

## Corporate Criminal Law Update: Enhanced Upjohn Warnings in the Wake of the Yates Memorandum

04.19.2016

On September 9, 2015, Deputy Attorney General Sally Yates issued a policy memorandum ("Yates Memorandum") placing greater emphasis at the outset of any investigation on targeting and prosecuting corporate individuals – executives, officers and employees – for the wrongdoing of the companies they serve. The policies set forth in the memorandum apply to both criminal and civil investigations involving corporations.

### A. Background

The Yates Memorandum introduced six new policy measures designed to strengthen the government's pursuit of individual corporate wrongdoing. Among the new key steps set forth in the memorandum and recently codified in the official Justice Department's written guidelines for federal prosecutors, corporations under investigation must now provide the government with all relevant facts relating to alleged wrongdoing by its executives, officers and employees. In fact, to be eligible for *any* cooperation credit, a corporation must identify and serve up its own people, regardless of their positions, who might be responsible for the wrongful conduct under investigation, and the corporation must continue to cooperate against those persons even after the government's case against it has been resolved. Further, absent extraordinary circumstances, Justice Department attorneys no longer are permitted to release individuals from either criminal or civil liability when resolving cases against corporations. Instead, government attorneys must preserve their ability to prosecute those individuals.

The policies set forth in the Yates Memorandum replace the sliding scale approach used previously by the government in evaluating cooperation. Now, companies failing to cooperate flawlessly with the government place themselves at significant risk of increased criminal exposure. Even where a company cooperates to the fullest, the government might decide not to provide the credit due because the company, the government might argue, did not go far enough to uncover and/or divulge wrongful individual conduct.

### B. Discussion

In ferreting out individual wrongdoing, corporate counsel often must interview officers and employees of the company. In such instances, counsel are required by the Supreme Court's *Upjohn* decision to advise each person that the nature of the interview is for the purpose of giving advice to the corporation and not to the individual. The corporate attorney-client privilege generally embraces communications between corporate counsel and individuals relating to a subject matter within the scope of counsel's duties for the purpose of providing legal advice to the corporation.

The attorney-client privilege, together with attorney work product privilege, routinely has been invoked by companies in relation to internal interviews. However, because the Yates

### ATTORNEYS

Peter M. Thomson

### CAPABILITIES

Criminal Defense and Government Investigations

Memorandum is silent in regard to both privileges, it remains unclear to what extent the government will respect the privileges and how it will view a company's decision to waive or not waive them in connection with an investigation. Therefore, corporate counsel must seek to understand how the prosecutor will approach the company's right to assert the privileges when making a decision about whether and how to cooperate.

Moreover, because the Yates Memorandum requires that companies cooperate flawlessly with government investigators in order to receive *any* cooperation credit, corporate counsel should be extra diligent when advising individuals that counsel represents the company only and not the individual. A less than perfect *Upjohn* warning may leave an individual with the impression that a personal attorney-client privilege exists with interviewing counsel. Such a misunderstanding potentially could lead to the individual attempting to prevent the company from disclosing the details of the interview to the government, which would adversely impact the company's ability to obtain cooperation credit.

To be sure, the Justice Department's newly adopted priority of targeting corporate individuals has the potential to create a chilling atmosphere in which companies find themselves at odds with the government as a result of being placed in conflict with their own officers and employees. Where corporate individuals appear to have criminal exposure, a potential conflict of interest arises. In such cases, corporate counsel immediately should decide whether the company will engage outside counsel for those individuals. Engaging outside counsel actually might inure to the company's benefit to the extent that it demonstrates institutional objectivity and impartiality. Thus, providing outside counsel for officers and employees might, under certain circumstances, be viewed favorably by Justice Department investigators.

In sum, corporate counsel must be super vigilant while conducting internal investigations and in responding to government requests for cooperation. If the *Upjohn* warnings are not adequately provided, the corporation runs a significant risk of losing its eligibility to receive cooperation credit under the "all or nothing" threshold test. A company therefore must be careful to satisfy its disclosure requirements under the Yates Memorandum by conducting internal interviews in a manner which avoids the perception of the existence of an attorney-client privilege between corporate counsel and the officer or employee.

### C. Enhanced *Upjohn* Warnings

The standard *Upjohn* script generally requires that individuals be advised that corporate counsel represents the company only and not the individual on a personal basis; that counsel is collecting facts to provide advice solely to the company; that the contents of the interview are protected by the attorney-client privilege, held only by the company, and not the individual; and that the individual must maintain confidentiality of the interview, with the exception of that person's privately retained counsel.

More specifically, the White Collar Crime Committee Working Group of the American Bar Association has suggested the following *Upjohn* blueprint for corporate counsel conducting interviews:

1. I am a lawyer for Corporation A. I represent only Corporation A, and I do not represent you personally.
2. I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.
3. Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.

4. In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss this discussion.
  
5. Do you have any questions?
  
6. Are you willing to proceed?

However, in light of the Justice Department's newly enacted policies targeting corporate individuals pursuant to the Yates Memorandum, in addition to the above standard warnings, corporate counsel conducting internal interviews in relation to government investigations or requests for cooperation also are urged to advise corporate individuals of the following:

1. Corporation A may choose to cooperate with the government in order to resolve the government's investigation of, or charges against, the company; and
  
2. In cooperating with the government, without consulting with you, Corporation A may disclose the contents of your interview to government attorneys and/or investigators for the purpose obtaining cooperation credit.

Corporate counsel should prepare a formal written script for delivering the above warnings during interviews, provide persons interviewed with a written summary of the warnings provided orally, and contemporaneously memorialize in a memorandum that the warnings have been provided. Counsel also strongly should consider requiring persons interviewed to acknowledge in writing their understanding and receipt of the warnings provided and, further, that they understand the applicability and scope of the attorney-client privilege.

#### **D. Conclusion**

The Justice Department's new policy directives have changed how internal investigations are conducted, impact whether and how companies will cooperate, and significantly raise the stakes for corporations and corporate individuals under investigation. Because companies must now provide perfect cooperation, the standard *Upjohn* warnings are no longer enough and corporate counsel should consider supplementing the warnings as described above. Although individuals who receive the enhanced warnings might choose to be less than candid, or seek private legal representation prior to agreeing to an interview, corporate counsel nevertheless should provide the warnings with sufficient clarity and memorialization to protect the company's right to waive the attorney-client and work product privileges in the future and obtain full cooperation credit from the government.