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The Yates Memo – DOJ Issues Questions And Answers: Question 5

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***This is the sixth in a series of blog posts that examines seven FAQs issued by the DOJ in response to questions raised by the Yates Memo. The fifth of these questions addresses what happens if a company cannot determine who did what within the organization.* Question: What happens if a company cannot determine who did what within the organization or is prohibited from providing that information to the government?** The simple answer to this question is that the company seeking cooperation credit has the burden of providing a compelling explanation to the DOJ if the corporation is not able to identify all wrongdoers and provide all relevant facts. By way of background, before the Yates Memo was issued, the government typically would award credit to corporations on a spectrum based on a company's degree of cooperation as perceived by the government. That spectrum was not well-defined and the government was not particularly transparent about the specific requirements for cooperation credit. As noted throughout this series, the Yates Memo now provides some specificity. Among other things, the Yates Memo notes that companies must disclose "all relevant facts about the individuals involved in corporate misconduct" in order "[t]o be eligible for *any* cooperation credit." As former Deputy Attorney General Sally Yates said after the memo came out, it's all or nothing. In order to receive any cooperation credit, companies must now "identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide . . . all facts relating to that misconduct." These new guidelines essentially require corporations to do more than actively investigate wrongdoing within their ranks if they want to receive cooperation credit from the government. Companies are expected to identify the wrongdoers and provide the government with all fact evidence implicating the wrongdoers. Indeed, as Yates has made clear in remarks, "[i]f they don't know who is responsible, they need to find out." But what happens when a company is unable to identify the culpable individuals? Or what if the company is unable to provide information to the government as a result of unintentional or unknowing destruction of hard copy and electronic documents, general unavailability of a witness or the refusal of a witness to be interviewed by company counsel, the attorney-client privilege or work product protections, or a joint defense agreement? The DOJ recognizes such difficult circumstances may arise where, for example, "despite its best efforts to conduct a thorough investigation, a company generally cannot get access to certain evidence or is actually prohibited from disclosing it to the government." U.S. Attorneys Manual (USAM) 9-28.700[1]. In providing such a response to government counsel, the DOJ places the burden on the company seeking cooperation to explain the restrictions that prevent the information's disclosure. Further, the DOJ cautions that companies should identify such disclosure concerns as early as possible in the investigation. Turning first to the unavailability of documents, it is not uncommon for an investigation to reveal that documents

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have been stolen, misplaced or destroyed. Culpable individuals may have stolen or destroyed relevant documents and emails or relevant documents may have been destroyed as part of a routine document retention program or other company policy. This is one of the scenarios that triggers prompt disclosure to the government with an explanation as to why the documents are no longer in possession, custody and control of the company. As long as the company is continuing to work cooperatively with the government to identify the individual wrongdoers, it should not be at risk of losing cooperation credit. Witnesses can include current and former employees. Often, the culpable or knowledgeable individuals may have been promoted, transferred or fired, or they may have retired or quit. This can present many challenges for the company, because it may not be able to locate these individuals. In other circumstances, a current employee or former employee may simply refuse to be interviewed. In the case of current employees, the company can make the individual's continued employment contingent on participation in an interview. This can demonstrate to the government that the company is making every effort to gather information and identify the individual wrongdoers. But in the case of former employees, the company may simply be at a loss if the individual refuses to submit to an interview. "This dynamic – *i.e.*, the difficulty of determining what happened, where the evidence is, and which individuals took or promoted putatively illegal corporate actions – can have negative consequences for the corporation. More specifically, because of corporate attribution principles concerning actions of corporate officers and employees uncertainty about who authorized or directed apparent corporate misconduct can inure to the detriment of a corporation." USAM 9-28.700(B). Regardless of the scenario, added hurdles for earning cooperation credit from DOJ arise when information is protected by the attorney-client privilege, work product doctrine or a joint defense agreement. In such a situation, the company must make a decision whether to waive privilege. With respect to the attorney-client privilege and work product doctrine, while the Yates Memo makes no formal changes to the DOJ's position on privilege with respect to cooperation credit for businesses, its practical implications are wide-ranging. The only reference to privilege in the Yates Memo is its warning that companies seeking cooperation credit must "cooperate completely as to individuals, within the bounds of the law and legal privileges." Yates has also argued in clarifying her position that "[f]acts are not [privileged]. If a law firm interviews a corporate employee during an investigation, the notes and memos generated from that interview may be protected, at least in part, by attorney-client privilege or as attorney work product." Yates acknowledged that in that situation a company does not need to turn over the protected material, but she added this caveat: "[T]o earn cooperation credit, the corporation does need to produce all relevant facts – including the facts learned through those interviews – unless identical information has already been provided." Nevertheless, even where every effort is made to provide the government with only the facts while preserving privilege, there are substantial collateral risks that must be considered (partial or selective waiver) when deciding whether to cooperate with the government in a post-Yates world. The DOJ's overly simplistic "facts are not privileged" decree sets a new expectation for corporate investigations and companies may be risking privilege protections in how they disclose "the facts" to the government. For example, investigating attorneys, in an effort to preserve the privilege, may prepare fact-only summaries of information gathered from employee interviews that could be provided to the government. Therefore, the "facts" would be independently memorialized and kept separate from privileged communications and memoranda containing legal analysis and

other attorney work product necessary to providing legal advice to the company. This procedure may appear to cure the dilemma, but it is not without risk. Separating out “the facts” from the interviews would not change the privileged nature of the underlying communication between the company’s employee and its attorneys. Another possible scenario involves a company’s decision to produce emails or documents from in-house or outside counsel in an effort to provide the government with facts about individual wrongdoing. While these documents may be redacted where necessary to maintain privilege protections, it is possible that opinions may differ as to whether such communications are actually privileged. If DOJ decides that in-house counsel was actually providing business advice, as opposed to legal advice, the entire unredacted version of the document and all related documents may be subject to disclosure. In addition, where a company must essentially waive privilege in order to provide the government with these documents, this limited disclosure may be viewed as a subject matter waiver, opening the company up to greater exposure. Still, “waiving the attorney-client and work product protections has never been a prerequisite under the Department’s prosecution guidelines for a corporation to be viewed as cooperative.” USAM 9-28.710. At the end of the day, a “company may be eligible for cooperation credit regardless of whether it chooses to waive privilege or work product protection in the process, if it provides all relevant facts about the individuals who were involved in the misconduct. But if the corporation does not disclose such facts, it will not be entitled to receive any credit for cooperation.” USAM 9-28.720 fn. 2. In the coming months and years, the Yates Memo is expected to be tested in the courts. Indeed, with the new sheriff in town, and with the U.S. Attorney for the District of Maryland sitting in the seat previously occupied by Yates, DOJ’s “go for broke” instruction of the Yates Memo may be quickly tested.