

THE YATES MEMO: WATCH OUT, THE DOJ IS COMING – OR IS IT?

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Corporate scandals and misconduct have persisted throughout twenty-first century America. Since 1999, the Department of Justice (“DOJ”) has attempted to provide federal prosecutors with guidance on how to prosecute corporations through the issuance of a series of memorandums. In September 2015, former Deputy Attorney General Sally Quillian Yates issued the latest memorandum aimed at targeting individuals involved in corporate crimes. This Note will discuss the Yates Memo and will argue that it serves at least two valuable functions, regardless of whether or not it simply solidifies existing policies. First, the revised requirement that cooperation credit is now “all or nothing” puts more pressure on companies to identify individual wrongdoers right from the outset of the investigation and reduces the opportunities for corporations to withhold crucial information needed by the DOJ. Second, the memo will hopefully serve as an incentive for individuals to abide by rules and regulations. Since corporations are obligated under the Yates Memo to disclose all relevant facts regarding individuals potentially involved in the misconduct in exchange for cooperation credit, it will perceivably be harder for employees to hide behind the corporation as a legal entity. This Note will also address the shortcomings of the Yates Memo, examining problems that are either presented or left unaddressed. Finally, this Note will explore the effects of the Yates Memo on recent cases like the Volkswagen scandal and its implications for success, in light of recent political developments.

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I. INTRODUCTION

Since the beginning of the twenty-first century, the American landscape has been plagued by corporate scandals and wrongdoing.¹ From Enron, Worldcom, Tyco, and Healthsouth to Lehman Brothers, American Insurance Group, Arthur Andersen, and Bernie Madoff, companies have declared bankruptcy, firms have been criminally indicted, and corporate executives have been arrested, tried, and convicted.² Prior to its collapse in 2001, Enron was an energy powerhouse and the sixth largest energy company in the world.³ However, the company overstated its earnings, engaged in a series of risky partnership

1. Maya Krigman, Note, *Prosecutorial Discretion of the Department of Justice in Corporate Criminal Cases: How Far is Too Far?*, 74 BROOK. L. REV. 231, 231 (2008); see also KENNETH R. GRAY ET AL., CORPORATE SCANDALS: THE MANY FACES OF GREED 1 (2005) ("[T]he twenty-first century has witnessed unprecedented corporate scandal, malfeasance, and financial crisis.").

2. GRAY ET AL., *supra* note 1, at 1-2; see also Kristine Blenkhorn Rodriguez, *The 21st Century's Top 10 Frauds*, INSIGHT MAG., Summer 2013, at 34, https://issuu.com/lillyd/docs/2013insight_summer_print.

3. GRAY ET AL., *supra* note 1, at 49; Matthew DiLallo, *Enron Scandal: A Devastating Reminder of the Dangers of Debt*, MOTLEY FOOL (June 21, 2015, 7:00 PM), <http://www.fool.com/investing/general/2015/06/21/enron-scandal-a-devastating-reminder-of-the-danger.aspx>.

deals that ultimately unraveled and resulted in the company's bankruptcy filing.⁴ The next year, Worldcom filed for bankruptcy after revealing that it had accumulated \$41 billion in debts and improperly accounted for over \$3.8 billion in expenses.⁵ In September 2008, Lehman Brothers filed for Chapter 11 bankruptcy in the midst of the international mortgage collapse after amassing \$60 billion in debt.⁶ The Federal Reserve Bank of New York chose not to bail out Lehman Brothers, and Lehman Brothers collapsed overnight.⁷

Just three months later, Bernard L. Madoff, founder of Bernard L. Madoff Investment Securities LLC, was arrested and charged with criminal securities fraud for running a "giant Ponzi scheme."⁸ Madoff cheated investors of \$65 billion on paper, faced \$7 billion in redemptions from his clients, and was ultimately sentenced to 150 years in jail.⁹ This period of corporate malfeasance has brought about a desperate need to restore the integrity of America's economic system and public faith in the

4. C. William Thomas, *The Rise and Fall of Enron*, J. OF ACCT. (Apr. 1, 2002), <http://www.journalofaccountancy.com/issues/2002/apr/theriseandfallofenron.html>.

5. David Hancock, *World-Class Scandal at WorldCom*, CBS NEWS (June 26, 2002, 9:23 AM), <http://www.cbsnews.com/news/world-class-scandal-at-worldcom/>; Simon Romero & Riva D. Atlas, *Worldcom's Collapse: The Overview; Worldcom Files for Bankruptcy; Largest U.S. Case*, N.Y. TIMES (July 22, 2002), <http://www.nytimes.com/2002/07/22/us/worldcom-s-collapse-the-overview-worldcom-files-for-bankruptcy-largest-us-case.html>.

6. Ian Salisbury & Paul J. Lim, *6 Years Later, 7 Lessons from Lehman's Collapse*, TIME (Sept. 14, 2014), <http://time.com/money/3330793/lessons-from-lehman-brothers-collapse/> (Lehman Brothers' bankruptcy filing "trigger[ed] a cascade effect across Wall Street. Within days, the insurer AIG had to be bailed out by the federal government while other investment banks, including Morgan Stanley and Merrill Lynch, were pushed to the brink. Merrill, in fact, was eventually sold amid panic to Bank of America.").

7. James B. Stewart & Peter Eavis, *Revisiting the Lehman Brothers Bailout That Never Was*, N.Y. TIMES (Sept. 29, 2014), <http://www.nytimes.com/2014/09/30/business/revisiting-the-lehman-brothers-bailout-that-never-was.html> (The decision not to rescue Lehman, "in cool hindsight, let problems at one bank snowball into a full-blown panic. By the time it was over, nearly every other major bank had to be saved.").

8. *The Madoff Case: A Timeline*, WALL ST. J. (Mar. 12, 2009, 12:01 AM), <http://www.wsj.com/articles/SB112966954231272304>.

9. Robert Lenzer, *Bernie Madoff's \$50 Billion Ponzi Scheme*, FORBES (Dec. 12, 2008, 6:45 PM), http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in_rl_1212croesus_inl.html; Stephanie Yang, *5 Years Ago Bernie Madoff Was Sentenced to 150 Years In Prison - Here's How His Scheme Worked*, BUS. INSIDER (July 1, 2014, 6:54 PM), <http://www.businessinsider.com/how-bernie-madoffs-ponzi-scheme-worked-2014-7>; see also *The Madoff Affair: Con of the Century*, ECONOMIST (Dec. 18, 2008), <http://www.economist.com/node/12818310>.

financial market and the legal system.¹⁰

Back in 1999, the U.S. Department of Justice (DOJ) issued the Principles of Federal Prosecution of Business Organizations (“Principles”), which provided guidance with regards to factors that a prosecutor should take into consideration when deciding whether to charge a corporation in a specific instance of misconduct.¹¹ The memo, released by then-Deputy Attorney General Eric Holder (“Holder Memo”), defined “[c]orporations [as] ‘legal persons,’ capable of suing and being sued, and capable of committing crimes.”¹² It went on to explain that “a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents” under the legal doctrine of *respondeat superior*.¹³ In order to hold a corporation liable for such actions, the government must establish that the corporate agent’s actions “(i) were within the scope of his duties and (ii) were intended . . . to benefit the corporation.”¹⁴ Elaborating on the benefit aspect, the Holder Memo specified that whether or not the corporation ultimately benefited from the agent’s actions was less important than whether the agent acted with the intent to benefit the corporation.¹⁵ The Holder Memo had a two-fold intent: penalizing wrongdoers and protecting investors and shareholders.¹⁶

In response to the Enron scandal and ensuing corporate and individual crimes committed in the following years, the DOJ provided revised standards for prosecuting companies that were set out in the

10. See GRAY ET AL., *supra* note 1, at 2 (“Even our legal system is implicated in these scandals: White-collar criminals are treated far more leniently than ‘street’ criminals, even though the economic and social magnitude of their acts are much greater.”).

11. Memorandum from Eric H. Holder, Jr., Deputy Att’y Gen., to All Component Heads & U.S. Attorneys, *Bringing Criminal Charges Against Corporations* 1 (June 16, 1999) [hereinafter Holder Memo], <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF>; see also 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., no. 2, 2009, at 8.

12. Holder Memo, *supra* note 11, at 2.

13. *Id.* at 2; U.S. ATTORNEY’S MANUAL § 9-28.210 (U.S. DEPT OF JUST. 2015) [hereinafter USAM], <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations> (last visited May 1, 2017).

14. Holder Memo, *supra* note 11, at 2.

15. *Id.* at 2 (quoting *United States v. Automated Med. Labs.*, 770 F.2d 399, 407 (4th Cir. 1985)).

16. See *id.* It is also interesting to note the circumstances that gave rise to the Holder Memo: “Holder explained that back in 1999 there were a group of private practitioners complaining that there was no uniformity in the way in which prosecutors decided to indict corporations.” Peter Lattman, *The Holder Memo and Its Progeny*, WALL ST. J.: L. BLOG (Dec. 13, 2006, 8:47 AM), <http://blogs.wsj.com/law/2006/12/13/the-holder-memo/>. The Holder Memo came into existence as a result of these criticisms. *Id.*

Thompson Memo in 2003.¹⁷ The Thompson Memo provided a list of factors for prosecutors to consider when determining the appropriate course of action to take against a corporation, such as “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection.”¹⁸ The Thompson Memo directed prosecutors to consider whether the company waived its attorney-client privilege and whether the company declined to pay or advance attorneys’ fees for employees who were potentially accountable, thus bringing about much concern.¹⁹ Despite criticisms of the Thompson Memo, between 2002 and 2006, federal prosecutors charged over 200 chief executive officers, presidents of companies, and chief financial officers.²⁰ Federal prosecutors also successfully obtained over 1200 white-collar convictions or guilty pleas, in addition to reclaiming billions of dollars for injured investors and stockholders.²¹

The DOJ next revised its standards in 2007 with the McNulty Memo, which provided federal prosecutors with the option of choosing not to indict a corporation if it determined that the corporation had cooperated with prosecutors during the course of their investigations.²² The McNulty Memo was also executed in response to concerns that the Thompson Memo was “discouraging full and candid communications between

17. Krigman, *supra* note 1, at 232; Memorandum from Larry D. Thompson, Deputy Att’y Gen., to Heads of Dep’t Components & U.S. Attorneys, *Principles of Federal Prosecution of Business Organizations* 1, 2 (Jan. 20, 2003) [hereinafter Thompson Memo], http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf.

18. Thompson Memo, *supra* note 17, at 3.

19. *Id.* at 7–8; see also Brian W. Walsh, *What We Have Here Is Failure to Cooperate: The Thompson Memorandum and Federal Prosecution of White-Collar Crime*, HERITAGE.ORG (Nov. 6, 2006), <http://www.heritage.org/crime-and-justice/report/what-we-have-here-failure-cooperate-the-thompson-memorandum-and-federal>.

20. Paul Davies & Kara Scannell, *Guilty Verdicts Provide ‘Red Meat’ to Prosecutors Chasing Companies*, WALL ST. J. (May 26, 2006, 12:01 AM), <http://www.wsj.com/articles/SB114860468837563784>.

21. *Id.*; *Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 5 (2007) (statement of Karin Immergut, U.S. Attorney, District of Oregon), <https://www.judiciary.senate.gov/imo/media/doc/Immergut%20Testimony%20091807.pdf>.

22. Memorandum from Paul J. McNulty, Deputy Att’y Gen., to Heads of Dep’t Components & U.S. Attorneys, *Principles of Federal Prosecution of Business Organizations* 1, 5 (Dec. 12, 2006) [hereinafter McNulty Memo], http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

corporate employees and legal counsel.”²³ Former Deputy Attorney General McNulty was especially cautious in pointing out that “the Thompson Memorandum was not intended to encourage practices that chill attorney-client communications, as is currently perceived by some.”²⁴ Importantly, the McNulty Memo set up a two-tiered test for prosecutors to differentiate between “purely factual information, which may or may not be privileged, relating to the underlying misconduct (‘Category I’)” and “attorney-client communications or non-factual attorney work product (‘Category II).”²⁵ This in turn would allow prosecutors to evaluate and determine if they had a legitimate need to request privileged information.²⁶

Despite implementation of the McNulty Memo, Congress, scholars, and consumer advocates continued to criticize the Justice Department for treating corporate executive officers leniently. In response, Deputy Attorney General Mark R. Filip announced revised guidelines (“Filip Memo”) on August 28, 2008, for criminal prosecutions of corporations.²⁷ The Filip Memo was codified in the United States Attorney’s Manual (USAM) as the Principles of Federal Prosecution of Business Organizations and became binding on all federal prosecutors within the Department of Justice.²⁸ One major change brought about by the Filip Memo was that it replaced the two-tiered standard established by

23. *Id.* at 1; see also CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE, AND RISK 75 (Mark Pieth & Radha Ivory eds., 2011) [hereinafter CORPORATE CRIMINAL LIABILITY]. Critics have argued that under the Thompson Memo, federal prosecutors were able to coerce corporations to reveal privileged information and to do their investigative work as well, with the hope that the government would be more lenient in its punishment. *Id.*

24. Paul J. McNulty, Deputy Attorney Gen., U.S. Dep’t of Justice, Prepared Remarks at the Lawyers for Civil Justice Membership Conference Regarding the Department’s Charging Guidelines in Corporate Fraud Prosecutions (Dec. 12, 2006), https://www.justice.gov/archive/dag/speeches/2006/dag_speech_061212.htm.

25. McNulty Memo, *supra* note 22, at 9–10.

26. See Crystal Joy Carpenter, *Federal Prosecution of Business Organizations: The Thompson Memorandum and Its Aftermath*, 59 ALA. L. REV. 207, 228–29 (2007).

27. Memorandum from Mark R. Filip, Deputy Att’y Gen., to Heads of Dep’t Components & U.S. Attorneys, U.S.A.M. §§ 9-28.700 (Aug. 28, 2008) [hereinafter Filip Memo], <https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>; Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015), <http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-urles-aimed-at-prosecuting-corporate-executives.html>.

28. Filip Memo, *supra* note 27, § 9-28.100; see also Richard Cullen & George J. Terwilliger III, *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>; *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>.

McNulty with a simplified cooperation standard:

[T]he government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—not whether the corporation discloses attorney-client or work product materials.²⁹

The Filip Memo also made other crucial revisions to the McNulty principles, including the way in which prosecutors would view “payment of attorneys’ fees by a business organization for its officers or employees, or participation in a joint defense or similar agreement.”³⁰ Corporations now no longer had to waive any privileges in order to obtain credit for cooperating, though they still had to disclose all relevant factual information to the DOJ.³¹

However, during the 2008 financial crisis and its aftermath, even though prosecutors recovered billions of dollars in fines from large financial institutions, such as JPMorgan Chase and Citigroup, only one Wall Street executive was sent to jail for his contribution to the financial crisis.³² While it should be noted that many factors make it difficult to prosecute individuals for corporate misconduct, this merely illustrates the inconsistency in the way prosecutors treat corporate executives and ordinary criminals.³³ The newest revisions to the Principles, and the focus of this Note, were announced by former Deputy Attorney General Sally Quillian Yates on September 9, 2015, in response and are aimed at targeting individuals involved in corporate crimes.³⁴ The Yates Memo not

29. USAM § 9-28.720(a) (U.S. DEP'T OF JUST. 2015).

30. Filip Memo, *supra* note 27, introduction, at 1; CORPORATE CRIMINAL LIABILITY, *supra* note 23, at 77.

31. Filip Memo, *supra* note 27, § 9-28.700-760.

32. Jackie M. Bennett, Jr., *The Yates Memo: Corporate Officers Under the Gun*, TAFT (Sept. 15, 2015), <http://www.taftlaw.com/news/publications/detail/1275-the-yates-memo-corporate-officers-under-the-gun> (“[M]any individuals may be involved in isolated parts of the wrongdoing without any one person having full knowledge of the wrongdoing.”); Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAG. (Apr. 30, 2014), <http://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html>.

33. Bennett, Jr., *supra* note 32.

34. Memorandum from Sally Quillian Yates, Deputy Attorney Gen., to Assistant Attorney Gen., Antitrust Div. et al. 1–2 (Sept. 9, 2015) [hereinafter Yates Memo], <http://www.justice.gov/dag/file/769036/download>; Cullen & Terwilliger III, *supra* note 28.

only prioritizes the prosecution of companies but also the prosecution of individual employees.³⁵

This Note will argue that, whether or not the new memorandum simply solidifies existing policies, it serves at least two valuable functions.³⁶ First, the revised requirement that cooperation credit is now “all or nothing” puts more pressure on companies to identify individual wrongdoers right from the outset of the investigation and reduces the opportunities for corporations to withhold crucial information needed by the DOJ.³⁷ Second, the memo will hopefully serve as an incentive for individuals to abide by rules and regulations. Since corporations are obligated under the Yates Memo to disclose all relevant facts regarding individuals potentially involved in the misconduct in exchange for cooperation credit,³⁸ it will perceivably be harder for employees to hide behind the corporation as a legal entity.

This Note will also address the shortcomings of the Yates Memo.³⁹ For instance, the Yates Memo does not provide any specific instructions or guidelines on how to gather sufficient evidence needed to prove individual criminality. Its emphasis on disclosure of all relevant facts also assumes that such evidence even exists in the first place.⁴⁰ In addition, a greater emphasis on individual prosecution will also require greater resources and may result in lengthy and expensive trials, some of which may result in acquittals of these individuals. Although the Yates Memo was announced with great fanfare, this Note argues that the DOJ's actions in subsequent cases after the Yates Memo thus far have failed to demonstrate any change in the DOJ's existing policies.⁴¹

Part II of this Note will examine the history and chronology of the memoranda issued by the DOJ, as well as discuss the characteristics and

35. Apuzzo & Protes, *supra* note 27. This in turn puts pressure on a corporation to turn in evidence of corporate wrongdoing by executives. *Id.* In an interview, Deputy Attorney General Yates stated that “[c]orporations can only commit crimes through flesh-and-blood people.” *Id.* “It’s only fair that the people who are responsible for committing those crimes be held accountable. The public needs to have confidence that there is one system of justice and it equally applies regardless of whether that crime occurs on a street corner or in a boardroom.” *Id.*

36. See *infra* Section III.A; Danielle Young, *No Longer a Cost of Doing Business: The Yates Memo Signals DOJ is Serious About Going After Individuals*, GLOBAL ANTICORRUPTION BLOG (Sept. 28, 2015), <http://globalanticorruptionblog.com/2015/09/28/no-longer-a-cost-of-doing-business-the-yates-memo-signals-doj-is-serious-about-going-after-individuals/>.

37. Yates Memo, *supra* note 34, at 2–3. The “all” refers to “all relevant facts relating to the individuals responsible for the misconduct.” *Id.* at 2.

38. *Id.*

39. See *infra* Section III.B.

40. Yates Memo, *supra* note 34, at 2–3.

41. See *infra* notes 188–192 and accompanying text.

changes made to each revised memorandum. Part III will evaluate how the Yates Memo serves several valuable functions and will discuss examples of weak enforcement by the DOJ. Part III will also examine problems that are either presented or left unaddressed by the Yates Memo, as well as present alternatives that the DOJ can consider when determining whether or how to bring criminal prosecutions. Finally, Part IV will explore reactions to the Yates Memo as well as the recent Volkswagen scandal and its implications for the success of the Yates Memo, in light of recent political developments.

II. BACKGROUND

A. *The Thompson Memorandum*

On January 20, 2003, then-Deputy Attorney General Larry Thompson issued a memorandum (“Thompson Memo”) with a revised set of guidelines intended to assist DOJ prosecutors in determining whether to press charges against a business organization.⁴² The focus of the revised memo was to place a larger emphasis and heightened scrutiny on the “authenticity of a corporation’s cooperation.”⁴³ It also addressed the effectiveness of existing corporate governance procedures in a company in an effort “to ensure that these measures [were] truly effective rather than mere paper programs.”⁴⁴ The Thompson Memo allowed prosecutors to consider two controversial factors: (1) whether the corporation was willing to waive its attorney-client privilege and work product privilege, with regard to its internal investigations and communications between employees of the corporation and its counsel; and (2) whether a company had declined to pay attorneys’ fees for its employees.⁴⁵

The language of the Thompson Memo also implicitly allowed prosecutors to consider a company’s readiness to take specific corrective measures against its own employees and agents during the course of the

42. Thompson Memo, *supra* note 17, introduction, at 1.

43. *Id.* While many corporations were purportedly cooperating and assisting in Department investigations, they in fact often had taken swift steps and measures to obstruct what would have been “quick and effective exposure of the complete scope of wrongdoing under investigation.” *Id.*

44. *Id.*

45. *Id.* at 3, 7–8; Ashby Jones, *Thompson Memo Out, McNulty Memo In*, WALL. ST. J. L. BLOG (Dec. 12, 2006, 1:27 PM), <http://blogs.wsj.com/law/2006/12/12/thompson-memo-out-mcnulty-memo-in/>.

investigation.⁴⁶ The “net results” were demands that employees waive their Fifth Amendment right to self-incrimination as a condition for continued employment, waivers of the Sixth Amendment right to counsel, as well as government interference “in obtaining and using lawful resources in the preparation of a defense.”⁴⁷ As a consequence, the legal community, business groups, and civil liberties organizations heavily criticized the Thompson Memo and claimed that such practices deprived individuals of their constitutional rights.⁴⁸

B. *The McNulty Memorandum*

The McNulty Memo, issued on December 12, 2006, by Deputy Attorney General Paul J. McNulty, announced that the DOJ was making revisions to its corporate charging guidelines.⁴⁹ While both the Thompson Memo and the McNulty Memos were designed to assist federal prosecutors in determining whether or not to charge a corporation with criminal offenses, the McNulty Memo specifically responded to criticisms of the Thompson Memo and required that federal prosecutors “obtain written approval from the Deputy Attorney General” when “seek[ing] privileged attorney-client communications or legal advice from a

46. Madeleine E. Moise Cassetta, Note, *Wagon Circling Prohibited: Forsaking Constitutional Rights as a Means to Prosecute Business Organizations*, 83 N.D. L. REV. 767, 772 (2007).

47. *Id.* at 779–80; see also *United States v. Stein*, 435 F. Supp. 2d 330, 361 (S.D.N.Y. 2006) (concluding that part of the idea of fair play and justice includes the right to be free from government interference when preparing a defense); Mark H. Alcott, *Promoting Needed Reform, Defending Core Values*, 78 N.Y. ST. B. ASS'N J. 5, 6 (2006) (noting that the government’s position, which finds a company uncooperative if it helps its employees defend themselves, amounts to an intrusion on constitutional and fundamental notions in our legal system); Earl J. Silbert & Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225, 1227–28 (2006) (explaining that companies may threaten to terminate their employees, refuse to provide counsel to employees while striving to obtain cooperation credit from the government, and fail to advise their employees that the material they provided during their interviews during internal investigations would potentially be revealed to the government).

48. McNulty Memo, *supra* note 22, introduction, at 1–2 (“Many of those associated with the legal community have expressed concern that our practices may be discouraging full and candid communications between corporate employees and legal counsel . . . [t]herefore [the DOJ has] decided to adjust certain aspects of [its] policy”); Jones, *supra* note 45; see also Paul Monnin & Eric D. Stolze, *Everything Old Is New Again: Why the Yates Memo is Constitutionally Suspect*, CORP. COUNS. (Jan. 11, 2016), <http://www.corpcounsel.com/id=1202746760402/Why-the-Yates-Memo-Is-Constitutionally-Suspect?slreturn=20160122144844> (“It was only after public outcry regarding coerced waiver of the corporate attorney-client privilege and courts dismissed charges against individuals who had been denied their legal right to fee advancement that [the] DOJ changed its tactics.”).

49. McNulty Memo, *supra* note 22, at 1–2.

company.”⁵⁰ In addition, prosecutors were directed not to take into consideration a corporation’s advancement of attorney’s fees to employees or agents who were being investigated, since corporations have the power under many state indemnification statutes to advance such fees before any formal establishment of guilt.⁵¹ However, an exception was made if the advancement of fees, in conjunction with other significant factors, indicated that the corporation had the intention of impeding the government’s investigation.⁵²

In spite of the revised guidelines, prosecutors still had large discretion to determine whether or not to charge corporations and individuals.⁵³ Furthermore, the Thompson Memo had already established a “culture of waiver” amongst corporations that felt compelled to waive their attorney-client privilege if they hoped to avoid an indictment.⁵⁴ There had also been allegations that prosecutors conveniently chose to ignore certain provisions of the McNulty Memo and that some prosecutors continued the practice of pressuring corporations to waive their attorney-client privileges.⁵⁵

50. Jones, *supra* note 45.

51. McNulty Memo, *supra* note 22, at 11 n.3.

52. Jones, *supra* note 45.

53. Krigman, *supra* note 1, at 233; *see also* McNulty Memo, *supra* note 22, at 9–10 (“A corporation’s response to the government’s request for waiver of [attorney-client] privilege for Category I information may be considered in determining whether a corporation has cooperated in the government’s investigation,” and “[p]rosecutors may always favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.”). Category I information refers to “purely factual information that may or may not be privileged, relating to the underlying misconduct.” *Id.* at 9.

54. *See The McNulty Memorandum’s Effects on the Right to Counsel in Corporate Investigations: Hearing Before the Subcomm. On Crime, Terrorism, & Homeland Security of the H Comm. on the Judiciary*, 110th Cong. 75 (2007) (statement of Richard T. White, Senior Vice President, Secretary, and General Counsel, The Auto Club Group), http://federalevidence.com/pdf/Corp_Prosec/House_Jud_McNulty_3_07.pdf. By 2007, there had been more than forty recent cases where the “culture of waiver” perpetuated by the DOJ in its corporate investigations made it unnecessary for the department to demand a waiver of privileges. *Id.* (statement of Rep. Sheila Jackson Lee) (discussing impact of the McNulty Memo); Editorial, *Abuse of Privilege*, WALL. ST. J., Sept. 20, 2007, at A12.

55. Marcia Coyle, *Efforts to Protect Privilege Falling Short*, NAT’L L.J., Sept. 24, 2007, at 6, LEXIS (“The behaviors ingrained in pre-McNulty remain ingrained post-McNulty and the memo hasn’t removed those practices.” (quoting Susan Hackett, Senior Vice President and General Counsel of the Association of Corporate Counsel)).

C. *The Filip Memorandum*

On August 28, 2008, Deputy Attorney General Mark Filip announced (“Filip Memo”) revisions of the McNulty Memo that updated the Principles within the USAM.⁵⁶ The revised memorandum provided that for corporations “[t]o receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request” privileged materials, such as notes, memoranda and other information obtained by its attorneys, as long as “the corporation timely discloses relevant facts about the putative misconduct.”⁵⁷

In addition, the new guidelines provided that “eligibility for cooperation is not predicated upon the waiver of attorney-client privilege or work product protection” and that corporations should be given cooperation credit if they chose to disclose relevant facts to prosecutors.⁵⁸ It also noted that there were other ways for a corporation to earn cooperation credit apart from disclosure of relevant facts.⁵⁹

The announcement of the Filip Memo came on the same day that the U.S. Court of Appeals for the Second Circuit affirmed a lower court’s decision to dismiss indictments for tax fraud against thirteen former partners and employees of the accounting firm, KPMG LLP, on the basis that the defendants had been deprived of their Sixth Amendment right to counsel.⁶⁰ The government had pressured KPMG to withhold and later cut payment for attorneys representing KPMG employees in order to avoid an indictment by the government.⁶¹ By forcing KPMG to depart

56. Filip Memo, *supra* note 27, at 1; *see also* Cullen & Terwillinger III, *supra* note 28, at 1 (“The ‘Principles’ are a detailed framework that federal prosecutors are supposed to rely on in assessing whether and what charges to bring against a corporation in a criminal case. They also provide corporations and their counsel tools for considering important issues such as cooperation and remediation.”).

57. USAM § 9-28.720 (U.S. DEPT OF JUST. 2015), https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#_ftnref2 (last visited June 5, 2017).

58. *Id.* (“[T]he sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct.”).

59. *Id.* § 9-28.720(a) n.1 (“There are other dimensions of cooperation beyond the mere disclosure of facts, such as providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records.”).

60. Charles Wm. McIntyre & Howard C. Vick Jr., *McNulty Memo Out, Filip Memo In: DOJ Makes Revisions to Corporate Charging Guidelines*, MCGUIREWOODS (Sept. 4, 2008), <https://www.mcguirewoods.com/Client-Resources/Alerts/2008/9/McNultyMemoOutFilipMemoInDOJMakesRevisionstoCorporateChargingGuidelines.aspx>; *see also* United States v. Stein, 495 F. Supp. 2d 390 (S.D.N.Y. 2007), *aff’d*, 541 F.3d 130, 135, 157–58 (2d Cir. 2008).

61. *Stein*, 495 F. Supp. 2d at 393.

from its previous practice of paying legal fees for its employees in all instances in which they were sued for actions they had taken on behalf of the company, the court held that such interference violated the constitutional rights of the employees.⁶² The court also rejected the government's argument that "KPMG formulated its own policy on payment of attorneys fees" and found that KPMG's decision to do so was "the direct consequence of the pressure applied by the Thompson Memorandum and the [United States Attorney's Office]."⁶³ The court concluded that the Constitution grants an individual

the right to spend their money for the best . . . defense that money can buy, free of unjustified interference by the government. . . . [and] prevents the government from interfering if a criminal defendant is fortunate enough to have someone who is willing to give the defendant the money to pay for a defense, even a very expensive one.⁶⁴

D. *The Yates Memorandum*

Former Deputy Attorney General, Sally Quillian Yates, issued the latest revisions to the USAM for prosecutions of business organizations on September 9, 2015, with a focus on holding individuals responsible for unlawful corporate conduct.⁶⁵ In a speech announcing the new policy's focus on individual liability in issues of corporate misconduct, Yates stated that "[c]rime is crime" and that the DOJ was obligated to hold lawbreakers accountable, regardless of where their crimes were committed.⁶⁶

62. *Id.*

63. *Id.* at 395, 400.

64. *Id.* at 425.

65. Yates Memo, *supra* note 34, at 1–2.

66. Sally Q. Yates, *Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing*, U.S. DEPT OF JUST. (Sept. 10, 2015) [hereinafter *Yates Remarks*], <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school> ("In the white-collar context, that means pursuing not just corporate entities, but also the individuals through which these corporations act."); *see also* Yates Memo, *supra* note 34, at 1 ("One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetuated wrongdoing.").

The guidance in the Yates Memo reflects six key steps that will apply to all future investigations of corporate wrongdoing.⁶⁷ First, and perhaps the most controversial of the revisions, is the “all or nothing” cooperation credit for corporations under investigation by the DOJ.⁶⁸ In order for corporations to be eligible for *any* cooperation credit, corporations must now identify and disclose all facts relating to individuals responsible for or involved in the corporate wrongdoing.⁶⁹ Prior to the Yates Memo, corporations could choose to disclose corporate misconduct voluntarily without revealing the identities of specific individuals and their wrongdoings.⁷⁰ Even though corporations were not eligible for full cooperation credit under such circumstances, they were still considered for partial cooperation credit for the information they provided prosecutors, and such partial credit could be sufficient to help the corporation avoid an indictment.⁷¹ Under the Yates revisions, corporations no longer have the option to “plead ignorance” if they wish to be considered for cooperation credit at all; if the company was previously unaware of misconduct by its employees or agents, it now has a duty to investigate and identify the law-breaking individual(s) and provide all non-privileged information it has about the specific wrongdoers.⁷² The Yates Memo also makes clear that the threshold condition of complete cooperation applies equally to criminal and civil investigations for corporations seeking to cooperate with federal prosecutors.⁷³

Second, the Yates Memo instructs that criminal and civil corporate investigations should focus on individuals from the beginning of the investigation, noting that multiple goals are accomplished by this method.⁷⁴ This broader policy shift presented by the Memo changes both the DOJ’s expectations of companies, as well as its expectations of its own department, because it is extremely challenging to build either a civil or criminal case against individuals unless the focus is on them from the

67. Yates Memo, *supra* note 34, at 2.

68. Yates Remarks, *supra* note 66, at 2; see also Yates Memo, *supra* note 34, at 2.

69. Yates Memo, *supra* note 34, at 3; see also Yates Remarks, *supra* note 66, at 3 (“To the average guy on the street, this might not sound like a big deal. But those . . . active in the white-collar area will recognize it as a substantial shift from our prior practice.”).

70. Yates Remarks, *supra* note 66, at 2 (regarding changes to one of the Filip factors).

71. *Id.*

72. *Id.* at 3. (“If [the corporations] don’t know who is responsible, they will need to find out. If they want any cooperation credit, they will need to investigate and identify the responsible parties, and then provide all non-privileged evidence implicating those individuals.”).

73. *Id.*; Yates Memo, *supra* note 34, at 3–4 (“For example, the Department’s position on ‘full cooperation’ under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.”).

74. Yates Memo, *supra* note 34, at 4.

outset.⁷⁵ According to the Yates Memo, since corporations are only able to act through individuals, investigating individual misconduct maximizes the efficiency and effectiveness in identifying relevant facts and details of the corporate wrongdoing.⁷⁶ In addition, individuals with knowledge of corporate misconduct will likely be more willing to cooperate with the investigation and reveal potential wrongdoing by top-level executives.⁷⁷ This method of investigation will also maximize the chances that the investigation will culminate in civil or criminal charges for both the corporation and individuals who are culpable.⁷⁸

The third step announced by the DOJ corresponds to the second—criminal and civil attorneys dealing with corporate investigations should communicate with one another regularly so as to maximize efficiency in such investigations.⁷⁹ It also reduces the likelihood that a criminal prosecutor will have to start from the beginning to build a new case after civil attorneys complete their investigations—or vice versa, illustrating the DOJ’s long-standing recognition of the importance of parallel development of civil and criminal proceedings.⁸⁰

The fourth and fifth steps in the Yates Memo delineate the way the DOJ resolves cases.⁸¹ The fourth step provides that individuals should

75. *Yates Remarks*, *supra* note 66, at 4.

76. *Yates Memo*, *supra* note 34, at 4.

77. *Id.*

78. *Id.* at 4–5.

For example, if an investigation starts as a civil inquiry into the company and interviews are conducted and documents gathered with a focus on corporate liability, it is often challenging for our attorneys to then go back at the conclusion of the civil matter and build a criminal case against individuals. This is particularly true not only because of the sheer passage of time, but also because individual criminal liability often hinges on proving a level of criminal intent much more demanding than what was required in the civil case.

Yates Remarks, *supra* note 66, at 4.

79. *Yates Memo*, *supra* note 34, at 4–5.

80. *Id.* The DOJ is formalizing these lines of communication:

Going forward, regardless of whether a corporate case begins as a civil or criminal inquiry, the DOJ attorneys initially handling the matter will be responsible for notifying the “other side of the house” about the investigation. As the case proceeds, civil and criminal attorneys will be in regular contact. If prosecutors decide not to bring criminal charges against individuals, they will need to notify their civil counterparts, who can make an independent assessment of civil liability. And if civil attorneys identify individuals during their investigation who should be subject to a criminal inquiry, they will be expected to promptly refer the matter to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Yates Remarks, *supra* note 66, at 4.

81. *Yates Remarks*, *supra* note 66, at 4.

not be released from civil or criminal liability when resolving a matter with a corporation except in exceptional circumstances.⁸² In the event that such a rare circumstance presents itself, the litigating attorneys are obligated to obtain written approval from the appropriate United States Attorney or Assistant Attorney General.⁸³ The Memo also instructs DOJ lawyers not to “agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers and employees.”⁸⁴

Under the fifth step, DOJ attorneys are instructed not to resolve corporate cases before establishing a clear plan to determine related individual cases before the statute of limitations runs out and to memorialize any declinations to prosecute with regards to individuals in such cases.⁸⁵ Specifically, the Yates Memo states that

[i]f the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period.⁸⁶

It also notes that delays in the corporate investigation should not impact the DOJ’s pursuit of individuals who are potentially culpable.⁸⁷

Finally, the sixth step of the Yates Memo broadens the focus of the DOJ’s “civil enforcement strategy” by advising civil attorneys to place consistent focus on both individuals and on the corporation while evaluating whether to bring suit against an individual based on considerations beyond the individual’s ability to pay.⁸⁸ It emphasizes that the DOJ’s civil enforcement efforts have “twin aims”—to recover as much money as possible as well as to hold individual wrongdoers accountable and to deter future individual misconduct.⁸⁹ Deputy Attorney General

82. *Id.* at 4.

83. *Id.*

84. Yates Memo, *supra* note 34, at 5 (noting “extraordinary circumstances or approved departmental policy such as the Antitrust Division’s Corporate Leniency Policy” as potential exceptions).

85. Yates Remarks, *supra* note 66, at 4.

86. Yates Memo, *supra* note 34, at 6.

87. *Id.*

88. Yates Remarks, *supra* note 66, at 4; Yates Memo, *supra* note 34, at 6.

89. Yates Memo, *supra* note 34, at 6.

Yates explains that both are equally important, because “[t]here is real value . . . in bringing civil cases against individuals who engage in corporate misconduct, even if that value cannot always be measured in dollars and cents.”⁹⁰ Department attorneys’ decisions whether or not to bring a civil suit against an individual should not be determined by the individual’s capability to satisfy a potential judgment.⁹¹ Department attorneys should instead be guided by several different factors.⁹² The USAM was amended accordingly to incorporate the substantive portions of the Yates Memo.⁹³

III. EVALUATION

A. *The Yates Memo Serves Valuable Functions*

To begin, the Yates Memo serves several valuable functions. First, the biggest change in the USAM announced by the Yates Memo deals with cooperation credit for companies. In the past, a company would be eligible for partial credit for cooperating with the DOJ if it provided crucial information about corporate misconduct without specifically identifying any individual wrongdoers.⁹⁴ However, under the new amendments, cooperation credit is now all or nothing.⁹⁵ Corporations will

90. *Yates Remarks*, *supra* note 66, at 5. Deputy Attorney General Yates goes on to say that

[w]hile we may not be able to satisfy the entire judgment with an individual’s resources, if that individual is liable, we can take what they have and ensure that they don’t benefit from their wrongdoing. . . . And by holding individuals accountable, we can change corporate culture to appropriately recognize the full costs of wrongdoing, rather than treating liability as a cost of doing business – a change that will protect public resources over the long term.

Id.

91. *Yates Memo*, *supra* note 34, at 6.

92. *Id.* at 6–7. The sample factors provided in the Memorandum for DOJ attorneys to take into consideration include “whether it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest.” *Id.*

93. See USAM § 9-28.210 (U.S. DEP’T OF JUST. 2015).

94. *Yates Remarks*, *supra* note 66, at 3.

95. *Id.* at 2; *Yates Memo*, *supra* note 34, at 3. In most cases, the DOJ rewards a corporation under investigation when the corporation identifies corporate misconduct, agrees to cooperate with the investigation, hires outside counsel to conduct an internal investigation to uncover the misconduct, and take steps to correct the misconduct. David Dayen, *The Justice Department’s New Policy is a Brutal Admission of Eric Holder’s Failures*, FISCAL TIMES (Sept. 11, 2015), <http://www.thefiscaltimes.com/Columns/2015/09/11/Justice-Department-s-New-Policy-Brutal-Admission-Eric-Holder-s-Failures>.

no longer have the luxury to choose what facts to disclose and what facts to conceal if they wish to receive any cooperation credit in the hopes of a reduced penalty.⁹⁶ This includes identifying from the outset of the investigation all of the specific individuals within the company who were either involved in or responsible for the corporate misconduct.⁹⁷ If a company provides all relevant facts pertaining to individuals, it meets the threshold requirement and potentially becomes eligible for cooperation credit.⁹⁸ The extent of the credit is contingent upon a list of non-exhaustive factors, including the timeliness of the company's cooperation, how proactive the company's cooperation was, as well as "the diligence, thoroughness, and speed of the internal investigation," among other factors.⁹⁹

Second, the Yates Memo will provide an incentive for corporate due diligence by focusing on individuals and the specific actions that constituted corporate wrongdoing as a whole.¹⁰⁰ Even though corporations are considered individuals in the eyes of the law, in reality, a corporation can only function through its employees.¹⁰¹ The Yates Memo's emphasis on individual conduct from the commencement of the investigation will not only permit the Department to efficiently and effectively identify all necessary facts but will also allow the DOJ to determine the extent of the corporate misconduct.¹⁰² The guidelines will hopefully increase the deterrent effect of the law for every level of the corporate hierarchy, since every individual in a company who engages in or is part of any corporate misconduct can potentially be held liable and individually responsible by the department.¹⁰³ It is understandable that this poses a real risk that the increased legal exposure for individuals potentially serves as an incentive for corporations to throw certain employees "under the proverbial bus to secure lenient treatment."¹⁰⁴

96. Yates Memo, *supra* note 34, at 3. "If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.*" *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Young, *supra* note 36.

101. See Yates Memo, *supra* note 34, at 4; Nina Totenberg, *When Did Companies Become People? Excavating the Legal Evolution*, NPR (July 28, 2014, 4:57 AM), <http://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution> (explaining the history and progression of how corporations came to have rights equivalent to that of individuals).

102. Yates Memo, *supra* note 34, at 4.

103. Young, *supra* note 36.

104. Peter J. Henning, *Pursuit of Individuals in Corporate Misconduct Still Arduous*, N.Y. TIMES (Sept. 22, 2015, 1:45 PM) [hereinafter Henning, *Pursuit of Individuals*],

However, the previous practice of offering companies partial cooperation credit without identifying any individual wrongdoers provided a very undesirable incentive as well: companies were able to provide the DOJ with minimal information for the Department to obtain charges while maximizing protection of its employees without losing any cooperation credit from the DOJ.¹⁰⁵

Third, the revised guidelines reflect the DOJ's acknowledgement of the loss of public trust in the Department in previous years and an attempt to at least make a change to punish responsible individuals.¹⁰⁶ As mentioned earlier, only one Wall Street executive was sent to jail for the activities that gave rise to the financial crisis in 2008, in spite of a "mountain of documentary evidence of fraud."¹⁰⁷ The lack of criminal prosecutions might also have been attributable to the Holder Memo, which suggested that prosecutors take into consideration "collateral consequences"¹⁰⁸ and also provided prosecutors with a bevy of "alternative remedies" to criminal prosecutions, "such as fines and deferred prosecution agreements."¹⁰⁹ This provided prosecutors with the opportunity to avoid complex cases they were not confident of winning,¹¹⁰ which ultimately led to an increase in civil penalties and a drastic decrease in individual charges and individual accountability for corporate misconduct.¹¹¹ The increased focus on individual liability in the

<http://dealbook.nytimes.com/2014/09/22/pursuit-of-individuals-in-corporate-misconduct-still-arduous/>.

105. Young, *supra* note 36.

106. Dayen, *supra* note 95.

The Justice Department would not have attempted to make this change without full recognition of the loss of public trust its actions over the past several years have engendered. Relentless criticism of the lack of white-collar prosecutions had an impact, and those who participated in that conversation should be proud.

Id.

107. See Eisinger, *supra* note 32; accord Dayen, *supra* note 95.

108. Dayen, *supra* note 95. The "collateral consequences" policy argues that prosecutors "should take into account innocent victims" that may get hurt when considering criminal charges against large corporations. *Id.*

109. *Id.* A deferred prosecution agreement is when a company enters into an agreement with the DOJ to undertake specific actions in exchange for deferred prosecution. See Peter J. Henning, *Deferred Prosecution Agreements and Cookie-Cutter Justice*, N.Y. TIMES (Sept. 17, 2012, 4:00 PM) [hereinafter Henning, *Deferred Prosecution*], <http://dealbook.nytimes.com/2012/09/17/deferred-prosecution-agreements-and-cookie-cutter-justice/>.

110. Dayen, *supra* note 95.

111. *Id.*; Young, *supra* note 36. Senator Warren also critically states that there is a legal system "for big companies, for the wealthy and the powerful" and "one for everyone else." Zach Carter, *Elizabeth Warren: American Justice is 'Rigged' in Favor of the Rich*,

Yates Memo is the DOJ's way of indicating to the public that they are responding to concerns over the lack of individual accountability in recent years and that the Department is making an effort to bolster public confidence in enforcement authorities by enforcing individual liability.¹¹²

1. Illustrations of Weak Enforcement by DOJ

United States v. BNP Paribas S.A. illustrates the kind of weak enforcement and lack of individual accountability that elicited public outcry and widespread criticisms.¹¹³ On June 30, 2014, France's biggest bank, BNP Paribas S.A. ("BNP"), pled guilty to conspiring to violate the International Emergency Economic Powers Act (IEEPA) and the Trading with the Enemy Act (TWEA) by transferring billions of dollars for the benefit of countries blacklisted by the United States and subject to U.S. economic sanctions—Sudan, Iran, and Cuba.¹¹⁴ BNP made conscientious efforts to hide the illegal transactions, conceal its tracks, and mislead U.S. authorities.¹¹⁵ While BNP was the seventh bank to settle a criminal sanctions violation case, it was the first time a global bank pled guilty, specifically here to one count of falsifying business records and one count of conspiracy.¹¹⁶ In addition, New York's financial regulator, Benjamin Lawsky, ordered BNP to fire thirteen of its employees, including the Group Chief Operating Officer, and noted that "[i]t is important to

HUFFINGTON POST POL. (Feb. 3, 2016, 10:55 AM), http://www.huffingtonpost.com/entry/elizabeth-warren-american-justice-rigged-for-rich_us_56b205a2e4b04f9b57d7e5fe. Senator Warren continues that to make things worse, "government officials fret about unintended consequences if they are too tough" on big companies. *Id.*

112. Young, *supra* note 36 ("The DOJ's legitimacy depends on public belief that the office genuinely advocates in the interest of the United States and its citizens.").

113. *United States v. BNP Paribus, S.A.*, No. 14CRIM460, 2014 WL 8815160, at *1 (S.D.N.Y. Jul. 9, 2014); *see also* Carter, *supra* note 111 (noting Senator Warren's critique of America's criminal justice system for having "two legal systems . . . [o]ne for the rich and powerful, and one for everyone else").

114. *BNP Paribas Agrees to Plead Guilty and to Pay \$8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions*, U.S. DEP'T OF JUST. (June 30, 2014) [hereinafter *BNP Press Release*], <http://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial>; Ben Protes & Jessica Silver-Greenberg, *BNP Paribas Admits Guilt and Agrees to Pay \$8.9 Billion Fine to U.S.*, N.Y. TIMES (June 30, 2014, 4:21 PM), <http://dealbook.nytimes.com/2014/06/30/bnp-paribas-pleads-guilty-in-sanctions-case/>.

115. *BNP Press Release*, *supra* note 114 ("[O]ver the course of eight years, BNP knowingly and willfully moved more than \$8.8 billion through the U.S. financial system on behalf of sanctioned entities, including more than \$4.3 billion in transactions involving entities that were specifically designated by the U.S. Government as being cut off from the U.S. financial system.").

116. Protes & Silver-Greenberg, *supra* note 114.

remember that banks do not commit misconduct – bankers do.”¹¹⁷ However, not one BNP employee was charged criminally as an individual,¹¹⁸ partially because BNP insulated its employees by refusing to provide the DOJ with crucial records until the deadline to file charges against specific individuals had passed.¹¹⁹ The head of the DOJ’s criminal division cited BNP as a primary example in which a company failed to cooperate fully with the department and is paying a substantial price as a result.¹²⁰ In addition to the approximately \$8.83 billion that the bank will forfeit, it also has to pay a fine of \$140 million and serve five years of probation.¹²¹

A week after the Yates Memo was announced, the top federal prosecutor in Manhattan, Preet Bharara, announced a \$900 million settlement with General Motors (GM) and a three-year deferred prosecution agreement without a single individual indictment.¹²² When GM began recalling 2.6 million Chevrolet Cobalts and other small cars with defective ignition switches in February 2014, the company’s problems came to light.¹²³ GM initially insisted that only thirteen deaths

117. *Id.*

118. *Id.*

119. Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015), <http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html>.

120. Stewart Bishop, *DOJ Official Cites BNP as Example of How Not to Cooperate*, LAW360 (May 12, 2015, 8:18 PM), <http://www.law360.com/articles/655167/doj-official-cites-bnp-as-example-of-how-not-to-cooperate>. Assistant Attorney General Leslie R. Caldwell stated that “BNP not only failed to fully cooperate [during the investigation] . . . they actually hindered [the DOJ’s] investigation against certain individuals based on some over-broad assertions of data privacy laws.” *Id.* This in turn prevented the DOJ from obtaining crucial documents needed to prosecute specific individuals within BNP. *Id.*

121. *Id.*

122. Joe Nocera, *Of Peanuts and Prosecution*, N.Y. TIMES (Sept. 25, 2015), <http://www.nytimes.com/2015/09/26/opinion/joe-nocera-of-peanuts-and-prosecutions.html>. If GM abides by the terms of the deferred prosecution agreement, the company can get a fresh start. Danielle Ivory & Bill Vlasic, *\$900 Million Penalty for G.M.’s Deadly Defect Leaves Many Cold*, N.Y. TIMES (Sept. 17, 2015), <http://www.nytimes.com/2015/09/18/business/gm-to-pay-us-900-million-over-ignition-switch-flaw.html>. Understandably, the Yates Memo is directed towards new investigations going forward and would not have been able to affect the GM case at that point, which was in its advanced stages. See David Ingram, *Why No GM Employees Have Been Prosecuted for Faulty Ignitions*, INS. J. (Sept. 21, 2015), <http://www.insurancejournal.com/news/national/2015/09/21/382224.htm>.

123. Ben Protess & Danielle Ivory, *U.S. Said to Have Settled with G.M. over Deadly Defect*, N.Y. TIMES (Sept. 16, 2015), <http://www.nytimes.com/2015/09/17/business/prosecutors-said-to-be-near-a-criminal-settlement-with-gm.html>.

were supposedly linked to its defective ignition switches.¹²⁴ “However, ‘today the death toll stands at at least 124.’”¹²⁵ Later investigations revealed that the company’s employees had suspicions about the defect for over a decade, yet higher-ups in the company chose to do nothing.¹²⁶

Starting in 2001, GM engineers discovered during the pre-production development of the Saturn Ion that the ignition could “wander from the ‘Run’ to the ‘Accessory’ or ‘Off’ position.”¹²⁷ The ignition switch was identified as the problem, and a report stated that a change in the ignition switch design had resolved the problem.¹²⁸ In 2003, a service technician “observed a stall while driving” and noted that the ignition switch was worn out by the weight of some of the keys on the key ring.¹²⁹ The same problem resurfaced in 2004 when the Chevrolet Cobalt was being tested prior to its release onto the market.¹³⁰ While GM engineers identified the specific problem, the company simply decided not to take any action to fix it after weighing the cost, effectiveness, and the amount of time needed to develop a solution.¹³¹ Customers began complaining to GM about incidents of sudden power loss after purchasing 2005 Cobalts, providing GM with another opportunity to redesign the ignition switch.¹³² However, not only did the company choose not to redesign the defective switch, GM assured the public that the defective switch did not pose a safety concern.¹³³

By 2012, GM had specific knowledge that the defective switch could cause airbags not to deploy in some of their cars and was aware that there had been several fatal accidents and serious injuries that might have been caused by the defective switch.¹³⁴ Not only were GM personnel aware of the situation, “[t]his knowledge extended well above the ranks

124. *Id.*

125. *Id.*

126. *Id.* Some defective ignition switches would turn off unexpectedly, cutting off the car’s electrical system and disabling the airbags. *Id.* Even though GM tracked the crashes of its cars where the air bags failed to deploy, the company failed to issue a recall in order to fix the defective ignition switches. Fabrice Vincent, *GM Faulty Ignition Recall*, LIEFF CABRASER HEIMANN & BERNSTEIN, <http://www.lieffcabraser.com/injury/car-accidents/gm-ignition/> (last visited May 1, 2017).

127. Vincent, *supra* note 126.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Manhattan U.S. Attorney Announces Criminal Charges Against General Motors and Deferred Prosecution Agreement with \$900 Million Forfeiture*, U.S. DEP’T OF JUST. (Sept. 17, 2015), <http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-general-motors-and-deferred>.

134. *Id.*

of investigating engineers to certain supervisors and attorneys at the Company.”¹³⁵ Nevertheless, GM did not notify the National Highway Traffic Safety Administration (NHTSA) of the link it had discovered between the defective switch and the airbag non-deployment accidents until some twenty months later, in February 2014.¹³⁶ The company “egregiously disregarded NHTSA’s five-day regulatory reporting requirement for safety defects.”¹³⁷ When the settlement was announced, U.S. Attorney Bharara acknowledged public criticisms about the lack of individual accountability and said that his office would continue to investigate GM employees but that the office faces several legal and factual obstacles, including “the need to prove ‘criminal intent’” in criminal prosecutions.¹³⁸ There have been no updates since the settlement was announced in September 2015, and it is unlikely that any GM employees will be prosecuted individually in future.

B. *The Yates Memo and Its Problems*

As optimistic as one may be with respect to the potential impact of the Yates Memo, it inevitably comes with its own set of problems as well. For starters, the Memo is silent on the DOJ’s specific requirements for companies to receive “cooperation credit,” providing nothing more than general, abstract guidelines.¹³⁹ The Yates Memo also fails to address the DOJ’s process going forward in dealing with attorney-client and work-product privileges, which perhaps has been the most controversial issue arising out of previous memos.¹⁴⁰ The section in the USAM addressing

135. *Id.*

136. *Id.*

137. *Id.*

138. David Ingram, *Corporate ‘Siloing’ an Obstacle to Charging GM Employees: Prosecutor*, REUTERS (Sept. 17, 2015, 6:38 PM), <http://www.reuters.com/article/us-gm-settlement-individuals-idUSKCN0RH31B20150917>.

139. William Sullivan et al., *Yates Memo: Increasing the Perils of Parallel Proceedings*, LAW360 (Nov. 3, 2015, 10:33 AM), <http://www.law360.com/articles/720868/yates-memo-increasing-the-perils-of-parallel-proceedings>; see also Thomas Gorman & Nick Ackerman, *The Yates Memo: A New DOJ Investigative Approach*, DORSEY (Sept. 21, 2015), <https://www.dorsey.com/newsresources/publications/client-alerts/2015/09/the-yates-memo-a-new-doj-investigative-approach> (“[T]he Memo offers no new way, no new technique, no secret formula for gathering evidence on individuals to gather evidence of criminal activity beyond a reasonable doubt.”). These questions can only be answered in the future based on the DOJ’s actions (or lack thereof).

140. See Robert J. Higdon, Jr. & John S. Davis, V, *The Yates Memo: The Department of Justice Attempts to Refocus Corporate Investigations on Individual Wrongdoers in Both Criminal and Civil Investigations*, WILLIAMS MULLEN 6 (2015), <http://www.williamsmullen>.

attorney-client privilege and work product protection was last revised in August 2008, and the Yates Memo only makes a passing reference that the requirement for companies to cooperate completely as to individuals is “within the bounds of the law and legal privileges.”¹⁴¹ Further, the threshold requirement of requiring the company to disclose all relevant facts pertaining to individuals is problematic as it stands. Even though the USAM specifically states that “a company is not required to waive its attorney-client privilege and attorney work product protection in order to satisfy this threshold,”¹⁴² an employee’s admission of wrongdoing to an attorney during an interview constitutes privileged attorney-client information, as well as a relevant fact that the DOJ will expect the company to disclose.¹⁴³

In addition, the DOJ’s requirement that corporations turn over all relevant facts pertaining to individuals “presumes that there is such evidence” and “also presumes that the company and those who conducted the internal inquiry, the results of which are being given to the Government in the name of cooperation, are acting in less than good faith.”¹⁴⁴ Corporations and counsel under investigation by the DOJ must have a clear understanding of the presiding prosecutor’s approach on what constitutes a relevant fact that must be disclosed to obtain cooperation credit and what is protected under the attorney-client privilege and work product protection.¹⁴⁵

Second, even though corporate misconduct is only possible through individual misconduct, the DOJ’s assumption that evidence pertaining to specific individuals not only exists but is also waiting to be uncovered creates an enormous hurdle for corporations to overcome during their internal investigations. As the DOJ has stated several times in the past, the evidence required to identify and prosecute specific individuals involved in corporate misconduct is not always present.¹⁴⁶ However, it is

com/sites/default/files/files/Yates_Long_HigdonDavis_Sept2015%20-%20Higdon%20%26%20Davis%20Alert.pdf.

141. *Id.*; see also USAM §§ 9-28.700 to 28.760 (U.S. DEPT OF JUST. 2015); Yates Memo, *supra* note 34, at 4.

142. USAM § 9-28.700A.

143. See Monnin & Stolze, *supra* note 48, at 1 (stating that there is substantial opportunity for constitutional abuse under the Yates Memo, and how “the Yates Memo [can] have a destabilizing impact on corporate decision-making, . . . [and] may also affect the integrity of federal prosecutions, [since] counsel for charged individuals pursue discovery of pre-indictment interaction between [the] DOJ and their clients’ former employers”).

144. Gorman & Ackerman, *supra* note 139.

145. See Higdon, Jr. & Davis, V, *supra* note 140, at 6.

146. See Yates Memo, *supra* note 34, at 2; Jason M. Breslow, *Lanny Breuer: Financial Fraud Has Not Gone Unpunished*, PBS (Jan. 22, 2013), <http://www.pbs.org/wgbh/frontline/article/lanny-breuer-financial-fraud-has-not-gone-unpunished/> (At the time, Lanny Breuer was the Assistant Attorney General for the DOJ’s Criminal Division. In an

much easier for the DOJ to use the lack of evidence as an excuse to account for the lack of individual prosecution than it is for a corporation to use the same excuse to explain a failure to provide all relevant facts relating to individuals involved in the misconduct to the DOJ's satisfaction. Further, the DOJ's involvement in the investigation process from the beginning dictates that the "evidence of individual culpability [discovered by a corporation] . . . will have to conform to the government's conception of right and wrong,"¹⁴⁷ which in turn leads to the path down a slippery slope.

Third, while the DOJ is clearly responding to censure and the public's demand for increased individual accountability, the emphasis on individual accountability produces its own set of problems. The Department's focus on individual prosecution raises questions about the effect it will have on corporations and its employees and whether this will create an environment in which corporations will feel pitted against their employees from the start.¹⁴⁸ In addition, this might in effect create an environment that discourages cooperation,¹⁴⁹ since corporate executives and managers are now unlikely to participate in an investigation without their own counsel.¹⁵⁰ Further, assuming that these individuals did engage in or were aware of corporate wrongdoing, they are now much less likely to reveal information to corporate counsel and cooperate with the corporation's internal investigation out of fear that the information they reveal will implicate themselves.¹⁵¹

Another concern relates to the adequacy of warnings given by corporate counsel to individual employees during internal investigation interviews.¹⁵² Corporate attorneys must inform employees that they represent the corporation and not the employees individually; these warnings are frequently referred to as "Upjohn Warnings."¹⁵³ However,

interview, when asked whether or not people on Wall Street would be prosecuted for securitizing bad mortgages, Mr. Breuer said, "[W]hen we cannot prove beyond a reasonable doubt that there was criminal intent, then we have a constitutional duty not to bring those cases."); Higdon, Jr. & Davis, V, *supra* note 140, at 6.

147. Monnin & Stolze, *supra* note 48, at 2.

148. See Higdon Jr. & Davis V, *supra* note 140, at 6.

149. *Id.* at 6–7.

150. Kirk Ogrosky & Ted Lotchin, *Cooperation or Accountability? Yates Memo Puts Spotlight on Pharmaceutical and Medical Device Executives*, 14 PHARM. L. & INDUSTRY REP. (BNA) 28, 30 (2016).

151. See *id.*

152. See Higdon Jr. & Davis V, *supra* note 140, at 7.

153. *Id.* The term originated from *Upjohn Co. v. United States*: the case provides a

issues arise as to the scope of these warnings since such warnings indubitably will affect the degree and extent to which an employee is willing to cooperate with the internal investigation.¹⁵⁴ For instance, is it sufficient for corporate counsel to simply inform employees that the corporation is their client?¹⁵⁵ Or do the attorneys have an obligation to also warn the employees that anything they reveal to them during the internal investigation will be disclosed to the DOJ in order to obtain cooperation credit for the corporation?¹⁵⁶ In this respect, the lack of guidance from the Yates Memo “raises thorny questions.”¹⁵⁷

The focus on individual accountability also poses the danger of having corporations throw certain employees “under the proverbial bus.”¹⁵⁸ On February 23, 2016, Bruno Iksil, the former JPMorgan Chase trader at the center of the “London Whale” scandal, released a four-page open letter in which he alleges that he was unjustly accused by the bank and targeted by media for \$6.2 billion in trading losses in 2012.¹⁵⁹ In his letter, Mr. Iksil stated that “[p]ublicity surrounding the losses sustained by the [Chief Investment Office (CIO)] of JP Morgan typically refers to ‘the London Whale’ in terms that imply that one person was responsible for the trades at issue.”¹⁶⁰ Mr. Iksil wrote, “Not only were my actions ‘not authorized’ in 2012, but I was instructed repeatedly by the CIO senior management to execute [the specific] trading strategy,” maintaining that his “role was to execute a trading strategy that had been initiated, approved, mandated and monitored by the CIO’s senior management.”¹⁶¹ If Mr. Iksil was in fact ordered by senior management to execute these trading strategies and then was fired by the bank shortly after the scandal surfaced, this would illustrate an instance where emphasis on

flexible structure that helps identify when communications between an employee and corporate counsel are protected under the attorney-client privilege. 449 U.S. 383, 396–403 (1981).

154. See *Upjohn Co.*, 449 U.S. at 392.

155. See *id.* at 390–92.

156. See *id.* at 391–92.

157. See Ogrosky & Lotchin, *supra* note 150, at 30.

158. See Henning, *Pursuit of Individuals supra* note 104 (“The emphasis on delivering evidence to allow the prosecution of individual employees sounds like an effort to have corporations throw them under the proverbial bus to secure lenient treatment.”).

159. Kara Scannell, *London Whale Complains of Unfair Blame for \$6.2bn JPMorgan Losses*, FIN. TIMES (Feb. 23, 2016, 7:02 PM), <https://www.ft.com/content/3f558d16-da51-11e5-a72f-1e7744c66818>. The “London Whale” scandal is one that cost JPMorgan Chase over \$6 billion in the Chief Investment Office (CIO) of the bank, which was responsible for investing surplus bank deposits in a low-risk manner. Christopher Matthews, *Too Big to Fail: 3 Lessons of the “London Whale” Debacle*, TIME (Mar. 20, 2013), <http://business.time.com/2013/03/20/what-have-we-learned-3-lessons-from-the-london-whale-trading-debacle/>.

160. Letter from Bruno Iksil 1 (Feb. 23, 2016), <http://im.ft-static.com/content/images/bb48030a-da5f-11e5-a72f-1e7744c66818.pdf>.

161. *Id.*

individual accountability caused a company to throw its employee under the bus in an attempt to save itself while insulating the “upper echelons of the executive suite” at the same time.¹⁶²

C. Alternatives for DOJ to Bring Criminal Prosecutions

It is undoubtedly more difficult for the DOJ to pursue a criminal prosecution than it is for it to obtain a sizeable civil penalty since a criminal case requires a much higher standard of proof: most notably, the need to prove scienter or intent.¹⁶³ The Yates Memo reemphasizes this point:

[i]n large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs.¹⁶⁴

However, there are alternative doctrines that the DOJ can consider when deciding whether and how to bring about a criminal prosecution.

162. See Ben Protess & Azam Ahmed, *With Tapes, Authorities Build Criminal Case over JPMorgan Loss*, N.Y. TIMES (Oct. 10, 2012, 10:00 PM), <http://dealbook.nytimes.com/2012/10/10/at-jpmorgan-inquiry-built-on-taped-calls/?ref=business>.

163. See Daniel Marans, *The Justice Department Pledge to Prosecute White-Collar Criminals is About to Face a Major Test*, HUFFINGTON POST (Sept. 19, 2015, 3:30 PM), http://www.huffingtonpost.com/entry/volkswagen-executives-prosecution_us_55fd9749e4b00310edf74f5d (“One of the reasons prosecutors are reluctant to charge employees in white-collar crime cases is that individual responsibility is hard to prove. And when they do choose to prosecute individuals, they have more success catching lower-level workers who take the fall for the executives calling the shots.”); Ben Protess & Matt Apuzzo, *Justice Dept. Vow to Go After Bankers May Prove a Promise Hard to Keep*, N.Y. TIMES (Sept. 10, 2015), http://www.nytimes.com/2015/09/11/business/dealbook/challenges-remain-for-justice-dept-in-prosecuting-executives.html?_r=0 (“White-collar cases are hard to prove, because they’re very complex and if you don’t have direct evidence of fraud, there’s room for argument on both sides.”).

164. Yates Memo, *supra* note 34, at 2; see also Marans, *supra* note 163 (“Senior executives are adept at concealing any evidence that might implicate them in wrongdoing done at their behest . . .”). *But cf.* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 81 (2014) (“Corporations may argue that managers did not know about the conduct of ‘rogue employees’ or ‘bad apples.’ . . . [But] [t]he corporation does not have to possess any knowledge of wrongdoing under the strict *respondet superior* rule.”).

1. Respondeat Superior

First, if an agent of a financial institution commits a criminal act within the scope of his or her employment with the intent to benefit the institution, the DOJ may be able to hold the institution criminally liable under the doctrine of *respondeat superior*.¹⁶⁵ Under this rule, the DOJ need not prove that the corporation was aware of wrongdoing, which should make it easier to convict a corporation.¹⁶⁶ Moreover, since the potential of an indictment against a corporation seriously jeopardizes its future, the DOJ can use this as leverage against the corporation to obtain information about individual corporate wrongdoing, use the corporation as an informant, and construct a case against individuals.¹⁶⁷ The USAM also states that a corporation may still be held criminally responsible despite the implementation of a corporate compliance program that specifically prohibits the misconduct in question.¹⁶⁸

i. *The Ostrich Instruction*

Another alternative for the DOJ is to request an “ostrich instruction” as one way to challenge attempts by corporate executives to hide by “[put]ting their heads in the sand.”¹⁶⁹ The ostrich instructions propose to punish individuals who engage in “deliberate avoidance,” also known as “deliberate ignorance, conscious avoidance, or willful blindness,” and are potentially able to convict a defendant who was not completely aware of

165. See Michael A. Wiseman, *Judge Rakoff, The Justice Department, and Corporate Crime: Lack of Will or Lack of Cause?*, 1 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 81, 83 (2014).

166. GARRETT, *supra* note 164, at 81.

167. *Id.* at 84; see also Wiseman, *supra* note 165 (“The benchmark horrible is Arthur Andersen.”). See generally Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107 (2006) (detailing the prosecution of Arthur Andersen and his accounting firm in the aftermath of the Enron scandal).

168. USAM § 9-28.800(B) (U.S. DEP’T OF JUST. 2015).

169. GARRETT, *supra* note 164, at 82. The metaphor in reference to ostriches burying their heads in the sand is actually a myth. *Ostrich*, SAN DIEGO ZOO, <http://animals.sandiegozoo.org/animals/ostrich> (last visited June. 5, 2017). Judge Richard Posner explained the ostrich instruction in *United States v. Giovannetti*:

The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings. A deliberate effort to avoid guilty knowledge is all the guilty knowledge the law requires.

919 F.2d 1223, 1228; see also Peter Lattman, *Conrad Black: The Ostrich Instruction in the Courtroom*, WALL ST. J.: L. BLOG (June 19, 2007, 9:09 AM), <http://blogs.wsj.com/law/2007/06/19/conrad-black-the-ostrich-instruction-in-the-courtroom/>.

the crime if he or she “deliberately sought to avoid the truth.”¹⁷⁰ The ostrich instruction has often been utilized in corporate criminal law, including applications to statutory schemes and the anti-fraud provisions of the Securities Act of 1933.¹⁷¹ In the corporate context, the ostriches are often corporate executives who argue that they had no knowledge of what was happening among their subordinates and thus argue that they should not be held responsible.¹⁷² As the former chief legal counsel of Levi Strauss put it, “A fundamental law of organizational physics is that bad news does not flow upstream.”¹⁷³ Going after corporate executives using the ostrich instruction serves several valuable purposes: higher-ups will be on notice that it will be much harder for them to claim lack of knowledge as a defense, that deliberate avoidance of the misconduct will not be a valid defense, and that they also cannot simply command lower-level employees to do their dirty work while they hide their heads in the sand.¹⁷⁴

ii. *The Responsible Corporate Officer Doctrine*

Second, federal prosecutors can continue the recent trend in using the responsible corporate officer (“RCO”) doctrine to pursue individual

170. GARRETT, *supra* note 164, at 82. On the other hand, the ostrich instruction also poses the risk that a jury will convict an individual who might have had suspicions about corporate wrongdoing but neither engaged in deliberate avoidance or knew enough about the misconduct to deserve punishment. *Id.*

171. Martin Flumenbaum & Brad S. Karp, *The Endangered Ostrich Defense: Actual Belief Exception Questioned*, 245 N.Y.L.J. 100 (May 25, 2011), <https://www.paulweiss.com/media/104575/SCR25May11.pdf>; see also Abbe David Lowell & Kathryn C. Arnold, *Corporate Crime After 2000: A New Law Enforcement Challenge or Déjà Vu?*, 40 AM. CRIM. L. REV. 219, 229 (2003); John Monroe, *Applying the Responsible Corporate Officer and Conscious Avoidance Doctrines in the Context of the Abu Ghraib Prison Scandal*, 91 IOWA L. REV. 1367, 1383 (2006).

172. Lowell & Arnold, *supra* note 171, at 230–31.

173. FRANCIS T. CULLEN ET AL., *CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND* 352 (1987).

174. See *id.* (“John S. Martin, a former U.S. Attorney who actively prosecuted corporate and white-collar crime cases, comment[ed] that when individual offenders can be identified they “often turn out to be lower-level corporate employees who never made a lot of money, who never benefited personally from the transaction, and who acted with either the real or mistaken belief that if they did not commit the acts in question their jobs might be in jeopardy.”). Of course, some corporate crimes, also termed as “control fraud” by criminologist William K. Black, “are crimes by higher-ups bent on self-dealing.” GARRETT, *supra* note 164, at 82.

prosecutions.¹⁷⁵

While the RCO doctrine originally developed in the public health and welfare context, recent prosecutions have also resulted from whistleblowing, other federal investigations, or the result of consumer illness or death.¹⁷⁶ Under the RCO doctrine, corporate officers may be prosecuted for public welfare offenses committed by a company, regardless of their knowledge of or participation in the acts or omissions.¹⁷⁷ The focus is not on any corporate officer but on “responsible corporate officers.”¹⁷⁸ A responsible corporate officer is one who “holds a position of responsibility and authority in an organization, and who possesses the ability to prevent or promptly correct a violation.”¹⁷⁹ The government can then present a *prima facie* case and argue that because of the individual corporate officer’s position, he or she had the ability and the authority to prevent such wrongdoing, or to rectify the misconduct and that he or she failed to do so.¹⁸⁰ Even though the RCO doctrine was initially only applied in cases that involved strict liability public welfare statutes, the doctrine has been extended to include cases involving public welfare statutes that require a scienter requirement.¹⁸¹ Regardless of how different courts interpret the word “knowledge,” courts in general have reduced the government’s burden of proof in cases that employ the RCO doctrine.¹⁸²

United States v. Dotterweich was the first case in which the Supreme Court applied the RCO doctrine to prosecute misdemeanors under the FDCA.¹⁸³ The next seminal case was *United States v. Park*, where the

175. Roscoe C. Howard Jr. & Leasa Woods Anderson, *Trends in Responsible Corporate Officer Doctrine Under FDCA*, LAW360 (Dec. 14, 2015, 1:11 PM), <http://www.law360.com/articles/737403/trends-in-responsible-corporate-officer-doctrine-under-fdca> (“Over the past several years, it appears that prosecutors have rediscovered the RCO doctrine and they are pursuing individual prosecutions more readily.”).

176. *Id.*

177. *Id.*; see also Lisa Ann Harig, Note, *Ignorance is Not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines*, 42 DUKE L.J. 145, 146 (1992).

178. Howard Jr. & Anderson, *supra* note 175.

179. *Id.*

180. *Id.*

181. Harig, *supra* note 177, at 147, 151 (“Knowledge will often be imputed from employees of the corporation to its responsible officers. At the very least, the trier of fact may infer knowledge from the circumstances surrounding the case.”). The term “public welfare offenses” refers to “a group of police offenses and criminal nuisances punishable irrespective of the actor’s state of mind.” Glen V. Borre, *Public Welfare Offenses: A New Approach*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 418, 418 n.1 (1961) (citation omitted).

182. Harig, *supra* note 177, at 151.

183. 320 U.S. 277, 281–285 (1943). The Supreme Court upheld the convictions of Dotterweich, who was the President and General Manager of Buffalo Pharmaceutical Company, Inc. for shipping misbranded and adulterated drugs in violation of the FDCA.

Court argued that criminal liability under the FDCA was not predicated on “awareness of some wrongdoing’ or ‘conscious fraud.’”¹⁸⁴ The Court held that Congress imposed on responsible corporate agents a duty that required “the highest standard of foresight and vigilance,” and reaffirmed that a responsible corporate officer could be held criminally responsible for corporate misconduct without participating in or having any knowledge or awareness of the wrongdoing.¹⁸⁵

Given the recent uptick in prosecutors utilizing the RCO doctrine, prosecutors may be able to apply the doctrine beyond the FDCA to other public welfare statutes, including the Clean Air Act, Clean Water Act, Federal Meat Transportation Act, and National Forest Service Regulations.¹⁸⁶ Some attorneys speculate that federal prosecutors will also expand use of the RCO doctrine to other industries as well, such as aviation, construction, and financial services.¹⁸⁷ While this might cause unease among defense attorneys and in-house counsel, the RCO doctrine is undoubtedly a tool in the prosecutorial arsenal, at the disposal of federal prosecutors.

D. Reactions to the Yates Memo

1. The Yates Memo Continues Previous Practices

Public reaction to the Yates Memo thus far has fallen into two general categories: either the Yates Memo is simply a continuation of previous DOJ practices and not as drastic as some perceive, or the Yates

Id. The Court rejected his argument that the corporation itself was the “person” subject to prosecution under the act (barring certain exceptions irrelevant here) and argued that even though the statute specifically defines “person” to include “corporations,” “the only way in which a corporation can act is through the individuals who act on its behalf.” *Id.*

184. 421 U.S. 658, 672–73 (1975). In *Park, Acme Markets Inc.*, a national retail food chain, allowed food it was holding for sale in its Baltimore warehouse to be accessible to rodents and contaminated by rodents, which caused it to be adulterated under the meaning of the FDCA. *Id.* at 660. The defendant was the chief executive officer of Acme and worked at the company’s headquarters in Philadelphia. *Id.* The Court rejected the defendant’s argument that even though he was responsible for the overall operation of the company, there was nothing more that he could have done, given that the company had over 800 stores worldwide. *Id.* at 664.

185. *Id.* at 663; see also David E. Frulla, Julian Solotorovsky & Matthew C. Luzadder, *Responsible Corporate Officer Doctrine: Strict Criminal Liability For Regulatory Violations*, KELLEY DRYE (Oct. 24, 2013), <http://www.kelleydrye.com/publications/articles/1771>.

186. Howard Jr. & Anderson, *supra* note 175.

187. *Id.*

Memo will be limited in terms of what it can actually achieve.¹⁸⁸ Commentators in the first group argue that the primary change in the Yates Memo about “all or nothing” cooperation credit is merely an elaboration on existing DOJ practices in criminal cases and that the DOJ has already emphasized the significance of a corporation’s disclosures and cooperation with regards to its impact on the punishment the corporation will receive.¹⁸⁹ For instance, during her keynote address at the New York City Bar Association’s Fourth Annual White Collar Crime Institute, Assistant Attorney General and Head of the Criminal Division Leslie R. Caldwell used BNP as an example of a corporation that not only failed to cooperate with the DOJ but also actively took steps to hinder the Department’s investigation and ability to prosecute accountable individuals and ended up paying a severe price as a result.¹⁹⁰ In contrast, PetroTiger was named as an example of a corporation that received a benefit from its cooperation with the DOJ.¹⁹¹ In this address, Caldwell also discussed several recent cases at the time that had reached a global scope and focused on the issue of cooperation in each of these cases.¹⁹²

2. The Yates Memo Has No Substantial Effect

Commentators who fall into the second group have either been cynical or skeptical about the Memo’s effectiveness from its release or remain unconvinced that it will bring about much change in future

188. See *New DOJ Guidance Puts Emphasis on Identifying Culpable Individuals in Corporate Internal Investigations*, SIDLEY AUSTIN (Sept. 11, 2015) [hereinafter *Sidley Update*], http://www.sidley.com/news/2015-09-11_white_collar_update; Gorman & Ackerman, *supra* note 139; Jim Letten & Carol T. Montgomery, *The Yates Memo: What New Challenges To Expect*, LAW360 (Jan. 3, 2016, 8:59 AM), <http://www.law360.com/articles/738741/the-yates-memo-what-new-challenges-to-expect>; Barry Ritholtz, *DOJ’s ‘Too Little Too Late’ Memo*, BIG PICTURE (Sept. 10, 2015, 11:55 AM), <http://ritholtz.com/2015/09/dojs-too-little-too-late-memo>.

189. *Sidley Update*, *supra* note 188; see also Assistant Attorney General Leslie R. Caldwell, Remarks at the New York City Bar Association’s Fourth Annual White Collar Crime Institute (May 12, 2015) [hereinafter *Caldwell Remarks*], <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-city-bar-0>.

190. *Caldwell Remarks*, *supra* note 189; see also Stewart Bishop, *DOJ Official Cites BNP as Example of How Not to Cooperate*, LAW360 (May 12, 2015, 8:18 PM), <http://www.law360.com/articles/655167/doj-official-cites-bnp-as-example-of-how-not-to-cooperate>; *supra* notes 113–120 and accompanying text.

191. *Caldwell Remarks*, *supra* note 189; see also Richard L. Cassin, *PetroTiger Joins Morgan Stanley with Rare DOJ Public Declination*, FCPA BLOG (June 16, 2015, 10:03 AM), <http://www.fcpa.com/blog/2015/6/16/petrotiger-joins-morgan-stanley-with-rare-doj-public-declina.html>; Marsha Gerber, *A Few Lessons From FCPA Trial of Ex-PetroTiger CEO*, LAW360 (June 25, 2015, 10:47 AM), <http://www.law360.com/articles/672193/a-few-lessons-from-fcpa-trial-of-ex-petrotiger-ceo>.

192. See *Caldwell Remarks*, *supra* note 189.

prosecutions.¹⁹³ The cases that have been decided since the issuance of the Yates Memo have not reflected the kind of change advocated by former Deputy Attorney General Yates.¹⁹⁴ Two subsequent settlements illustrate this point.

First, Morgan Stanley agreed to a \$3.2 billion settlement on February 11, 2016 that would hold the bank “appropriately accountable” for deceiving investors about the quality of its mortgages in its mortgage-backed securities before the 2008 financial crisis.¹⁹⁵ Even though press releases of big bank settlements are typically accompanied by the DOJ’s release of emails from bank employees, the Morgan Stanley settlement provided no such emails and identified no individuals.¹⁹⁶ Critics say that unless the DOJ prosecutes individuals, then the Yates Memo “would be shown to be an empty threat when it comes to Wall Street.”¹⁹⁷ While this does not reflect well on the Yates Memo, it is important to note that Morgan Stanley apparently had “reached an agreement in principle with federal prosecutors in February 2015,”¹⁹⁸ which was approximately seven months prior to the Yates Memo. It is unclear whether the Department could have renegotiated the agreement or have taken the investigation down a different course.

On February 16, 2016, two subsidiaries of PTC, Inc. (collectively, “PTC-China”), a Massachusetts-based software company, agreed to pay the SEC a \$14.54 million criminal fine in violation of the Foreign Corrupt Practices Act (FCPA) for providing recreational travel to Chinese government officials.¹⁹⁹ While the trips were purportedly for training at

193. Ritholtz, *supra* note 188 (“Pardon my cynicism, but after so much failure to prosecute, I remain doubtful that much if anything has changed. The onus is on the Justice Department to show that it’s serious by way of actions, not words in a memo.”). Cf. John F. Savarese, *White Collar and Regulatory Enforcement: What to Expect in 2016*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (Jan. 28, 2016), <https://corpgov.law.harvard.edu/2016/01/28/white-collar-and-regulatory-enforcement-what-to-expect-in-2016> (“[I]t is difficult to predict at this point with any degree of certainty the precise impact these new policies will have . . .”).

194. See *supra* notes 65–93 and accompanying text.

195. Evan Weinberger, *Yates Memo Fails to Trigger Charges in Morgan Stanley Deal*, LAW360 (Feb. 11, 2016, 8:10 PM), <http://www.law360.com/articles/758250/yates-memo-fails-to-trigger-charges-in-morgan-stanley-deal>.

196. *Id.*

197. *Id.*

198. *Id.*

199. *PTC Inc. Subsidiaries Agree to Pay More than \$14 Million to Resolve Foreign Bribery Charges*, U.S. DEP’T OF JUST. (Feb. 16, 2016) [hereinafter *PTC Settlement*], <http://www.justice.gov/opa/pr/ptc-inc-subsidiaries-agree-pay-more-14-million-resolve->

PTC's headquarters in Massachusetts, in reality they were recreational trips to various destinations in the United States, including New York, Hawaii, Las Vegas, and Los Angeles.²⁰⁰ These trips and other improper payments to the government officials totaled approximately \$1.5 million.²⁰¹

Even though the DOJ had declined to join the SEC when the latter brought corporate FCPA resolutions in nine different cases last year, the DOJ announced a parallel resolution with the SEC in this case.²⁰² Considering the DOJ's recent history of deferring to the remedy established by SEC, why did it decide to pursue a parallel resolution in this case?²⁰³ The answer lies in PTC China's failure to make a complete disclosure about the wrongdoing, despite the company's self-disclosure to the DOJ back in 2011.²⁰⁴ Consistent with the amended guidelines announced by the Yates Memo, the DOJ did not give PTC-China full cooperation credit or any voluntary disclosure because it failed to disclose all relevant facts during its initial disclosure.²⁰⁵ It was not until the DOJ discovered additional information and brought it to PTC-China's attention that the company then revealed the previously withheld information.²⁰⁶

At first glance, this case appears to illustrate the Yates Memo in effect where the DOJ took affirmative steps as prescribed by the revised guidelines. However, none of the individuals involved in the bribery of the Chinese officials were identified or prosecuted criminally, and the

foreign-bribery-charges.

200. *Id.* These trips, in addition to inappropriate gifts and entertainment, were made in order to obtain or retain business from the Chinese government officials who were in turn employed by Chinese state owned entities ("SOEs"). PTC Inc., Exchange Act Release No. 77145, 2016 SEC LEXIS 560.

201. PTC Inc., 2016 SEC LEXIS 560 ("PTC-China made these improper payments in two primary ways: 1) by providing at least \$1,179,912 to third party agents, disguised as commissioned payments or sub-contracting fees, which were then used to pay for non-business related foreign travel for Chinese government officials; and 2) by allowing its sales staff to provide Chinese government officials with gifts and excessive entertainment of over \$274,313.").

202. James Koukios & Lauren Navarro, *Lessons from DOJ's FCPA Resolution with PTC China: No Partial Self-Disclosure Credit*, MORRISON & FOERSTER 1 (Feb. 18, 2016), <http://www.mofo.com/~media/Files/ClientAlert/2016/02/160318LessonsfromDOJsFCPAREsolution.pdf>.

203. *Id.* at 2.

204. *Id.*

205. *PTC Settlement*, *supra* note 199; *see also* Koukios & Navarro, *supra* note 202, at 3 ("DOJ's decision to award PTC China less than full cooperation credit is also consistent with the 'Yates Memo,' a policy memo announced by Deputy Attorney General Sally Quillian Yates in September 2015 that sets forth six 'key steps' designed to better hold individuals accountable for corporate wrongdoing.").

206. *Id.*

DOJ settled for a non-prosecution agreement with PTC-China, despite the fact that “by the conclusion of the investigation,” the companies had provided to the department all relevant facts known to them, “including information about individuals involved in the FCPA misconduct.”²⁰⁷

What companies and corporate counsel can take away from this case, though, is that a company’s compliance staff must disclose all material information about the corporate misconduct discovered during internal investigations with “complete candor” in order to obtain cooperation credit that will help mitigate potential penalties.²⁰⁸ The PTC-China resolution also indicates that the “DOJ is ‘pressure testing’ internal investigations,” illustrating their recent promise to “pressure test a company’s internal investigation with the facts [they] gather on [their] own.”²⁰⁹ This means that if a company chooses to self-disclose misconduct to the DOJ, unless it discloses all material facts relevant to the corporate misconduct, the DOJ will not award the company any cooperation credit at all.²¹⁰ In theory, this should motivate companies to disclose all relevant material facts to the DOJ from the start of the investigation. However, it is unclear if this will encourage or have a negative effect on companies’ willingness to self-disclose misconduct to the DOJ.²¹¹

The Rutgers Center for Corporate Law and Justice also held a panel discussion in November 2015 on Corporate Governance and the Justice Department, focusing on compliance, individual accountability, and the role of the Justice Department in shaping corporate governance.²¹² The

207. *Id.* See generally 2013 Mid-Year Update on Corporate Deferred Prosecutions Agreements (DPAs) and Non-Prosecution Agreements (NPAs), GIBSON DUNN (July 9, 2013), <http://www.gibsondunn.com/publications/pages/2013-Mid-Year-Update-Corporate-Deferred-Prosecution-Agreements-and-Non-Prosecution-Agreements.aspx> (elaborating on the DOJ’s consistent use of DPAs and NPAs as tools to settle allegations of corporate wrongdoing). In a related action, the SEC entered into its first-ever deferred prosecution agreement with an individual in an FCPA case and agreed to defer FCPA charges against Yu Kai Kuan, a previous employee of PTC-China, because of “significant cooperation he . . . provided during the SEC’s investigation.” *SEC: Tech Company Bribed Chinese Officials*, SEC (Feb. 16, 2016), <https://www.sec.gov/news/pressrelease/2016-29.html>.

208. Nelson Dong & John Marti, *Yates Memo in Action: No Cooperation Credit in FCPA Enforcement for Failing to Disclose Key Facts*, DORSEY & WHITNEY (Feb. 24, 2016), <https://www.dorsey.com/newsresources/publications/client-alerts/2016/02/yates-memo-no-cooperation-credit-fcpa-enforcement> (elaborating on “five key lessons” that corporate counsel and compliance directors should extract from the PTC case).

209. Koukios & Navarro, *supra* note 202, at 4.

210. *See id.*

211. *Id.*

212. Panel Discussion at Rutgers Law School Center for Law and Justice (Nov. 30, 2015).

panel featured Paul J. Fishman, United States Attorney for the District of New Jersey; Joseph G. Brauenreuther, Deputy General Counsel of Johnson & Johnson; Maureen A. Ruane, Chair, Health Care Litigation Investigations and Compliance, Lowenstein Sandler; and was moderated by Douglas S. Eakeley, Alan V. Lowenstein Professor of Corporate and Business Law, Rutgers Law School.²¹³ The panelists discussed their reactions to the Yates Memo, its implications, and the extent of its future impact.²¹⁴ Overall, the panelists seemed to express skepticism with regards to the impact and effectiveness of the Yates Memo and whether or not it would bring about much change in the Department's prosecutorial practices.²¹⁵

Mr. Fishman began the discussion with a brief history of the previous memoranda and stated that the memoranda in the past have all grappled with the factors that the DOJ should consider in order to determine corporate liability.²¹⁶ The Yates Memo's instructions to enhance focus on individual accountability would not change much in the District of New Jersey, said Mr. Fishman, since it is already common practice for prosecutors here to consider individual prosecution and the likelihood of success in obtaining enough evidence required to prove the elements in a criminal case.²¹⁷ Mr. Fishman also emphasized that the burden in a civil case is different from the burden in a criminal case: prosecutors often choose not to prosecute individual wrongdoers criminally because they do not have the confidence to prove all the elements beyond a reasonable doubt.²¹⁸ He also pointed out that "bad judgments and stupid risk taking" are not crimes.²¹⁹

Mr. Brauenreuther stated that the Yates Memo was a response to public criticisms in some ways, and agreed with Mr. Fishman that it is not as dramatic of a change as might be perceived.²²⁰ He went on to elaborate that even though prosecutors have desired to pin blame on individuals for the past twenty to thirty years, it is often a much safer and more attractive option to compel resolution and take money from the corporation, rather than pursuing individual wrongdoing and risk

213. *Id.*

214. *Id.*

215. Disclaimer: It should be noted that the panelists were neither attending in their official capacities nor speaking for their organizations.

216. Paul Fishman, U.S. Attorney Gen., Panel Discussion at Rutgers Law School Center for Law and Justice (Nov. 30, 2015).

217. *Id.*

218. *Id.*

219. *Id.*

220. Joseph G. Brauenreuther, Deputy Gen. Counsel of Johnson & Johnson, Inc., Panel Discussion at Rutgers Law School Center for Law and Justice (Nov. 30, 2015).

losing.²²¹

In a report released in January 2016, the office of Senator Elizabeth Warren also criticized federal law enforcement agencies, especially the DOJ, for agreeing to criminal and civil settlements with corporations without requiring the corporation to admit to wrongdoing, in addition to failing to prosecute individuals.²²² Even though the report was released a few months after the Yates Memo was announced, the report is illustrative of the type of criticism that has been directed at the DOJ in recent years. As stated in the report, “The contrast between the treatment of highly paid executives and everyone else couldn’t be sharper. . . . Even the settlement process is different.”²²³ Senator Warren’s office argues that the bedrock of this country and its framework of democracy is undermined when big corporations or their executives routinely escape prosecution— “[i]f justice means a prison sentence for a teenager who steals a car, but it means nothing more than a sideways glance at a CEO who quietly engineers the theft of billions of dollars, then the promise of equal justice under the law has turned into a lie.”²²⁴ The report discusses twenty criminal and civil cases in 2015 in which prosecutors failed to obtain either meaningful accountability from the corporate defendants or prosecute individuals for corporate misconduct.²²⁵ Even though these twenty cases were among the most publicized last year, there was only one case in which a corporation went to trial and an individual was required to account for involvement in corporate misconduct.²²⁶ In addition to her office’s report, Senator Warren also published an Op-ed piece in *The New York Times* where she emphasized that while weak enforcement is often the consequence of

221. *Id.*

222. OFFICE OF SEN. ELIZABETH WARREN, U.S. SENATE, RIGGED JUSTICE: 2016, HOW WEAK ENFORCEMENT LETS CORPORATE OFFENDERS OFF EASY 1 (Jan. 2016), http://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf.

223. *Id.* (“For most people accused of a crime, prosecutors may be willing to plead out the cases, but they typically require admission of guilt and, if the crime involves more than a trivial amount of money, time in jail. Various three-strikes rules frequently put people away for life for non-violent crimes involving modest amounts of money. Politicians routinely get elected promising to be ‘tough on crime,’ and both federal and state government devote immense resources to put and keep criminals in prison.”).

224. *Id.*

225. *Id.* at 1–2. The report also elaborates that “[t]hese twenty cases are not the only examples of prosecutorial timidity when dealing with well-financed corporate defendants. Instead, they illustrate patterns across of a range of areas from financial crimes to personal injury to environmental disasters.”

226. *Id.* at 2.

inadequate resources, it is also often a result of the people at the top.²²⁷ In response, a *Forbes* contributor challenged Senator Warren's criticisms, claiming that the reason "loads of bankers" have not been jailed is because "they didn't actually do anything criminal."²²⁸

E. The Volkswagen Scandal: "Diesel-Gate"

A major development that has occurred since the Yates Memo was announced is the Volkswagen emissions scandal, colloquially known as "Dieselgate."²²⁹ The development of this case and the manner in which the DOJ proceeds with its investigation will be of primary interest to a wide variety of individuals who are keen to determine whether or not the amended guidelines announced by the Yates Memo will have teeth. On September 18, 2015, the U.S. Environmental Protection Agency (EPA) issued a notice of violation (NOV) of the Clean Air Act (CAA) to Volkswagen AG, Audi AG, and Volkswagen Group of America, Inc. ("Volkswagen")²³⁰ and revealed to the public that Volkswagen's clean diesel cars had actually been cheating in emissions tests, entangling Volkswagen in one of the largest corporate scandals in recent times.²³¹ The scandal was actually exposed by two transport campaigners—Peter Mock and John German—who wanted to prove to European authorities that it was possible to make clean diesel cars.²³² Even though the United

227. Elizabeth Warren, *Elizabeth Warren: One Way to Rebuild our Institutions*, N.Y. TIMES (Jan. 29, 2016), <http://www.nytimes.com/2016/01/29/opinion/elizabeth-warren-one-way-to-rebuild-our-institutions.html>. While the focus of this piece is on the current presidential race and the president's power to nominate the heads of federal agencies, these are the takeaways relevant to this current discussion: the president nominates heads of federal agencies, who in turn will significantly impact the direction these agencies will take, and that whether or not the Yates Memo will actually help "rebuild faith in our institutions by honoring the simple notion that nobody is above the law" will depend on who the next president is. *See id.*

228. Tim Worstall, *Memo to Elizabeth Warren: We Didn't Jail All the Bankers Because the Bankers Didn't Commit Crimes*, FORBES (Jan. 30, 2016, 12:27 PM), <http://www.forbes.com/sites/timworstall/2016/01/30/memo-to-elizabeth-warren-we-didnt-jail-all-the-bankers-because-the-bankers-didnt-commit-crimes/#637e3f612181> (commenting on the sixth broker to be acquitted by jury in the *Libor* trial).

229. *See, e.g.*, Jeff Cobb, *What Volkswagen's 'Dieselgate' Is, and Why it Matters*, HYBRIDCARS (Sept. 22, 2015), <http://www.hybridcars.com/what-volkswagens-dieselgate-is-and-why-it-matters/>.

230. EPA, *California Notify Volkswagen of Clean Air Act Violations / Carmaker Allegedly Used Software that Circumvents Emissions Testing for Certain Air Pollutants*, EPA (Sept. 18, 2015), <https://www.epa.gov/newsreleases/epa-california-notify-volkswagen-clean-air-act-violations-carmaker-allegedly-used>.

231. Jon Yeomans, *Five Questions About the VW Emissions Scandal that Won't Go Away*, TELEGRAPH (Oct. 2, 2015), <http://www.telegraph.co.uk/finance/newsbysector/industry/11906842/Five-questions-about-the-VW-emissions-scandal-that-wont-go-away.html>.

232. Sarah Knapton, *Volkswagen Scandal: How Two Campaigners Exposed the World's*

States had stricter pollution checks than in the European Union, American cars seemed to be successful in passing these checks, so Mock and German decided to carry out on-the-road tests with the help of West Virginia University's Center for Alternative Fuels, Engines and Emissions (CAFEE), in order to prove to the Europeans that diesels could be run with cleaner emissions.²³³ WVU provided a portable emission measurement system that was placed in the trunk of the car, along with an attached probe that was put in the exhaust pipe.²³⁴ German then carried out the tests using a Passat, Jetta and a BMW X5, but when the Volkswagen cars (the Passat and the Jetta) immensely exceeded their official emissions readings in normal driving conditions, the researchers thought that there must have been a technical error.²³⁵ As a result, the researchers expanded the test and decided to drive the cars from San Diego to Seattle—for over 1200 miles and almost spanning the entire length of the west coast—yet the nitrogen oxide emissions in the readings of the Volkswagen cars still exceeded the U.S. standards by up to thirty-five times.²³⁶ The research was published by CAFEE and thereafter submitted to the EPA.²³⁷

On January 4, 2016, the DOJ filed a civil complaint on behalf of the

Biggest Car Company, TELEGRAPH (Sept. 22, 2015), <http://www.telegraph.co.uk/news/uknews/road-and-rail-transport/11883343/volkswagen-scandal-campaigners-expose-world-biggest-car-company.html>. German acts as United States co-lead of the International Council on Clean Transportation (ICCT), a small non-profit organization devoted to helping to reduce vehicle emissions, and Peter Mock is the Europe Managing Director and the EU Lead for ICCT. Rupert Neate, *Meet John German: The Man Who Helped Expose Volkswagen's Emissions Scandal*, GUARDIAN (Sept. 26, 2015), <http://www.theguardian.com/business/2015/sep/26/volkswagen-scandal-emissions-tests-john-german-research>.

233. Neate, *supra* note 232. West Virginia University's Center for Alternative Fuels Engines and Emissions is a non-profit research center that does extensive work on emissions reduction research. UNIVERSITY OF WEST VIRGINIA CENTER FOR ALTERNATIVE FUELS ENGINES AND EMISSIONS, <http://cafee.wvu.edu/home>.

234. Neate, *supra* note 232.

235. *Id.*

236. *Id.* Nitrogen oxide emissions create smog and have been named as the cause for "increased asthma attacks and other respiratory" diseases. *Id.* The Passat and the Jetta were the Volkswagen cars that exceeded U.S. emissions standards; "[t]he BMX X5 was within the regulated range." *Id.* One of the research professors at WVU who conducted the tests said, "We were doubting ourselves and our procedures and making sure to double check that we were not doing anything wrong. We did so much testing we couldn't possibly doing the same mistake again and again." *Id.*

237. *Id.*

EPA against Volkswagen in federal court in Detroit, Michigan.²³⁸ The original complaint only names Volkswagen and its subsidiaries as defendants and fails to identify any individuals.²³⁹ It also alleges that Volkswagen installed defeat devices in nearly 600,000 diesel engine vehicles that impaired their emission control systems and caused the vehicle emissions to exceed acceptable standards set by the EPA.²⁴⁰ The complaint also alleges that Volkswagen violated the Clean Air Act by selling, importing, or introducing into U.S. commerce vehicles that differed from what the company had reported in its applications for EPA certification and from the California Air Resources Board (CARB).²⁴¹ CARB and the EPA began their investigations around May 2014, and repeatedly questioned Volkswagen representatives about WVU's findings.²⁴² Volkswagen's response was that "the increased emissions from the vehicles studied by WVU were attributable to various yet-to-be-

238. Press Release, U.S. Dep't of Justice, United States Files Complaint Against Volkswagen, Audi and Porsche for Alleged Clean Air Act Violations, (Jan. 4, 2016) [hereinafter DOJ Volkswagen Press Release], <http://www.justice.gov/opa/pr/united-states-files-complaint-against-volkswagen-audi-and-porsche-alleged-clean-air-act>.

239. See Complaint at 1, United States v. Volkswagen, No. 2:16-cv-10006-LJM-MJH (E.D. Mich. 2016) [hereinafter Volkswagen Complaint]. Six German Volkswagen employees and executives have since been charged by a federal grand jury in the Eastern District of Michigan. Press Release, U.S. Dep't of Justice, *Volkswagen AG Agrees to Plead Guilty and Pay \$4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests* (Jan. 11, 2017) [hereinafter VW Guilty Plea], <https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six>.

240. Volkswagen Complaint, *supra* note 239, at 12. A defeat device is not a physical object; rather, it is a "device" "embedded in the software code" that runs the engine control computer, which is typically located on the firewall beneath the dashboard. Mike Brown, *Volkswagen Emissions Scandal: What Is A 'Defeat Device,' How Does it Work, and Why Can't You See It?*, INT'L BUS. TIMES (Sept. 24, 2015), <http://www.ibtimes.com/volkswagen-emissions-scandal-what-defeat-device-how-does-it-work-why-cant-you-see-it-2112350>. In order to determine if a vehicle satisfies EPA standards, a car is placed on rollers and made to perform a series of maneuvers specified by federal regulations. See Andrea Peterson & Brian Fung, *The Tech Behind How Volkswagen Tricked Emissions Tests*, WASH. POST (Sept. 22, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/09/22/the-tech-behind-how-volkswagen-tricked-emissions-tests/>. Volkswagen was able to obtain advanced knowledge of the detailed requirements of the EPA tests and as such was able to modify the engine performance of its vehicles. *Id.* When the vehicle detected that it was in test mode, the defeat device in the modified software caused the vehicle to operate in a "temperature conditioning" mode, which met EPA's emission standards. DOJ Volkswagen Press Release, *supra* note 238. However, when the vehicle was operating under normal circumstances, it operated in a "normal mode" which allowed emissions of nitrogen oxide that far exceeded the accepted EPA standards. *Id.*

241. DOJ Volkswagen Press Release, *supra* note 238. The Clean Air Act is a federal law that focuses on reducing air pollution, in order to address public health and welfare issues. *Summary of the Clean Air Act*, EPA, <http://www.epa.gov/laws-regulations/summary-clean-air-act> (last visited May 1, 2017).

242. Volkswagen Complaint, *supra* note 239, at 17.

identified technical issues with the after treatment emission control systems and in-use conditions not represented by the FTP [federal test procedure].”²⁴³ Volkswagen finally admitted in September 2015 that “these 2.0L motor vehicles contained a defeat device in the form of a software algorithm or algorithms that detect when the vehicle is undergoing emission testing.”²⁴⁴ After the EPA issued a NOV on November 2, 2015, Volkswagen initially denied that it had installed any software designed to illegally alter emissions in certain 3.0L light duty diesel vehicles but later admitted that the 3.0L subject vehicles contained defeat devices that are illegal under the Clean Air Act.²⁴⁵

The DOJ filed its complaint against Volkswagen on January 4, 2016, and on January 21, Elizabeth Cabraser was named by U.S. District Judge Charles Breyer of San Francisco as the lead counsel for the consumer fraud lawsuits filed against Volkswagen.²⁴⁶ Judge Breyer also named a committee of twenty-two plaintiffs’ attorneys to help guide the lawsuits.²⁴⁷ Subsequently, some 500 Volkswagen drivers filed a consolidated complaint against Volkswagen, alleging that the German carmaker engaged in extensive fraud in marketing its vehicles in the United States.²⁴⁸ The consolidated complaint is over 700 pages long and alleges that “Volkswagen, its Audi and Porsche units, and company executives including former Chief Executive Martin Winterkorn and his successor, Matthias Müller, and auto supplier Robert Bosch GmbH”²⁴⁹ violated the “Racketeer Influenced and Corrupt Organizations Act, the federal Magnuson-Moss Warranty Act and the consumer protection laws

243. *Id.* “During the course of this investigation, . . . [Volkswagen] suggested a number of potential technical issues and in-use conditions that might explain the higher emission test results, but none of those issues adequately explained why the 2.0L Subject Vehicles behaved differently while operating on the FTP test cycles versus while being driven on the road.” *Id.* at 18.

244. *Id.*

245. *Id.* at 19; see also William Boston & Mike Spector, *Volkswagen’s Emissions-Testing Scandal Widens*, WALL ST. J. (Nov. 4, 2015, 4:22 PM), <http://www.wsj.com/articles/volkswagen-shares-plunge-as-emissions-scandal-spreads-1446628400> (Volkswagen initially “disputed the EPA’s claims, saying it didn’t install any emissions-cheating software on the engines used in these vehicles”).

246. Julia Cheever, *SF Lawyer Chosen to Helm VW Diesel Lawsuits*, SF BAY (Jan. 21, 2016, 11:05 PM), <http://sfbay.ca/2016/01/21/sf-lawyer-chosen-to-helm-vw-diesel-lawsuits/>.

247. William Boston, *Class-Action Suit Filed Against Volkswagen in U.S. Court*, WALL ST. J. (Feb. 24, 2016, 7:52 AM), <http://www.wsj.com/articles/class-action-suit-filed-against-volkswagen-in-u-s-court-1456318343>.

248. *Id.*

249. *Id.*

of all 50 states along with claims of fraud and unjust enrichment.”²⁵⁰ Plaintiffs’ attorneys allege that Volkswagen knowingly installed defeat devices in order to cheat emissions tests, and that the company spent large amounts of money advertising its “clean diesel” technology, which in turn allowed it to “grab as much as 70% of the nascent diesel-engine market in the U.S.”²⁵¹ The complaint also alleges that the company deliberately defrauded consumers and dealers by making false promises and false advertisements about the diesel vehicles’ low emissions and high performance capabilities.²⁵² One statistical model estimates that the pollution caused by these cars will cost the lives of 100 people in the next seven years, whereas a “peer-reviewed study by researchers at MIT and Harvard University” estimated that the emissions from these illegal vehicles “will cause 59 early deaths and result in environmental costs exceeding \$450 million.”²⁵³

In its press release, the Department claimed that the filing of a civil complaint does not prevent the government from obtaining other remedies, such as criminal charges against the company or its executives.²⁵⁴ However, while the Clean Air Act makes refineries and other types of major polluters criminally liable for exceeding acceptable EPA emissions standards, the section of the Act that applies to the automobile industry lacks such a provision.²⁵⁵ With the help of industry-friendly lawmakers, carmakers were able to win a carve-out from criminal penalties in the Clean Air Act, “a loophole that has largely” gone unnoticed.²⁵⁶ While the DOJ has considered bringing criminal charges against various automakers that violated pollution laws in the past, the Department ultimately decided to pursue civil remedies instead, due to problems with evidence and jurisdiction.²⁵⁷ Despite the loophole in the

250. Emily Field, *Drivers Hit VW with Consolidated Claims in Emissions MDL*, LAW360 (Feb. 24, 2016, 4:27 PM), <http://www.law360.com/articles/763007/drivers-hit-vw-with-consolidated-claims-in-emissions-mdl> (Between 2009 and 2015, Volkswagen “sold or leased almost 600,000 ‘dirty diesels’ . . . charging environmentally conscious drivers a premium to unwittingly become some of the biggest polluters on the road”).

251. Boston, *supra* note 247.

252. *Id.*

253. Field, *supra* note 250.

254. DOJ Volkswagen Press Release, *supra* note 238; Amy Harder & Aruna Viswanatha, *Volkswagen May Not Face Environmental Criminal Charges*, WALL ST. J. (Sept. 29, 2015, 6:53 PM), <http://www.wsj.com/articles/volkswagen-may-not-face-environmental-criminal-charges-1443567204>.

255. *Id.*

256. *Id.* Now that the loophole has been exposed, lawmakers and activists are working on legislation to close the loophole. *Id.* Sen. Richard Blumenthal (D-CT) said in an interview that “[t]he loophole should be closed so there is a specific penalty for auto manufacturers.” *Id.*

257. DOJ Volkswagen Press Release, *supra* note 238. “[A] longtime congressman and

Clean Air Act, prosecutors could still bring a traditional criminal fraud case against Volkswagen if they are able to identify evidence that the company, or any of its executives, intentionally misled and deceived regulators or consumers.²⁵⁸

In June 2016, Volkswagen agreed to pay up to \$14.7 billion in a “proposed settlement involving the federal government and” attorneys representing owners of approximately 475,000 Volkswagen vehicles.²⁵⁹ The proposed settlement also “includes a maximum of \$10.03 billion to buy back” impacted vehicles at prices prior to the scandal, as well as potential cash reimbursement for affected vehicle owners.²⁶⁰ Volkswagen’s civil settlement is the largest to date by an automobile company, “dwarfing” the \$1.4 billion Toyota had to pay in a class-action settlement, and the over \$2 billion General Motors has paid thus far.²⁶¹

On July 19, 2016, the attorneys general of Massachusetts, New York, and Maryland announced lawsuits against Volkswagen, Audi, and Porsche, alleging that the automakers not only fitted diesel automobiles with illegal “defeat devices” but also “attempt[ed] to cover-up their [unlawful] behavior.”²⁶² The automakers allegedly managed the cover-up

auto industry ally who helped pass the Clean Air Act,” former Rep. John Dingell (D-MI), stated in an interview that the DOJ often opted for civil penalties instead of criminal charges because they were “easier, speedier, quicker.” Harder & Viswanatha, *supra* note 254. One of the differences between civil and criminal penalties is that the former does not “carry [a] potential prison sentence[] for individuals . . . responsible for any [of the] violations.” *Id.*

258. *Id.* Since the company has access to the source codes of all of its cars, the DOJ should be able to find evidence to fulfill the intent element needed to prove deception. Mr. Michael Horn, President and Chief Executive Officer of Volkswagen Group of America, testified before the United States House of Representatives Subcommittee on Oversight and Investigations Committee on Energy and Commerce on October 8th 2015, and admitted that “[Volkswagen’s] representations to EPA and CARB that the increased NOx emissions from the 2.0L Subject Vehicles were due to technical issues were false.” Volkswagen Complaint, *supra* note 239, at 18–19. Mr. Horn also “admitted that the installation of the ‘defeat device’ in the 2.0L Subject Vehicles was a knowing and willful decision to deceive.” *Id.* at 19.

259. Hiroko Tabuchi & Jack Ewing, *Volkswagen to Pay \$14.7 Billion to Settle Diesel Claims in U.S.*, N.Y. TIMES (June 27, 2016), <http://www.nytimes.com/2016/06/28/business/volkswagen-settlement-diesel-scandal.html>.

260. *Id.*

261. *Id.*

262. NY A.G. Schneiderman, Massachusetts A.G. Healey, Maryland A.G. Frosh Announce Suits Against Volkswagen, Audi and Porsche Alleging They Knowingly Sold Over 53,000 Illegally Polluting Cars and Suvs, Violating State Environmental Laws, N.Y. ST. OFF. ATT’Y GEN. (July 19, 2016), <http://www.ag.ny.gov/press-release/ny-ag-schneiderman-massachusetts-ag-healey-maryland-ag-frosh-announce-suits-against>.

for over a year and a half, and the attorneys general alleged that the “cover-up was orchestrated and approved at the highest levels of the company, up to and including the former CEO, Martin Winterkorn.”²⁶³ The civil lawsuits also demonstrate that Volkswagen’s behavior following the exposure of the scandal indicates that the company has done little to reform its corporate culture and behavior.²⁶⁴ In 2015, after a senior in-house attorney in Germany tipped off numerous employees that Volkswagen was under investigation, Volkswagen employees allegedly destroyed incriminating evidence.²⁶⁵ The Volkswagen Supervisory Board recently also awarded \$70 million in executive compensation to the Management Board that was in charge during the cover-up period, highlighting “how stubborn and unrepentant the culture at Volkswagen is that gave rise to the systemic cheating and deception.”²⁶⁶

The New York civil complaint identifies six different defeat devices and describes in detail the process of the deception, as well as various engineers and managers who are or were employed by a number of the Defendants.²⁶⁷ These individuals include Wolfgang Hatz, the former head of engines and transmissions at Volkswagen and Audi, as well as Ulrich Hackenberg, who held senior engineering positions (including emissions responsibilities) at Audi and Volkswagen.²⁶⁸ However, the complaint stops short of alleging that the current chief executive officer Matthias Müller had “specific knowledge of the [defeat] devices.”²⁶⁹ It is important to note that Mr. Müller was head of project management at Audi at the time of the 2006 decision to install defeat devices.²⁷⁰ The New York suit also alleges that Mr. Müller and Mr. Martin Winterkorn, the former Volkswagen chief executive officer, were informed in 2006 that Audis with 3.0L diesel engines needed significantly larger tanks in order to

263. *Id.*

264. *Id.*

265. *Id.* Prosecutors in Germany are currently investigating whether a Volkswagen manager persuaded employees to destroy evidence last year, shortly before the company was publicly accused by the Environmental Protection Agency of unlawfully cheating emissions tests. Jack Ewing, *Fired VW Employee Withdraws Wrongful Dismissal Lawsuit*, N.Y. TIMES (June 30, 2016), <http://www.nytimes.com/2016/07/01/business/international/fired-vw-employee-withdraws-wrongful-dismissal-lawsuit.html>.

266. Complaint at 6–7, *State of New York v. Volkswagen Aktiengesellschaft* (N.Y. Sup. Ct. filed July 19, 2016) [hereinafter *N.Y. Volkswagen Civil Complaint*], https://ag.ny.gov/sites/default/files/new_york_vw_complaint_7.19.pdf.

267. Jack Ewing & Hiroko Tabuchi, *Volkswagen Scandal Reaches All the Way to the Top, Lawsuits Say*, N.Y. TIMES (July 19, 2016), <http://www.nytimes.com/2016/07/20/business/international/volkswagen-ny-attorney-general-emissions-scandal.html>. See N.Y. Volkswagen Civil Complaint, *supra* note 266, at 21–28.

268. N.Y. Volkswagen Civil Complaint, *supra* note 266, at 13–14.

269. Ewing & Tabuchi, *supra* note 267.

270. *Id.*; see also N.Y. Volkswagen Civil Complaint, *supra* note 266, at 24.

contain the chemical solution used to neutralize nitrogen oxide emissions in the exhaust and that Volkswagen decided to utilize defeat devices to meet emissions standards instead of spending the necessary money to redesign the vehicles.²⁷¹

Volkswagen also currently faces “criminal investigations and shareholder lawsuits around the world.”²⁷² German prosecutors are currently investigating Mr. Winterkorn for market manipulation by waiting too long to reveal that Volkswagen was under investigation, as well as another management board member “for potential violations of securities laws.”²⁷³ The investigation into executive suite members threatens to severely undercut Volkswagen’s defense—that a small group of managers in the middle are suspected of installing defeat devices in the affected vehicles, beginning with the 2009 models, and that top management had no knowledge until shortly before the deception was disclosed in September 2015.²⁷⁴ This in turn also indicates that prosecutors are also looking into potential cover-up activities after Volkswagen became aware that it was being investigated for “violating clean air rules in the United States.”²⁷⁵ Prosecutors in South Korea are also investigating local Volkswagen executives and considering pressing criminal charges.²⁷⁶ “Volkswagen [also] faces a criminal inquiry by the Department of Justice,” as well as “investigation[s] by attorneys general in 42 states, the District of Columbia and Puerto Rico.”²⁷⁷ The Norwegian Government Pension Fund—Volkswagen’s fourth largest investor and its

271. N.Y. Volkswagen Civil Complaint, *supra* note 266, at 24.

272. Ewing & Tabuchi, *supra* note 267.

273. Jack Ewing, *Martin Winterkorn, Ex-C.E.O. of Volkswagen, is Under Investigation*, N.Y. TIMES (June 20, 2016), <http://www.nytimes.com/2016/06/21/business/international/volkswagen-winterkorn-germany.html>. Prosecutors in Germany “did not identify the second board member” under investigation, only that it was not Volkswagen’s chief financial officer at the time and current chairman of the supervisory board, Hans Dieter Pötsch. *Id.* However, an individual with knowledge of the case confirmed German news reports indicating that the second executive was Herbert Diess, who was involved in selling “Volkswagen brand cars in the United States.” *Id.*

274. *Id.* A lower-ranked executive, however, sent Mr. Winterkorn a memo in 2014 and reported that a private study conducted on Volkswagen diesel cars sold in the United States would potentially cause the company to be accused of cheating emissions tests. *Id.* Even though Volkswagen acknowledged the existence of this memo, the company said it was unsure whether Mr. Winterkorn “took note of the memo.” *Id.*

275. *Id.*

276. Choe Sang-Hun, *South Korea Targets Executives, Pressed by an Angry Public*, N.Y. TIMES (July 4, 2016), <http://www.nytimes.com/2016/07/05/business/dealbook/south-korea-targets-executives-pressed-by-an-angry-public.html>.

277. Tabuchi & Ewing, *supra* note 259.

biggest independent shareholder—joined other investors in suit in May 2016.²⁷⁸

Mr. Winterkorn was subjected to questioning by German lawmakers in January 2017, where he once again maintained his unawareness that the company was bypassing emissions standards and that he had not heard the term “defeat device” prior to the discovery of the scandal.²⁷⁹ During the ninety minutes of questioning in Parliament in Berlin, Mr. Winterkorn provided vague and unclear responses to questions about the emissions scandal.²⁸⁰ However, Mr. Winterkorn’s claim is undermined by several developments in the case. First, Mr. Gottweis, a Volkswagen executive who specialized in solving emissions problems in the United States, warned Mr. Winterkorn in a 2014 memo that officials here would reasonably investigate “whether Volkswagen implemented a test detection system in the engine control unit software”²⁸¹ and that the company would be unable to provide a “sound explanation for the dramatically elevated” emissions levels.²⁸² The company’s defense was that the memo was part of a “stack of weekend reading” Mr. Winterkorn received and it is unclear if he ever read the memo. However, Mr. Gottweis not only reported directly to Mr. Winterkorn, but was also known internally as “the fireman”, making it doubtful that a warning coming from such an executive would have been overlooked.²⁸³ Second, Volkswagen formally agreed to plead guilty to three criminal felony counts one week before Mr. Winterkorn’s questioning, making his claims even less believable.²⁸⁴ German prosecutors also announced shortly after that they had evidence that Mr. Winterkorn had participated in the company’s emissions fraud, which seriously undermines both his and the company’s claims.²⁸⁵

Even before Volkswagen’s criminal guilty plea, one thing was clear: Volkswagen would not be entitled to any cooperation credit under the

278. Alanna Petroff, *New Bombshell Lawsuit Against Volkswagen*, CNN MONEY (May 16, 2016, 8:30 AM), <http://money.cnn.com/2016/05/16/news/companies/volkswagen-norway-lawsuit/>.

279. Alison Smale & Jack Ewing, *Ex-Chief of VW Holds Firm During Grilling on Emissions Deception*, N.Y. TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/business/germany-investigation-volkswagen-winterkorn-diesel-emissions.html>.

280. *Id.*

281. *Id.*

282. Jack Ewing, *Volkswagen Memos Suggest Company Mised U.S. Regulators*, N.Y. TIMES (Feb. 18, 2016), <https://www.nytimes.com/2016/02/19/business/volkswagen-memos-suggest-emissions-problem-was-known-earlier.html>.

283. Smale & Ewing, *supra* note 279.

284. *Id.*

285. Jack Ewing, *Ex-Volkswagen Chief Investigated by Germany in Emissions Cheating Scandal*, N.Y. TIMES (Jan. 27, 2017), https://www.nytimes.com/2017/01/27/business/volkswagen-germany-winterkorn-diesel-emissions.html?_r=0.

Yates Memo. First, the government’s “efforts to learn the truth about the emission exceedances and other irregularities related to the 3.0L Subject Vehicles, including whether VW had committed the violations of federal law . . . were impeded and obstructed by material omissions and misleading information provided by VW entities.”²⁸⁶ In addition, Volkswagen also “knowingly concealed facts that would have revealed the existence of the dual-calibration strategy utilized in the 3.0L Subject Vehicles to regulators when they had a duty to share such information.”²⁸⁷ Not only did the company fail to disclose all relevant facts about the misconduct, it “engaged in affirmative misrepresentations and took affirmative actions designed to conceal these facts.”²⁸⁸ If the company had been forthcoming in admitting its wrongdoing and had it taken disciplinary measures against culpable individuals, it might have been able to receive reduced financial penalties.

Volkswagen’s criminal guilty plea includes conspiracy charges to defraud the United States and its U.S. customers, conspiracy to violate the Clean Air Act, obstruction of justice for destroying relevant documents, as well as a “separate crime of importing these cars into the U.S. by means of false statements about the vehicles’ compliance with emissions limits.”²⁸⁹ Volkswagen’s criminal fine will cost the company \$2.8 billion, in addition to another \$1.5 billion it has agreed to pay for “separate resolutions of environmental, customs and financial claims.”²⁹⁰ This settlement includes EPA’s civil case against the company that was resolved through three partial settlements, as well as customs fraud claims by the U.S. Customs and Border Protection.²⁹¹ These amounts do not include the approximately \$16 billion that the company has had to pay out in civil settlements in the United States alone.²⁹²

286. Volkswagen Complaint, *supra* note 239, at 20.

287. *Id.*

288. *Id.* Even after Mr. Horn’s admissions during his October 8th testimony, and after the EPA issued the NOV to Volkswagen, the company still failed to come forward and disclose that the 3.0L Subject Vehicles also contained illegal defeat devices, which was only discovered through the EPA and CARB’s own investigations. *Id.* at 19.

289. VW Guilty Plea, *supra* note 239.

290. VW Guilty Plea, *supra* note 239.

291. *Volkswagen Clean Air Act Civil Settlement*, EPA, <https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement> (last visited May 1, 2017).

292. Jack Ewing, Adam Goldman & Hiroko Tabuchi, *Volkswagen Executive’s Trip to U.S. Allowed F.B.I. to Pounce*, N.Y. TIMES (Jan. 9, 2017), <https://www.nytimes.com/2017/01/09/business/volkswagen-emissions-scandal-oliver-schmidt.html>.

Six Volkswagen employees and executives have also been indicted by a federal grand jury in the Eastern District of Michigan,²⁹³ in what the New York Times described as “a sharp turn by a departing administration that is trying to remake its image of being soft on corporate crime.”²⁹⁴ Of the six individuals charged, five are believed to be in Germany, and one, Oliver Schmidt, was arrested in early January 2017.²⁹⁵ F.B.I. agents pounced at the opportunity to arrest a foreign corporate executive on American soil when they learned that Schmidt would be in Miami. An F.B.I. agent’s affidavit stated that Mr. Schmidt, formerly the top emissions compliance executive in the United States, had performed a crucial part in the company’s cover-up of the emissions scandal.²⁹⁶ The criminal complaint charged Mr. Schmidt “for knowingly participating in a conspiracy” to defraud the United States, the EPA, Volkswagen customers and to violate the Clean Air Act.²⁹⁷ Mr. Schmidt continued to work for Volkswagen even after the scandal came to light, and even appeared before a committee of the UK Parliament, arguing that “in the understanding of the Volkswagen Group” the software was “not a defeat device”.²⁹⁸ While it seems unclear why Mr. Schmidt chose to come to the United States knowing that these investigations were underway, Mr. Schmidt’s arrest “is a stroke of luck”, since the rest of the executives are in Germany.²⁹⁹ Since the country rarely extradites its own citizens, American authorities are only able to arrest the other individuals if they voluntarily surrendered.³⁰⁰ The other five indicted individuals comprised of an engines expert, an emissions specialist, an

293. *Id.*

294. Hiroko Tabuchi, Jack Ewing & Matt Apuzzo, *6 Volkswagen Executives Charged as Company Pleads Guilty in Emissions Case*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/business/volkswagen-diesel-vw-settlement-charges-criminal.html>. Of course, by the time this article is published the administration will have departed, and it remains to be seen how the new administration will treat corporate crime.

295. *Id.*

296. Ewing, Goldman & Tabuchi, *supra* note 292.

297. *Criminal Complaint Against VW’s Compliance Manager*, N.Y. TIMES, <https://www.nytimes.com/interactive/2017/01/09/business/document-volkswagen-complaint-compliance-manager.html> (last visited May 1, 2017).

298. 25 Jan. 2016, Parl Deb HC (2016) col. 495 (UK), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/transport-committee/volkswagen-group-emissions-violations/oral/27791.pdf>; see Adam Goldman, Hiroko Tabuchi & Jack Ewing, *F.B.I. Arrests Volkswagen Executive on Conspiracy Charge in Emissions Scandal*, N.Y. TIMES (Jan. 9, 2017), <https://www.nytimes.com/2017/01/09/business/volkswagen-diesel-emissions-investigation-settlement.html>.

299. Ewing, Goldman & Tabuchi, *supra* note 292.

300. Hiroko Tabuchi & Jack Ewing, *VW Engineer Pleads Guilty in U.S. Criminal Case Over Diesel Emissions*, N.Y. TIMES (Sept. 9, 2016), https://www.nytimes.com/2016/09/10/business/international/vw-criminal-charge-diesel.html?_r=0.

executive showman, a troubleshooter, and a quality-control employee.³⁰¹

Thus far, the only Volkswagen employee who has pled guilty is James Robert Liang, an engineer who has been employed by the company since 1983.³⁰² Mr. Liang was part of the team that was supposed to develop a new diesel engine in 2006 that would comply with the stringent emissions laws in the United States.³⁰³ Instead of making necessary modifications to the engine that would have proven costly, they decided to use software to cheat emissions tests.³⁰⁴ The problem was that nobody inside the company knew how to create the software.³⁰⁵ Volkswagen thus turned to its German supplier and one of the world's largest suppliers, Robert Bosch.³⁰⁶ As one of Bosch's largest customers, Volkswagen had immense influence over the supplier and Bosch "practically [had] no possibility to say 'no,' or they [would risk] losing business from the biggest carmaker in the world."³⁰⁷ Bosch's involvement in the scandal highlights the breadth of Volkswagen's deceit, extending beyond the company itself and undoubtedly involved scores of people for almost a decade.³⁰⁸

The DOJ desperately needs to successfully prosecute and hold individuals accountable for Dieselgate in order to regain public confidence and, more importantly, to prevent corporate crime through deterrence.³⁰⁹ Even though there has been a lack of reliable data on the exact effect of corporate fraud, a recent study estimated the annual cost of corporate securities fraud in the United States to be \$380 billion.³¹⁰ An analogy between corporate crime and street crime reveals that there are two rudimentary aspects to deterrence: "the certainty of punishment and

301. Jack Ewing, *Volkswagen's Diesel Scandal: Who Has Been Charged?*, N.Y. TIMES (Jan. 13, 2017), <https://www.nytimes.com/2017/01/13/business/volkswagen-diesel-emissions-executives.html>.

302. *Id.*

303. *Id.*

304. *Id.* Mr. Liang's plea agreement also states that when he moved to California in 2008 to introduce the company's "clean diesel" vehicles in the country, he and the other engineers misrepresented that the cars complied with federal and state laws. *Id.*

305. Jack Ewing, *Supplier's Role Shows Breadth of VW's Deceit*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/business/bosch-vw-diesel-settlement.html>.

306. *Id.*

307. *Id.*

308. *Id.*

309. Robert H. Tillman & Henry N. Pontell, *Corporate Fraud Demands Criminal Time*, N.Y. TIMES (June 29, 2016), <http://www.nytimes.com/2016/06/29/opinion/corporate-fraud-demands-criminal-time.html>.

310. *Id.*

the severity of punishment.”³¹¹ Research shows that the first aspect has a stronger deterrent effect because people are less likely to commit crimes when the likelihood of getting caught is high.³¹² It is thus reasonable to assume that Volkswagen decided to cheat because it believed that it had a slim possibility of getting caught by the U.S. government.³¹³ Volkswagen also believed that the punishment it would receive, if it were caught, would also not be very severe.³¹⁴ Volkswagen released a statement in March, saying “[it] was advised . . . in the past that U.S. emissions penalties were not especially high for a company the size of Volkswagen.”³¹⁵

Another issue lies with the types of punishment meted out by the DOJ for corporate crimes in recent years. Federal prosecutors have settled for deferred prosecution agreements, large-scale fines, and no criminal charges against either the corporation or any individuals.³¹⁶ In order to have a stronger deterrent effect to prevent corporate crime, the DOJ needs to “change the corporate calculus,” and the steps are threefold:

First, [the DOJ] need[s] to increase the chances that white-collar criminals will be punished . . . Second, corporate executives must face the very real prospect of doing time in prison and not just pay fines . . . Third, regulatory agencies must also have a stronger presence in the markets and industries they oversee.³¹⁷

IV. CONCLUSION

While this country has seen an abundance of corporate wrongdoing in this century, the DOJ under the Obama administration had been continuously criticized for being “soft on corporate crime”.³¹⁸ As a result,

311. *Id.*

312. *Id.*

313. *Id.* (“[T]he company had little reason to fear discovery in the United States, where government regulators have been slow to react to suspected design defects, going back to the infamous exploding Ford Pintos of the 1970s.”)

314. *See id.*

315. Nathan Bomey, *Volkswagen: We Thought Scandal Wouldn't Cost Much*, USA TODAY (Mar. 2, 2016), <http://www.usatoday.com/story/money/cars/2016/03/02/volkswagen-emissions-scandal/81214726/>.

316. Tillman & Pontell, *supra* note 309 (“The deterrent value of these types of punishments, however, is highly questionable. A 2011 analysis by The New York Times found that many Wall Street firms charged with securities fraud in a 15-year period were ‘repeat offenders’ that continued to break the rules even though they faced heavier penalties.”).

317. *Id.*

318. Ben Protess & Matt Apuzzo, *Justice Department Toughened Approach on Corporate*

the DOJ began to push harder for the prosecution of corporate crime. For instance, the DOJ's handling of the Volkswagen case and the criminal charges of culpable individuals suggest that there is some change in the way corporate crime is prosecuted. Whether or not the Yates Memo will restore public faith and have any real impact on individual accountability will depend on future prosecutions of business organizations. However, the new administration brings about a new set of prosecutors with very different ideas of how corporate crime should be treated. While this Note has no intention of taking a political stance, recent events in politics that will bear heavily on the future of the Yates Memo and the prosecution of corporate misconduct must be mentioned.

On January 27, 2017, President Trump signed an Executive Order banning citizens and refugees of seven Muslim countries.³¹⁹ In response, then-acting Attorney General Yates issued a letter to DOJ attorneys, instructing them not to follow the Executive Order.³²⁰ She explained the difference between her role and that of the Office of Legal Counsel, stating that she was "responsible for ensuring that the positions we take in court remain consistent with this institution's solemn obligation to always seek justice and stand for what is right," concluding that she was not convinced that the Executive Order was lawful.³²¹ The President fired Ms. Yates that same night for her "insubordination".³²²

The President replaced Ms. Yates with Dana Dana J. Boente, the United States attorney for the Eastern District of Virginia, who announced that his first act as acting attorney general was to revoke Ms. Yates' order. However, since Mr. Boente was only serving as acting attorney general until Jeff Sessions, Mr. Trump's choice for attorney general, was confirmed, it will be up to Mr. Sessions to continue this

Crime, but Will That Last?, N.Y. TIMES (Jan. 12, 2017), <https://www.nytimes.com/2017/01/12/business/dealbook/justice-department-corporate-crime.html>.

319. Michael D. Shear & Helene Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html>.

320. *Letter From Sally Yates*, N.Y. TIMES, <https://www.nytimes.com/interactive/2017/01/30/us/document-Letter-From-Sally-Yates.html> (Jan. 30, 2017).

321. *Id.* ("At present, I am not convinced that the defense of the Executive Order is consistent with these responsibilities nor am I convinced that the Executive Order is lawful.")

322. Michael D. Shear et al., *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html>.

“momentum against corporate crime”.³²³ As Ms. Yates said in a recent interview, “I don’t think the concept of holding individuals accountable who actually committed crimes is a particularly controversial concept.”³²⁴ Even though Mr. Sessions has the ability to revoke memos issued by former attorney generals, he has previously criticized the “too-big-to-jail philosophy” in 2010, during investigations of the banks that caused the financial crisis.³²⁵ Whether or not the DOJ is able to continue its prosecuting streak will depend entirely on how Mr. Sessions chooses to proceed.

323. Proress & Apuzzo, *supra* note 318.

324. *Id.*

325. *Id.*