent reduction in criminal fines and other substantial benefits for companies that, among other things, voluntarily disclose all facts related to individual misconduct.

Before the Yates Memo, courts typically have not found companies to be state actors when cooperating with the government in internal investigations, even when those companies pressured employees to cooperate. *See, e.g.,* Order Denying Defendants' Motion to Suppress Defendants' Statements, *United States v. Carson*, No. 8:09-cr-00077 (C.D. Cal. May 22, 2012), ECF No. 774 (''Carson Order''). Likewise, courts typically

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have not found cooperating companies to be state actors when they pressured employees to participate in government proffer sessions. *See, e.g., United States v. Ferguson*, No. 3:06CR137, 2007 WL 4240782, at *6 (D. Conn. Nov. 30, 2007). In either case, the rationale was that the DOJ's cooperation policies were not inherently coercive, and the prosecutors were not sufficiently involved in the company's decision-making process. In *United States v. Ferguson*, for example, the court found that the Thompson Memorandum—an earlier DOJ memorandum that infamously based the extent of corporate cooperation credit on factors like the waiver of attorney-client privilege and the denial of attorney fee payments to culpable employees—did not inherently coerce the company into cooperating with the government. *See id.* The court further found that the company's pressure on its employees was merely ''a unilateral effort to avoid indictment,'' because the company did not ''seek government approval'' of its specific strategy. *Id.* at *5-6.

**Testing the Information.** However, after the Yates Memo, there is arguably nothing left for the government to do but test the information provided by the company. A company now ''must'' develop the entire case against any individuals—''regardless of their position, status or seniority''—and turn it over to the government to receive ''*any*'' cooperation credit. Yates Memo at 3 (emphasis in original). Further, while the *U.S. Attorneys' Manual* states that ''[e]xactly how and by whom the facts are gathered is for the corporation to decide,'' § 9-28.720(a), now that a cooperating company has to turn over ''all relevant facts,'' it will face increasing pressure to confer with its prosecutors and yield to the government's stance on strategy and tactics in how it conducts its internal investigation. Indeed, in a May 2016 speech at a New York City Bar Association conference, Deputy Attorney General Yates reiterated that ''if a company's counsel has questions regarding scope, they should do what many defense lawyers do now—contact the prosecutor directly and talk about it.''

Specifically in the Fifth Amendment context, courts in the past have not protected the rights of employees of private companies in internal investigations. *See, e.g.*, Carson Order. Because companies were typically not deemed state actors, a company was generally free to threaten to discipline or fire an employee who refused to answer questions by invoking the Fifth Amendment. By contrast, courts have long held that the government context is different: In its own internal investigations, the government cannot secure self-incriminating statements from its employees by threatening to fire them. *See Garrity v. New Jersey*, 385 U.S. 493 (1967). But now it is arguably more likely that a company will be deemed a state actor, and cannot prevent the assertion of Fifth Amendment rights, given that companies have to develop and turn over to the government all facts about culpable employees.

**Constitutional Implications.** Companies should be concerned about the constitutional implications of internal investigations because, as a general matter, potentially infringing on the constitutional rights of employees creates risks, and also because the evidence gathered may be unreliable and later deemed inadmissible. *See, e.g.*, *United States v. Stein (Stein II)*, 440 F. Supp. 2d 315, 338 (S.D.N.Y. 2006) (''The coerced statements and their fruits must be suppressed.''). Providing separate counsel to executives and employees with potential exposure is one way to temper these risks. Courts in the past have found statements of individual employees to be voluntary, and not compelled in violation of the Fifth Amendment, in part because they were represented by separate counsel during interviews. *See, e.g.*, *Ferguson*, 2007 WL 4240782, at *7 (finding an employee voluntarily participated in government interviews because, among other things, he ''was represented by his current criminal defense counsel when he decided to participate in the interviews,'' ''his attorney attended the interviews with him,'' and ''[he] and his criminal defense counsel both signed an attestation that his proffer was made voluntarily'').

## Conclusion

In sum, while the full effect of the Yates Memo remains to be seen, government investigations in a post-Yates Memo world will likely have unintended consequences, such as those noted. Early retention of counsel by individuals involved in internal investigations may help to mitigate risk and, ultimately, protect against those consequences.