
YALE LAW & POLICY REVIEW

Coughing Up Executives or Rolling the Dice?:
Individual Accountability for Corporate Corruption

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INTRODUCTION.....50

I. FCPA ENFORCEMENT54

 A. *Background* 54

 B. *Cooperation Credit*..... 55

 1. Considerations in Prosecuting Business Organizations..... 55

 2. Deferred and Non-Prosecution Agreements 57

 3. SEC Enforcement Cooperation Program..... 59

 4. Mitigated Sentencing.....60

 C. *Individual Accountability* 61

II. YATES MEMO..... 64

 A. *Cooperation Credit: An “All-or-Nothing” Approach* 65

 B. *Other Steps*66

III. ANTI-BRIBERY ENFORCEMENT: A LAW AND ECONOMICS APPROACH67

 A. *The Economic Goal of Anti-Bribery Enforcement*.....67

 B. *The Economic Function of Anti-Bribery Enforcement*.....69

 C. *The Economic Function of Corporate Liability*.....70

 D. *Individual Accountability* 72

 E. *The Economic Function of Regulatory Credit*.....74

IV. YATES MEMO: EVALUATION75

 A. *Conflict of Interest*75

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1. Corporate Perspective76

2. Individual Perspective78

B. *Chilling Cooperation*.....78

1. Corporate Perspective79

2. Individual Perspective82

C. *The Yates Memo: Efficiency Outcome*..... 83

1. Cost of Anti-Bribery Enforcement 83

2. Cost of Bribery.....85

CONCLUSION.....86

INTRODUCTION

Anti-bribery enforcement continues to intensify on a global scale. More than ever before, multinational corporations currently face high financial and reputational risks relating to bribery and other corrupt practices. These increasing risks result predominantly from an escalating enforcement of the U.S. Foreign Corrupt Practices Act (FCPA). This escalation is clearly demonstrated by an increase in the ticket price of FCPA actions in recent years: in 2014, for instance, companies paid on average more than \$150 million to resolve FCPA cases. This value is about seven-and-a-half times higher than the average total value of monetary resolutions of corporate FCPA cases in 2012 and almost double the same value in 2013.¹ Additionally, FCPA enforcement has extended beyond corporate America. U.S. authorities increasingly act against foreign bribery in distant jurisdictions, even when links with the United States are remote.² To date, eight of the top ten monetary FCPA enforcement resolutions have been reached with non-US companies, with Siemens (Germany, \$800 million in 2008) and Alstom (France, \$772 million in 2014) topping the list of skyrocketing monetary resolutions.

While U.S. authorities—namely, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC)—still dominate the global fight against foreign bribery, anti-bribery enforcement actions have also been gaining priority in other jurisdictions, including the United Kingdom, Germany, Italy, Switzerland, and the Netherlands.³ From the entry into force of the Organiza-

1. See *2014 Year-End FCPA Update*, GIBSON DUNN (Jan. 5, 2015), <http://www.gibsondunn.com/publications/documents/2014-Year-End-FCPA-Update.pdf> [<http://perma.cc/6684-BXE5>].

2. The FCPA has extraterritorial jurisdiction and may apply to bribery paid by a non-U.S. company outside the United States when sufficient other links with the United States exist. See *infra* Section I.A.

3. See *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*, ORG. FOR ECON. COOPERATION & DEV. (2014) [hereinafter *OECD*].

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

tion for Economic Cooperation and Development (OECD) Anti-Bribery Convention (February 15, 1999)⁴ until June 2014, OECD Convention signatories took more than 400 enforcement actions against corporations and individuals for foreign bribery offenses.⁵ In 2013 alone, the total amount imposed in combined monetary sanctions was more than \$1.2 billion, compared to \$0.65 million only a decade earlier.⁶

While following a hard line with FCPA offenders, U.S. enforcement authorities have long sought to encourage corporations to play an active role in the fight against bribery and corruption by presenting benefits for this type of cooperation. Specifically, corporations that voluntarily self-report incidents of bribery to the authorities and that cooperate with the investigation have been offered cooperation credit: for instance, in the form of an opportunity to enter into agreed-upon resolutions rather than going through a complete and painful criminal trial.⁷ This cooperation credit has been significant in shaping corporate decisions—particularly those of large multinational companies—on how to deal with incidents of employee involvement in foreign bribery detected by the corporation. Seeking to prevent the adverse publicity, high costs, and business upheaval often involved in long-running criminal proceedings, corporations in most FCPA enforcement cases in recent years have chosen to cooperate, at least to a certain extent, with the DOJ investigation and thereby benefit from the cooperation credit.⁸

Report], http://www.keepeek.com/Digital-Asset-Management/oecd/governance/oecd-foreign-bribery-report_9789264226616-en [<http://perma.cc/4TZC-RWWS>].

4. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, ORG. FOR ECON. COOPERATION & DEV. (Nov. 21, 1997), http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [<http://perma.cc/P8BL-KW4F>].
5. *See OECD Report*, *supra* note 3, at 13.
6. *Id.* at 20.
7. *See infra* Section I.B.
8. Most FCPA settlements reached by the DOJ in recent years specifically mention corporate cooperation with the DOJ's investigation. *See, e.g.*, Press Release, U.S. Dep't of Justice, Louis Berger International Resolves Foreign Bribery Charges (July 17, 2015), <http://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges> [<http://perma.cc/PW6J-CBQ3>] (“Among other factors, in entering into a DPA in this case, the government considered: (1) LBI’s self-reporting of the misconduct; (2) the company’s cooperation, including voluntarily making both U.S. and foreign employees available for interviews, and collecting, analyzing and organizing evidence and information for federal investigators . . .”). In a very limited number of cases the DOJ mentioned the company’s refusal to cooperate with the investigation. *See, e.g.*, Press Release, U.S. Dep’t of Justice, PTC Inc. Subsidiaries Agree To Pay More than \$14 Million To Resolve Foreign Bribery Charges (Feb. 16, 2016), <http://www.justice.gov/opa/pr/ptc-inc-subsidiaries-agree-pay-more-14-million-resolve-foreign-bribery-charges> [<http://perma.cc/N53V-HFYR>]; *see also* Gary DiBianco et al., *U.S. Foreign Corrupt Practic-*

On September 9, 2015, however, the DOJ changed the rules of the game. Through a memorandum titled *Individual Accountability for Corporate Wrongdoing*, signed by U.S. Deputy Attorney General Sally Quillian Yates (Yates Memo), the DOJ imposed a condition requiring companies to turn in any employees involved in corporate fraud.⁹ On the basis of the Yates Memo, cooperation credit can no longer be awarded unless corporations identify individuals involved in the misconduct, and provide the DOJ with all relevant facts, regardless of the employees' position, status, and seniority.

Holding individuals accountable for wrongdoing committed within the scope of their employment has long been a priority for the DOJ in FCPA enforcement matters. This way, the DOJ seeks to encourage corporations to enhance their corporate culture, while securing public confidence in the U.S. justice system. In spite of this high priority, enforcement actions against individual offenders are not always feasible. Such actions involve a special set of challenges, particularly in disentangling who did what within a complex corporate structure. Therefore, the Yates Memo increases the burden of corporations seeking to benefit from cooperation credit by requiring them to assist the DOJ in coping with the challenges hindering enforcement actions against individual players.

The Yates Memo continues a steady trend of strengthening the enforcement approach against individuals involved in corporate fraud, including bribery. Accordingly, several commentators have downplayed the innovative nature of the Memo in the context of criminal cases, treating it as an official statement of a long-established U.S. enforcement policy.¹⁰ However, as reiterated recently by Ms. Yates, while the requirement to provide all facts about individuals is in-

es Act Enforcement Developments and Trends and Selected Non-U.S. Anti-Corruption Developments, 21 WORLD SEC. L. REP. 1, 2 (2015), <http://www.skadden.com/sites/default/files/publications/Skadden%20-%20FCPA%20article.pdf> [<http://perma.cc/TYU8-D4JF>] (“The majority of companies choose to cooperate with authorities. For example, eight of the 10 corporate settlements in 2014 and the only two settlements announced to date in 2015 involved reportedly prompt and genuine cooperation by the target entities.”).

9. Memorandum from Sally Quillian Yates, Deputy Att’y Gen., *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015) [hereinafter Yates Memo], <http://www.justice.gov/dag/file/769036/download> [<http://perma.cc/PD2L-AVX9>].
10. See, e.g., Daniel P. Chung, *Individual Accountability for Corporate Wrongdoing*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 21, 2015), <http://corpgov.law.harvard.edu/2015/09/21/individual-accountability-for-corporate-wrongdoing/> [<http://perma.cc/2STF-EWMA>]; Memorandum from Covington & Burling, LLP, DOJ Issues New Guidance on Pursuing Individual Accountability for Corporate Wrongdoing (Sept. 11, 2015), http://www.cov.com/-/media/files/corporate/publications/2015/09/doj_memo_individual_corporate_wrongdoing.pdf [<http://perma.cc/UX32-P4RX>]; *Unpacking the Yates Memo: What the “New” DOJ Policy Really Means*, MCGUIREWOODS (Sept. 11, 2015), <http://www.mcguirewoods.com/Client-Resources/Alerts/2015/9/Unpacking-Yates-Memo-New-DOJ-Policy.aspx> [<http://perma.cc/8WPP-CHPJ>].

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

deed not new, what has changed is the consequence of not doing so.¹¹ The Memo follows an “all-or-nothing” approach, requiring corporations to provide *all* the facts about individual conduct in order to qualify for *any* cooperation credit. Following the promulgation of the Memo, corporations are faced with a choice: either *cough up executives* as a precondition for cooperation credit or *roll the dice* and defend their case before a jury.¹² This key shift in policy lies at the heart of this Article.

Following a law and economics approach, this Article critically examines the desirability of the policy promulgated by the Yates Memo from a social welfare maximization point of view. The analysis reveals potentially serious shortcomings that may have an adverse effect on the incentives of corporations and employees. These drawbacks stem from the conflict of interest that the Yates Memo promotes between corporations and their employees, and from the possible chilling effect on the cooperative enforcement model the DOJ has consistently fostered since 1990s. Given these two pitfalls, the analysis suggests that the new policy communicated by the Yates Memo threatens to undermine rather than to promote the key purpose of U.S. anti-bribery enforcement policy. Accordingly, the analysis casts serious doubts on the social desirability of the Memo’s shift in policy and recommends its prompt reconsideration.

This Article is structured as follows: Part I provides a brief overview of key FCPA enforcement trends relating to both corporate and individual wrongdoers, after which Part II explores in more detail the six-step approach promulgated by the Yates Memo. Subsequently, Part III discusses the objectives of anti-bribery enforcement and the underlying functions of corporate and individual liability from a welfare maximization perspective. Part IV then evaluates the expected impact of the new enforcement policy on social welfare.

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11. See Sally Quillian Yates, Deputy Att’y Gen., Remarks at the New York City Bar Association White Collar Crime Conference (May 10, 2016), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association> [<http://perma.cc/KES3-R3S4>].
 12. The terms “coughing up high-level executives” and “rolling the dice” were specifically used by Deputy Attorney General Yates in announcing the Yates Memo at New York University School of Law. See Sally Quillian Yates, Deputy Att’y Gen., Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school> [<http://perma.cc/M5WQ-PHBE>].

I. FCPA ENFORCEMENT

A. Background

The FCPA was enacted in 1977 following the Watergate scandal.¹³ This pioneering piece of legislation was the first law in the world that governed domestic business behavior involving foreign government officials in foreign markets.¹⁴ Its main goal was to terminate a long-standing corporate culture based on the corrupt payments of hundreds of millions of dollars to foreign officials to secure business overseas.¹⁵ According to Congress, such practices had impaired public confidence in the financial integrity of U.S. companies, and hampered the efficient functioning of the markets.¹⁶

The FCPA contains both anti-bribery and accounting provisions. The *anti-bribery provision* prohibits the corrupt offering or provision of anything of value, including payments, gifts, and other benefits, to officials of foreign governments, foreign political parties, or public international organizations, with the intent of obtaining or retaining business. This provision applies to “issuers,” “domestic concerns,” and “agents” acting on behalf of issuers or domestic concerns, as well as to “any person” who violates the FCPA while in the territory of the United States.¹⁷ The *accounting provisions* require issuers and their agents to create and keep accurate books and records and to devise and maintain an ade-

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13. See *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure Acts of 1977: Hearing on S. 305 Before the S. Comm. on Banking, Hous., and Urban Affairs*, 95th Cong. (1977); AARON G. MURPHY, *FOREIGN CORRUPT PRACTICES ACT: A PRACTICAL RESOURCE FOR MANAGERS AND EXECUTIVES* (2011); Eugene R. Erbstoesser et al., *The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 CAP. MKTS. L.J. 381 (2007); Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929 (2012); Wallace Timmeny, *An Overview of the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 235 (1982).
 14. Erbstoesser et al., *supra* note 13, at 395.
 15. See HARLEY O. STAGGERS, *UNLAWFUL CORPORATE PAYMENTS ACT OF 1977*, H.R. REP. NO. 95-640, at 4–5 (1977); S. COMM. ON BANKING, HOUS., & URBAN AFFAIRS, *DOMESTIC & FOREIGN INVESTMENT IMPROVED DISCLOSURE ACTS OF 1977*, S. REP. NO. 95-114, at 3–4 (1977).
 16. S. REP. NO. 95-114, at 3–4.
 17. The term “issuer” covers any business entity that is registered under 15 U.S.C. § 78l or that is required to file reports under 15 U.S.C. § 78o(d). The term “domestic concern” includes any U.S. citizen, national, or resident, as well as any business entity that is organized under the laws of a U.S. state or that has its principal place of business in the United States. See *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, CRIM. DIV. U.S. DEP'T JUST. & ENFORCEMENT DIV., U.S. SEC. & EXCHANGE COMMISSION 10–11 (Nov. 2012) [hereinafter FCPA Resource Guide], <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [<http://perma.cc/3ZN5-5ZE7>].

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

quate system of internal accounting controls. Furthermore, these provisions prohibit individuals and businesses from knowingly falsifying books and records or from consciously circumventing or failing to implement a system of internal controls.¹⁸

FCPA enforcement is led by the DOJ and the SEC. The DOJ is entrusted with criminal enforcement powers against public companies and their associated persons, including stockholders, directors, employees, and other third parties acting on their behalf. Additionally, the DOJ is empowered to enforce the FCPA's anti-bribery provision, both criminally and civilly, against U.S. citizens, nationals, and residents, against U.S. businesses and associated persons, and against certain foreign persons and corporations acting in furtherance of an FCPA violation while in the territory of the United States.¹⁹ The FCPA entrusts the SEC with civil enforcement powers over public companies, including stockholders, directors, employees, and other third parties acting on their behalf.

In recent years, both the DOJ and the SEC have followed a hard line in enforcing the FCPA provisions, thus posing a tangible threat to corporate wrongdoers.

B. Cooperation Credit

While adopting a harsh approach to corporate wrongdoers, U.S. authorities have long sought to encourage corporations to cooperate in the battle against bribery. This goal has led U.S. enforcement authorities to establish a cooperative enforcement model, under which corporations may benefit from *cooperation credit* when they voluntarily self-disclose wrongdoing and cooperate with investigations.²⁰ This section discusses how the regulatory credit for cooperation has been incorporated into various aspects of U.S. enforcement policy against corporate fraud. As shown below, cooperation credit may play an important role in influencing prosecutors' decisions to bring charges against corporations or to enter into settlements with corporate wrongdoers. The cooperation credit could also influence judicial sentencing determinations for convicted corporations.

1. Considerations in Prosecuting Business Organizations

Based on the cooperative enforcement model employed by U.S. enforcement authorities in recent years, corporate self-reporting of corporate wrongdoing and cooperation with investigations may earn corporations cooperation credit, including declination of prosecution. The cooperative enforcement

18. *Id.* at 2.

19. *Id.* at 4.

20. See SHARON ODED, CORPORATE COMPLIANCE: NEW APPROACHES TO REGULATORY ENFORCEMENT 48–70 (2013) (presenting a detailed review of the transformation in U.S. authorities' enforcement approach to corporate wrongdoing).

model was developed through a series of DOJ Memos, starting as early as 1999 with the Memo issued by then-Deputy Attorney General Eric Holder.²¹ The Holder Memo instructed U.S. prosecutors to consider eight factors in determining whether to bring charges against corporations for corporate wrongdoing. Among these, the Memo specifically instructed prosecutors to consider “[t]he corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents”²² The Holder Memo further stipulated:

In determining whether to charge a corporation, that corporation’s *timely and voluntary disclosure of wrongdoing and its willingness to cooperate* with the government’s investigation may be relevant factors. In gauging the extent of the corporation’s cooperation, the prosecutor *may consider the corporation’s willingness to identify the culprits within the corporation, including senior executives*, to make witnesses available²³

Importantly, the Holder Memo referred to the challenges involved in pursuing individual actors for corporate wrongdoing as a justification for securing corporate cooperation:

In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. *It will often be difficult to determine which individual took which action on behalf of the corporation.* Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. *Accordingly, a corporation’s cooperation may be critical in identifying the culprits and locating relevant evidence.*²⁴

This approach, which rewards corporations for self-reporting and cooperating with investigations, was reinforced by the Thompson Memo of 2003,²⁵ the

21. Memorandum from Deputy Att’y Gen. Eric Holder, Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter Holder Memo], <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.pdf> [<http://perma.cc/8B7C-BRJH>].

22. *Id.* § II.

23. *Id.* § VI (emphasis added).

24. *Id.* (emphasis added).

25. Memorandum from Deputy Att’y Gen. Larry D. Thompson, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson-Memo], <http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities>

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

McNulty Memo of 2006,²⁶ and the Filip Memo of 2008.²⁷ In a nod to this approach, the DOJ has specifically referred to corporate voluntary self-reporting and cooperation as key determinants in its decisions to decline prosecution in the FCPA matter of Morgan Stanley & Co. and, more recently, in the matter of PetroTiger.²⁸

2. Deferred and Non-Prosecution Agreements

Cooperation credit has also played an important role in U.S. enforcement authorities' decisions as to whether to enter into Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) as alternatives to trial. Since the early 1990s, the DOJ has gradually incorporated the practice of DPAs and NPAs into the corporate arena.²⁹ DPAs and NPAs comprise a wide variety of agreements, under which prosecutors agree to defer (in DPAs) or to avoid altogether (in NPAs) the prosecution of culpable corporations if these organizations abide by the terms of the agreements. Normally, these terms would in-

/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf [http://perma.cc/HLQ2-JHTB].

26. Memorandum from Deputy Att'y Gen. Paul J. McNulty, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memo], http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf [http://perma.cc/LQ7K-2JNR].
27. Memorandum from Deputy Att'y Gen. Mark Filip, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008) [hereinafter Filip Memo], <http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf> [http://perma.cc/XQS4-BE7Q].
28. See Press Release, U.S. Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), <http://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required> [http://perma.cc/S4Z8-D7BD] ("The Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct. The company voluntarily disclosed this matter and has cooperated throughout the department's investigation."); Press Release, U.S. Dep't of Justice, Former Chief Executive Officer of Oil Services Company Pleads Guilty to Foreign Bribery Charge (June 15, 2015), <http://www.justice.gov/opa/pr/former-chief-executive-officer-oil-services-company-pleads-guilty-foreign-bribery-charge> [http://perma.cc/4UYT-8NQZ] ("The case was brought to the attention of the department through a voluntary disclosure by PetroTiger, which fully cooperated with the department's investigation. Based on PetroTiger's voluntary disclosure, cooperation, and remediation, among other factors, the department declined to prosecute PetroTiger.").
29. Deferred prosecution was originally created at the beginning of the twentieth century as an alternative arrangement used to rehabilitate juvenile and drug offenders. See JAMES A. INCIARDI ET AL., *DRUG CONTROL AND THE COURTS* 35–53 (1996); David A. Inniss, *Development in the Law: Alternative to Incarceration*, 111 HARV. L. REV. 1863, 1902–03 (1998).

clude, among other things, the payment of a criminal fine or a civil penalty, an obligation to cooperate with the authorities' investigation, and a commitment to adopt structural reforms and to comply with certain standards of behavior.³⁰ The key difference between DPAs and NPAs lies in whether the charges—and the agreement—are filed with the court. In DPAs, the charges are filed with the court; the parties then ask the court to approve the agreement. In NPAs, however, the agreement is reached between the corporation and the public prosecutor without being filed with or approved by the court.³¹

The Holder Memo planted the initial seeds for the recognition of DPAs and NPAs as official prosecutorial instruments in the case of corporate wrongdoing. As noted earlier, the Holder Memo explicitly recognized the challenge often faced by the prosecution in determining which individual took which action on behalf of the corporation. As such, the Memo referred to corporate cooperation as critical in identifying the culprits and in locating relevant evidence, and thereby allowed prosecutors to award corporations a unique credit in the form of immunity or amnesty in exchange for their cooperation.³²

The Thompson Memo, which followed the Holder Memo in 2003, explicitly acknowledged DPAs and NPAs as legitimate enforcement instruments that prosecutors may use as a form of credit for corporate cooperation. Specifically, the Memo allowed prosecutors to enter into DPAs and NPAs when a corporation's timely cooperation appeared to be necessary to the public interest and when other means of obtaining the desired cooperation were unavailable or would not be effective.³³ Accordingly, DPAs and NPAs were officially added to the toolkit of U.S. enforcement authorities, allowing them to close a case at an initial stage and to secure forward-looking structural changes within the corporation. With the use of DPAs and NPAs, the DOJ and the SEC³⁴ have substantially reduced the time, energy, and costs invested per matter in FCPA cases, while increasing their influence on future corporate compliance. Furthermore, DPAs and NPAs have often allowed authorities to reach enforcement goals while minimizing the collateral effects sometimes associated with a full trial.³⁵

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30. See Eugene Illovsky, *Corporate Deferred Prosecution Agreements: The Brewing Debate*, 21 CRIM. JUST. 36, 36–37 (2006); Sharon Oded, *Deferred Prosecution Agreements: Prosecutorial Balance in Times of Economic Meltdown*, 2 L.J. SOC. JUST. 65, 67–87 (2011); Peter Spivack & Sujit Raman, *Regulating the “New Regulators”: Current Trends in Deferred Prosecution Agreements*, 45 AM. L. REV. 159, 160–61 (2008).
31. See Oded, *supra* note 30, at 70 n.11.
32. Holder Memo, *supra* note 21, § VI (“[G]ranting a corporation immunity or amnesty may be considered in the course of the government’s investigation.”).
33. Thompson Memo, *supra* note 25, § VI.B.
34. Since January 2010, DPAs and NPAs have also been available as official enforcement instruments for the SEC. See *infra* Section II.B.3.
35. See Oded, *supra* note 30, at 79–82; Michael Yangming Xiao, Note, *Deferred/Non-Prosecution Agreements: Effective Tools To Combat Corporate Crime*, 23 CORNELL J.L. & PUB. POL’Y 233, 242 (2013).

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

Indeed, throughout the last decade, DPAs and NPAs have become critical instruments for both U.S. authorities and companies in resolving corporate corruption cases. Since 2000, the DOJ and the SEC have entered into more than 420 DPAs and NPAs, of which more than seventy-five were related to the FCPA.³⁶ Both the DOJ and the SEC continuously emphasize the heightened cooperation required for organizations to secure NPAs or DPAs.

From a corporate perspective, cooperation credit in the form of DPAs and NPAs offers significant benefits. Apart from saving the tremendous costs of a long-running trial, such as representation and business upheaval, DPAs and NPAs may materially reduce reputation damages. Additionally, the resolution of matters through DPAs and NPAs, as opposed to an adversarial legal procedure, allows corporations some room—albeit limited—to influence the statement of facts in the agreement document. This way, corporations may limit their exposure in follow-up civil litigation, in which plaintiffs will seek to rely on the statement of facts to support their claims.

3. SEC Enforcement Cooperation Program

Cooperation credit has also been adopted by the SEC as an incentivizing mechanism. Parallel to the development of U.S. criminal enforcement as described above, in October 2001 the SEC issued a Report of Investigation and a statement explaining its decision not to take enforcement action against a public company it had investigated for financial statement irregularities (known as the Seaboard Report).³⁷ In this report, the SEC articulated specific criteria that it would consider as a basis on which to grant leniency to companies under investigation. Among other relevant considerations, the SEC specifically referred to self-disclosure and cooperation with the investigation.³⁸

Furthermore, in January 2010, the SEC introduced a series of measures to intensify its enforcement policy, aiming to further encourage corporations and individuals to cooperate with SEC investigations and enforcement actions. First, the SEC implemented DPAs, NPAs, and other cooperation agreements previ-

36. *2015 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON DUNN 2 (Jan. 5, 2016), <http://www.gibsondunn.com/publications/documents/2015-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf> [<http://perma.cc/6YQ8-P29V>].

37. Report of Investigation and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969 and Accounting and Auditing Enforcement Release No. 1470, 76 SEC Docket 220 (Oct. 23, 2001).

38. *Id.* (“[Criterion] 8. . . . Did the company promptly, completely and effectively disclose the existence of the misconduct to the public, to regulators and to self-regulators? Did the company cooperate completely with appropriate regulatory and law enforcement bodies?”).

ously used only by the DOJ.³⁹ Additionally, the SEC further stipulated the guiding criteria it will use to evaluate corporate cooperation in considering whether to apply a lenient enforcement approach in specific cases. These criteria include self-policing prior to the discovery of the misconduct as well as cooperating with law enforcement authorities, including providing all information relevant to the underlying violations and evidence of the corporation's remedial efforts.⁴⁰

It is important to note that the DOJ's Yates Memo is not aimed at amending the SEC enforcement policy, including with respect to the cooperation credit offered by the SEC Enforcement Cooperation Program. Nevertheless, as past experience has shown, on various occasions the SEC has tended to independently align its enforcement policy with that of the DOJ, as with the adoption of DPAs and NPAs. Andrew Ceresney, the Head of Enforcement at the SEC, announced initial steps toward beefing up the SEC enforcement policy shortly after the promulgation of the Yates Memo.⁴¹ Therefore, the following evaluation of the Yates Memo may soon become relevant as well to the SEC's enforcement policy.

4. Mitigated Sentencing

Finally, cooperation credit was included in the U.S. Organization Sentencing Guidelines (Organizational Guidelines) adopted by the U.S. Sentencing Commission in November 1991 as Chapter 8 of the Guidelines Manual.⁴² The

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39. For a discussion of DPAs and NPAs, see *supra* Section II.B.2. Cooperation agreements, not discussed further in this Article, are formal written agreements in which the SEC Enforcement Division agrees to recommend to the SEC that a cooperator receives credit for cooperating in investigations or related enforcement actions if the cooperator provides substantial assistance, such as full and truthful information and testimony.
40. Policy Statement Concerning Cooperation by Individuals in Its Investigations and Related Enforcement Actions, Release No. 34-61340, 17 C.F.R. pt. 202 (Jan. 13, 2010).
41. Andrew Ceresney, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Keynote Address at ACI's 32nd FCPA Conference (Nov. 17, 2015), <http://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html> [<http://perma.cc/Z3F6-7NFR>] (announcing a parallel amendment in the enforcement policy of the SEC, according to which "going forward, a company must self-report misconduct in order to be eligible for the Division to recommend a DPA or NPA to the Commission in an FCPA case"). This newly introduced condition of non- and deferred prosecution agreements was said to be brought forward in order to incentivize corporations to promptly report FCPA misconduct to the SEC and to further emphasize the benefits that come with self-reporting and cooperation.
42. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g)(1)-(3) (U.S. SENTENCING COMM'N 2015); see also Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIAMI L. REV. 321, 343-44 (2012) (arguing that the cooperation

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

Organizational Guidelines constitute a highly explicit and comprehensive policy that serves as a roadmap for judges in setting the sentences for convicted organizations, including corporations, partnerships, pension funds, trusts, and others.⁴³ According to the Organizational Guidelines, in sentencing corporations, judges should set the fine within a range that is based on the seriousness of the offense and the culpability of the organization. In determining culpability, judges should take into account six specific factors, such as whether the corporation has self-reported the offense in a timely manner, has thoroughly cooperated with the investigation, and has accepted responsibility.⁴⁴ Accordingly, self-reporting and cooperation with the investigation may allow the corporation to benefit from a mitigated sentence.⁴⁵ It should be noted that implementation of the cooperation credit set forth by the Organizational Guidelines has been limited in the context of FCPA enforcement, because in reality most FCPA investigations have been resolved through DPAs and NPAs rather than full court trials.

C. *Individual Accountability*

In addition to corporate liability, the FCPA includes various channels through which individuals may be held liable. At the outset, individuals are subject to direct criminal liability when they are directly involved in bribery, aid or

credit offered by the Organizational Guidelines is too small to encourage firms to detect, report, and help prosecute the employees' crimes).

43. For a detailed overview of the Sentencing Guidelines, see Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697 (2002); and ODED, *supra* note 20, at 144–50. For a summary of the Sentencing Guidelines, see Paula Desio, *An Overview of the Organizational Guidelines*, U.S. SENTENCING COMM'N, <http://www.usc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf> [<http://perma.cc/28LE-SCUS>].
44. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g).
45. To date, there is limited empirical evidence on the impact of self-disclosure and cooperation on the ultimate fine. See, e.g., Rebecca Files, *SEC Enforcement: Does Forthright Disclosure and Cooperation Really Matter?*, 53 J. ACCT. & ECON. 353 para. VI (2012); Sarah Marberg, *Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act*, 45 VAND. J. TRANSNAT'L L. 557, 567–68 (2012); Nicole Leeper Piquero & Jason L. Davis, *Extralegal Factors and the Sentencing of Organizational Defendants: An Examination of the Federal Sentencing Guidelines*, 32 J. CRIM. JUST. 643, 651 (2004); Rebecca Files et al., *Cooperating with Regulators: Meaningful Credit or Sword of Damocles?* 20–34 (Aug. 2015) (unpublished manuscript), <http://ssrn.com/abstract=2026282> [<http://perma.cc/2AL8-A3VL>]; see also Peter R. Reilly, *Incentivizing Corporate America To Eradicate Transnational Bribery Worldwide: Federal Transparency and Voluntary Disclosure Under the Foreign Corrupt Practices Act*, 67 FLA. L. REV. 1683, 1709–10 (2015) (arguing that the effect of self-reporting might be non-existent).

abet bribery, or otherwise conspire to violate the FCPA.⁴⁶ Moreover, as with corporations, individuals who knowingly or recklessly provide substantial assistance to a violator can be held civilly liable for aiding and abetting violations of the FCPA anti-bribery provisions.⁴⁷ Likewise, while the FCPA accounting provisions are chiefly directed at organizations, individuals can also be held civilly liable for aiding and abetting or causing an issuer's violation of the accounting provisions.⁴⁸

FCPA individual liability is by no means limited to low-level, primary-actor employees. In fact, U.S. authorities increasingly seek to address the highest-level executives who are responsible for the tone, culture, or weak internal controls that may facilitate foreign bribery and other corrupt practices.⁴⁹ Already in the late 1990s, individual accountability, including for corporate executives, was set as an important enforcement goal by the DOJ in the Holder Memo.⁵⁰ Similar statements also appeared in later memoranda issued by the DOJ⁵¹ and were eventually officially included in the U.S. Attorney's Manual as the Principles of Federal Prosecution of Business Organizations.⁵²

46. FCPA Resource Guide, *supra* note 17, at 34.

47. *Id.*

48. *Id.* at 43.

49. See, e.g., Laura Fraedrich & Jamie A. Schafer, *What Is in It for Me: How Recent Developments in FCPA Enforcement Affect the Voluntary Disclosure Calculus*, 8 GLOBAL TRADE & CUSTOMS J. 257, 262–63 (2013); Michael G. McGovern & Steven S. Goldschmidt, *Snaring 'Control Person' Executives in FCPA Liability*, N.Y. L.J. (Feb. 8, 2010), <http://www.newyorklawjournal.com/id=1202442018976/Snaring-Control-Person-Executives-in-FCPA-Liability> [<http://perma.cc/9HML-3XPN>]; Press Release, U.S. Dep't of Justice, CEO and Managing Partner of Wall Street Broker-Dealer Charged with Massive International Bribery Scheme (Apr. 14, 2014), <http://www.justice.gov/opa/pr/ceo-and-managing-partner-wall-street-broker-dealer-charged-massive-international-bribery> [<http://perma.cc/M3DF-J2WZ>] (“We will aggressively pursue individual executives, all the way up the corporate ladder, when they try to bribe their way ahead of the competition.”).

50. See Holder Memo, *supra* note 21, § I.B (“Charging a corporation, however, does not mean that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Further, imposition of individual criminal liability on such individuals provides a strong deterrent against future corporate wrongdoing.”).

51. See Thompson Memo, *supra* note 25, § I; McNulty Memo, *supra* note 26, § II.B; Filip Memo, *supra* note 27, § 9-28.200.B.

52. U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-28.210 (2015), <http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations> [<http://perma.cc/UZ8A-EXZR>] (“Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

In practice, the enforcement focus on individuals has translated into numerous actions against corporate executives and employees for their own responsibility for foreign bribery. As shown by the figure below, in the six-year period between 2002 and 2008, the DOJ and the SEC brought FCPA charges against 64 individuals, while in the subsequent six-year period this number more than doubled, totaling 133 individuals.

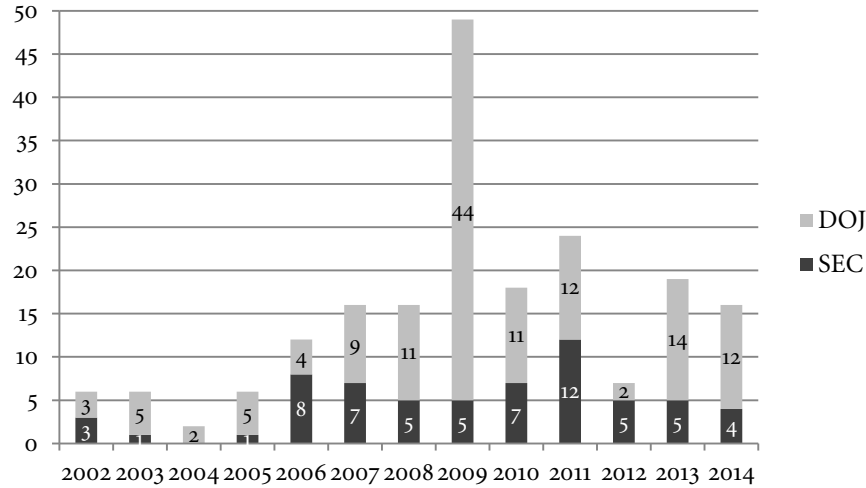


Figure 1: DOJ and SEC charges against individuals: 2002–2014⁵³

In 2015, actions against individuals made up eighty percent of the DOJ’s FCPA enforcement docket. That year, the DOJ brought no action against a corporation without also prosecuting officers associated with it.⁵⁴ Furthermore, on at least two recent occasions—the Morgan Stanley and PetroTiger cases—U.S. authorities have taken individual enforcement action against former corpora-

against future corporate wrongdoing. Provable individual culpability should be pursued, particularly if it relates to high-level corporate officers . . . regardless of the ultimate corporate disposition, a separate evaluation must be made with respect to potentially liable individuals.”).

53. *FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*, SHEARMAN & STERLING LLP 2 (Jan. 2015), <http://www.shearman.com/~media/Files/NewsInsights/Publications/2015/01/Recent-Trends-and-Patterns-only-LT-010515.pdf> [<http://perma.cc/WK8J-CZTA>]. Note that the spike in enforcement actions in 2009 is attributable to the so-called “SHOT Show” sting, in which the DOJ charged twenty-two individuals from sixteen different companies as part of an alleged conspiracy. All those charges were eventually dismissed, however, making the statistics for 2009 somewhat unrepresentative.

54. See GIBSON DUNN, *supra* note 36.

tion executives, even when declining to bring actions against the corporations.⁵⁵ Officials from both the DOJ and the SEC have repeatedly reinforced their firm commitment to continue pursuing individual corporate officers suspected of foreign bribery, revealing that the authorities “look for ways to innovate in order to further strengthen [their] ability to charge individuals.”⁵⁶ The Yates Memo is one such innovative policy amendment.

II. YATES MEMO

Issued by the Deputy Attorney General, Sally Quillian Yates, on September 9, 2015, the Yates Memo further increases the DOJ’s focus on individual accountability. Under this approach, holding individual wrongdoers accountable is necessary to achieve actual deterrence of corporate misdeeds, to have a real impact on corporate culture, and to ensure that the public has confidence in the justice system.⁵⁷ But doing so is not free of practical challenges, particularly in determining which individual took which action on behalf of the corporation. The challenges involved in pursuing individual actors for corporate wrongdoing were highlighted by the Holder Memo in 1999 and in various public speeches by

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55. Garth Peterson, a former real estate executive at Morgan Stanley, was charged by the DOJ and the SEC with violating the FCPA and securities laws in relation to his role in a conspiracy to evade the company’s internal accounting controls. See Leslie R. Caldwell, Assistant Att’y Gen., Speech at American Conference Institute’s 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st> [<http://perma.cc/8M9F-DQX3>]; see also Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud (Apr. 25, 2012), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171488702> [<http://perma.cc/9XBG-Q6WG>]. Morgan Stanley was not charged in this matter. Similarly, Joseph Sigelman, PetroTiger’s former co-CEO, pleaded guilty in June 2015 in the District Court of New Jersey to conspiracy to violate the FCPA, while the DOJ decided to decline prosecution against PetroTiger based on its self-reporting and cooperation.
56. Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n, Speech at the NYC Bar Association’s Third Annual White Collar Crime Institute: Three Key Pressure Points in the Current Enforcement Environment (May 19, 2014), <http://www.sec.gov/News/Speech/Detail/Speech/1370541858285> [<http://perma.cc/3FQT-5UAZ>]; see also Leslie R. Caldwell, Assistant Att’y Gen., Remarks at the Taxpayers Against Fraud Education Fund Conference (Sept. 17, 2014), <http://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-taxpayers-against> [<http://perma.cc/S5NC-GJEH>]; Marshall L. Miller, Principal Deputy Assistant Att’y Gen., Remarks at the Global Investigation Review Program (Sept. 17, 2014), <http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller> [<http://perma.cc/9B5Q-M7JK>]; U.S. Dep’t of Justice, *supra* note 49.
57. These goals were formulated by Deputy Attorney General Yates in her speech on May 10, 2016. See Yates, *supra* note 11.

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

DOJ officials.⁵⁸ These challenges were more recently exemplified by the acquittal of a former Warner Chilcott executive, Carl Reichel, of conspiring to bribe doctors in order to promote the sales of the company drugs.⁵⁹ The acquittal came after Warner Chilcott and several former managers pled guilty to similar charges.⁶⁰ Similarly, in 2012, the DOJ dropped all charges against several former executives of Stryker Biotech LLC, even after the company pled guilty to a misdemeanor misbranding charge and paid a \$15 million fine.⁶¹

The challenges to holding individuals accountable for wrongdoing within the scope of their employment led the DOJ to reconstruct the enforcement policy in a way that enlists culpable corporations to assist the DOJ in pursuing individual actors. Corporations are now required to gather all relevant information on involved employees and share it, in its entirety, with the DOJ as a precondition for cooperation credit. Deputy Attorney General Yates clarified the goal of the amended policy in speeches delivered on September 10, 2015 at the New York University School of Law and on May 10, 2016 at the New York City Bar Association White Collar Crime Conference.⁶² Below is a summary of the memo's key steps.

A. *Cooperation Credit: An "All-or-Nothing" Approach*

This step is the most substantial shift from the DOJ's previous practice and relates to the way in which the DOJ now interprets the cooperation factor in assessing whether to bring charges against or negotiate an agreement with culpable corporations.⁶³ On the basis of the Yates Memo, in order for companies to receive any cooperation credit, they must *fully* disclose to the DOJ *all* relevant facts about individuals' involvement in the misconduct, regardless of their position, status, or seniority. In practice, cooperation credit would not be awarded to corporations that failed to disclose all information regarding employees en-

58. See Holder Memo, *supra* note 21 and accompanying text; see also Yates, *supra* note 11; Yates, *supra* note 12.

59. United States v. Reichel, No. 1:15-CR-10324 (D. Mass. June 17, 2016), ECF No. 246.

60. Jonathan Sack, *Recent Trials Highlight DOJ's Challenges in Prosecuting Individuals for Corporate Misconduct*, FORBES (July 11, 2016), <http://www.forbes.com/sites/insider/2016/07/11/recent-trials-highlight-doj-challenges-in-prosecuting-individuals-for-corporate-misconduct/#5d853bd63b4c> [<http://perma.cc/VG7N-NEUR>].

61. Plea Agreement, United States v. Stryker Biotech, LLC, No. 09-CR-10330-GAO (D. Mass. Jan. 17, 2012), ECF No. 290, http://lib.law.virginia.edu/Garrett/plea_agreements/pdf/StrykerBiotech.pdf [<http://perma.cc/8HCE-6AXD>].

62. See Yates, *supra* note 11; Yates, *supra* note 12.

63. The cooperation factor—the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents—was originally determined by the Holder Memo, and was further adopted in the following series of Deputy Attorney General memoranda through the Filip Memo. See *supra* notes 21–27 and accompanying text.

gaged in the wrongdoing even if they self-reported violations and generally cooperated with the investigation.⁶⁴

The Yates Memo further stipulates that corporate cooperation will be closely assessed by the DOJ on the basis of its timeliness, diligence, thoroughness, proactive nature, and other related factors. The cooperation expected from corporations does not end once the ink on the settlement documents has dried. Agreed-upon resolutions such as plea agreements, DPAs, and NPAs will include a standard provision that requires continued cooperation even after the signing of an agreement while the government is still pursuing individual wrongdoers. A company's failure to continue its cooperation with the DOJ will be considered a material breach of the agreement and will provide the DOJ with a ground for revocation.⁶⁵

Lastly, the Yates Memo also extends its applicability to civil enforcement matters (e.g., False Claims Act matters) and stipulates that corporations under civil investigation seeking cooperation credit must provide to the DOJ all relevant facts about individual misconduct in order to receive any consideration in the negotiation.

B. Other Steps

Next to the “all-or-nothing” approach to cooperation credit, the Yates Memo includes supplementary steps that are geared toward strengthening individual accountability:

Focus on individuals from the inception of the investigation. The Yates Memo explicitly recognizes the practical challenges involved in pursuing individual actors for corporate wrongdoing. These are particularly salient in large multinational corporations where ownership is separated from daily control. Interestingly, these challenges were recognized more than sixteen years ago by the Holder Memo. At that time, they served as the basis for a lenient approach toward corporations with the aim of encouraging cooperation.⁶⁶ Today, the Yates Memo handles these challenges differently. It guides all U.S. Attorneys to focus on building cases against individual wrongdoers from the inception of an investigation, thereby increasing their ability to gather relevant facts about these individuals.

Enhanced internal communication. To further increase the efficiency of the DOJ's enforcement, the Yates Memo directs U.S. civil and criminal attorneys to collaborate with each other—to the full extent permitted by law—at all stages of the investigation.

No protection of individuals in corporate resolutions. This step further emphasizes the DOJ's intention of holding individuals accountable regardless of any resolution reached with the corporation. Accordingly, resolution agreements such as DPAs and NPAs with corporations can no longer contain provisions to dismiss charges against individuals or to otherwise immunize them from liability except under extraordinary circumstances.

64. See Yates Memo, *supra* note 9 and accompanying text.

65. See Yates, *supra* note 12.

66. See Holder Memo, *supra* note 21 and accompanying text.

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

Resolution of individual cases. This step is aimed at ensuring that DOJ attorneys do not ignore actions against individuals while focusing on the investigation against the corporation. Delayed action against individuals may be blocked due to the expiration of limitation periods. Therefore, DOJ attorneys are instructed to submit to supervisors their plans on how to resolve cases against individuals if these have not been concluded by the time of resolution with the corporation. Furthermore, decisions to decline prosecution of individuals should be memorialized and approved by the relevant Assistant Attorney General or a U.S. Attorney.

Pursuing individual actors. The Yates Memo stipulates that in addition to recovering as much money as possible from wrongdoers, DOJ civil enforcement also aims to deter future misconduct. As such, the DOJ decision whether to file a civil action must not turn solely on whether the individual wrongdoer is judgment-proof. According to the Memo, there is real deterrence value in bringing civil cases against individuals who engage in corporate malpractice, even if the individual is unable to satisfy the entire judgment due to his/her limited resources. Therefore, when the DOJ decides whether to bring suit against individuals, it should consider those individuals' ability to pay along with other considerations such as their misbehavior, past records, and the circumstances of the misconduct.

III. ANTI-BRIBERY ENFORCEMENT: A LAW AND ECONOMICS APPROACH

Having described the recent important developments in the anti-bribery enforcement policy brought about by the Yates Memo, this Part outlines the objectives of anti-bribery enforcement and the underlying functions of corporate and individual liability from a welfare maximization perspective. Initially, it clarifies the chief goal of anti-bribery enforcement policy, which will serve in Part IV as the basis for an evaluation of the Yates Memo from a social welfare perspective. It continues by exploring the economic function of corporate and individual liability. This discussion is important in order to subsequently point to the possible impact of the Yates Memo on corporate and individual incentives.

A. *The Economic Goal of Anti-Bribery Enforcement*

Bribery is harmful to society in a number of ways: the impediment of economic growth, the diversion of public resources from other important priorities, and the weakening of the rule of law are only a few of the costs that bribery imposes on society.⁶⁷ This social cost is the primary economic justification for

67. See FCPA Resource Guide, *supra* note 17, at 2–3; Susan Rose-Ackerman, *The Law and Economics of Bribery and Extortion*, 6 ANN. REV. L. SOC. SCI. 217, 218–21 (2010); see also Raymond Fisman & Jakob Svensson, *Are Corruption and Taxation Really Harmful to Growth? Firm Level Evidence*, 83 J. DEV. ECON. 63, 68–73 (2007); Jennifer Hunt & Sonia Laszlo, *Is Bribery Really Regressive? Bribery's Costs, Benefits, and Mechanisms*, 40 WORLD DEV. 355, 355 (2012); Shang-Jin Wei, *How Taxing Is Corruption on International Investors?*, 82 REV. ECON. & STAT. 1, 4–8 (2000).

anti-bribery enforcement. Therefore, in a hypothetical world—in which anti-bribery enforcement is cost-free—an efficient enforcement policy would have a single goal: minimizing the social costs of bribery and corruption.⁶⁸

However, the cost of anti-bribery enforcement is steep. Corrupt practices are normally difficult to detect, particularly when carried out in the shadow of enforcement threats. Offenders can be sophisticated, and in many cases bribes are camouflaged as friendly gestures, gifts, free goods, inflated payments, royalties, or consulting fees. Bribes can also be channeled through third parties, such as agents, consultants, and intermediaries. In some instances, bribery may result from the accumulated actions of several employees, each playing a small role in a larger scheme. These characteristics of typical bribery schemes make it particularly challenging for enforcement authorities to trace misconduct.

Furthermore, even when red flags have alerted authorities, reaching full detection and evidence-based findings of an FCPA violation requires substantial resources. In many cases—particularly when large multinational corporations are involved—the bribery investigations require immense resources to identify and review a large amount of physical and electronic data, such as financial administration systems, internal records, audit reports, email accounts of various custodians, phone records, and other sources. Review of this information is normally supplemented by personal interviews with potentially relevant corporate employees and representatives to obtain additional details relating to suspected allegations. In addition to the costs involved in the aforementioned investigatory actions, anti-bribery enforcement is also associated with indirect costs, such as administrative costs (i.e., those of enforcement and investigation by authorities and courts); procedural costs (i.e., of criminal trials); error costs (i.e., of convicting an innocent person or discharging a culpable one); and evasion costs (i.e., investments by wrongdoers to cover their tracks and escape liability).

In summary, enforcement actions against foreign bribery can be exceedingly expensive. Hence, the efficiency of an enforcement policy cannot be measured solely by its level of effectiveness, that is, on how productive it is in preventing bribery and minimizing the associated social harm. In order to assess the efficiency of anti-bribery enforcement systems, one must also consider the total social resources spent in putting these enforcement systems into action. To maximize total social welfare, an anti-bribery enforcement policy should minimize the *sum* of the social costs associated with bribery and with its prevention, including the cost of enforcement.⁶⁹ Accordingly, from a law and economics perspective, the social desirability of any anti-bribery enforcement policy should be assessed based on the policy's ability to achieve the combined goal of minimized bribery-related social harm and enforcement costs.

68. For simplification, the analysis assumes away any social benefits that may arise from bribery.

69. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 485–532 (6th ed. 2012); Arun S. Malik, *Avoidance, Screening and Optimum Enforcement*, 21 *RAND J. ECON.* 341, 347 (1990); George J. Stigler, *The Optimum Enforcement of Laws*, 78 *J. POL. ECON.* 526, 533 (1970).

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

B. The Economic Function of Anti-Bribery Enforcement

The scholarship of law and economics relies primarily on the rational choice theory as the basis for predicting behavior. According to this theory, market actors determine their actions by juxtaposing the expected costs and benefits of alternative behavioral choices and eventually opting for the behavior that maximizes their own objectives.⁷⁰ The rational choice theory has been applied in the context of crime and punishment and has led to the development of the Deterrence Theory.⁷¹ In the context of this Article, the Deterrence Theory suggests that individuals consider whether to engage in bribery by assessing their expected net payoff in each possible scenario: namely, when they do and do not engage in bribery. Table 1, below, illustrates a simplified rational decision-making process relating to a hypothetical bribery payment. Consider for instance an individual who contemplates whether to pay a bribe of \$100,000 to a foreign government official, in which case he/she would be awarded a contract yielding a profit of \$1 million. If the individual does not pay the bribe, the contract is awarded to another person. In this instance, the individual invests nothing and so does not profit from the project in any way.

	<i>Cost</i>	<i>Benefit</i>
<i>Bribing</i>	\$10,000 + EL	\$ 1,000,000
<i>Not bribing</i>	0	0

Table 1: Rational Bribery Payment Decision

Each of the two bottom rows in Table 1 depicts the costs and benefits associated with an alternative choice of behavior: engaging in bribery or avoiding bribery. EL represents the expected liability one would face in the event of engaging in bribery. This expected liability is normally a function of the probability and the severity of sanctions levied by the government.⁷² Applying the deterrence theory, the individual will engage in bribery only if the net payoff in the bribery scenario, $\$1,000,000 - (\$100,000 + EL)$, which is $\$900,000 - EL$, is greater than the net payoff in the alternative scenario of not bribing: namely,

70. For a general discussion of the rational choice theory, see MICHAEL ALLINGHAM, *RATIONAL CHOICE* (1999); and RATIONAL CHOICE THEORY: RESISTING COLONIZATION 16–36 (Margaret S. Archer & Jonathan Q. Tritter eds., 2001).

71. The first to formalize the deterrence hypothesis was Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968), which analyzed offenders' behavioral choices as decisions made by rational agents weighing the costs and benefits of their actions when deciding whether to commit a crime. See also A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45 (2000); David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CALIF. L. REV. 917, 919 (2001); Stigler, *supra* note 69, at 526–36.

72. See COOTER & ULEN, *supra* note 69.

\$0. In other words, in the example above, the decision-maker is expected to engage in bribery only if the expected liability is lower than \$900,000, i.e., only if $EL < \$900,000$.⁷³ If the expected liability is greater than \$900,000, the decision-maker is simply better off avoiding the bribery scenario.

While the above example is overly simplified, it clearly illustrates the role and the economic function of anti-bribery enforcement where individual actors are concerned: deterring bribery by ensuring that individuals face an expected liability that makes them worse off if they opt to engage in bribery. This way, the net payoff of bribery is negative, and the decision-maker is better off not engaging in it.⁷⁴ Hence, when the enforcement policy produces an adequate threat, no benefit can be expected from engaging in bribery.⁷⁵

C. *The Economic Function of Corporate Liability*

Corporations are fictitious entities that operate through their flesh-and-blood employees. Hence, one might question the necessity of and justification for holding corporations liable for bribery offenses carried out by corporate employees. After all, if enforcement policy were adequately designed, individual employees anticipating their expected liability would not engage in bribery. However, an economic analysis of law suggests at least two interlinked justifications for holding corporations liable.⁷⁶

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73. This example is obviously a simplification of reality and does not take into account other possible factors such as public relations and the impact on reputation that would normally play a role in corporate decisions.
74. The Deterrence Theory, as it is normally referred to, has been accepted in the law and economics scholarly literature as the fundamental economic theorem of crime and punishment. See Anthony G. Heyes, *Making Things Stick: Enforcement and Compliance*, 14 OXFORD REV. ECON. POL'Y 50, 51–54 (1998); Polinsky & Shavell, *supra* note 71; Stigler, *supra* note 69.
75. The Deterrence Theory was criticized by various scholars as overly simplifying reality. Scholars particularly referred to the bounded rationality of agents, including corporate actors, as the main limitation of the purely economic Deterrence Theory. For an extensive literature overview, see ODED, *supra* note 20, at 43–47.
76. The enhanced control exerted by corporations over employees has been discussed in various studies. See, e.g., STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 173–74 (1987); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 700 (1997); Vikramaditya S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 AM. CRIM. L. REV. 1239, 1245 (2002); Reinier H. Kraakman, *Vicarious and Corporate Civil Liability*, in TORT LAW AND ECONOMICS 135–37 (Michael Faure ed., 2d ed. 2009); Sharon Oded, *Inducing Corporate Compliance: A Compound Corporate Liability Regime*, 31 INT'L REV. L. ECON. 272 (2011); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 678 (1995); Kevin B. Huff, Note, *The Role of Corporate*

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

Deterrence. The first justification is a straightforward application of the underlying logic of individual liability in the corporate context. Corporations direct their employees' actions, determine their roles and responsibilities, and set their pay. At the same time, corporations are also affected by the actions of employees within the scope of their employment. They are often the main beneficiaries of such actions. Corporate liability may play an important role in ensuring that corporations direct their employees to choose an honest course of action rather than a corrupt one.

Consider a corporation that might win an important public tender if its employees present an innovative, competitive proposal. This corporation could also win the same project—possibly with higher profit margins—if its employees were to bribe the official running the tender. To ensure that this corporation directs its employees away from the corrupt course of action, corporate liability could produce an expected accountability that makes the corporate payoff in the corrupt scenario unfavorable. The deterrence function of corporate liability is therefore similar to the one explained above in Table 1.

Enforcement cost reduction through corporate control. This justification is unique to corporate liability, and goes beyond the simple application of individual liability in the corporate context. It stems from the complex structure of corporations compared to individual actors. Unlike individuals, corporations are complex entities composed of various actors operating collectively on behalf of a legal person. As discussed earlier, the corporate setting makes it costly for enforcement authorities to determine which individual took which action on behalf of the corporation.⁷⁷ Some of these high enforcement costs could be prevented by inducing corporations to apply their enhanced ability to control, monitor, and investigate employees' activities.⁷⁸ Thus, corporate liability also serves to motivate corporations to use their enhanced ability to control employees and thereby improve the overall efficiency of anti-bribery enforcement.

The underlying assumption of this justification of corporate liability is that corporations can often monitor, control, and investigate their employees more efficiently than public authorities. The basis for this assumption is the wide variety of tools available for corporations to direct, manage, and control employee behavior—tools to which enforcement authorities do not have access. For instance, corporations can set an appropriate organizational tone and determine the business values in their employees' working environment, such that corrupt practices remain outside the boundaries of accepted business behavior. Corporations can also set internal policies and procedures that guide employees to conduct their activities without the use of bribery and teach them how to operate while respecting the corporation's anti-corruption business principles. Furthermore, corporations are able to establish a wide range of internal controls, such as reporting and approval duties, anti-bribery audits and screenings, rotation of roles, whistleblowing and speak-up mechanisms, disciplinary actions, and many other means to ensure that their anti-bribery policies are respected.

Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach, 96 COLUM. L. REV. 1252, 1281 (1996).

77. See *supra* text accompanying note 24.

78. See, e.g., Arlen, *supra* note 42.

Hence, corporate liability may play an important role in motivating organizations to effectively use those unique capabilities. By holding companies vicariously responsible for employees' wrongdoing, an enforcement policy may motivate them to exercise their control capabilities in order to reduce their own legal exposure.

These two justifications for holding corporations vicariously liable for bribery carried out by their employees are closely linked to the combined goal of enforcement policies discussed above in Section III.A: minimizing bribery-related social harm and enforcement costs. Because corporations are better able than enforcement authorities to control employees and to detect and investigate violations, corporate liability may ultimately reduce both bribery-related social harm and the costs of enforcement.

D. Individual Accountability

As explained above, anti-bribery corporate liability is said to induce corporations to exercise control over employees, thereby preventing and responding to corrupt actions by employees. Under these circumstances, is individual liability still needed? Should individual employees be held liable even when their employer bears liability?

The law and economics scholarly literature has dealt with this question and has proposed the neutrality principle as an initial response. According to this principle, the state can optimally deter crime through *either* individual *or* corporate liability, and thus does not need to employ joint individual and corporate liability, as long as the expected liability is adequately set at the optimal level, i.e., the level of social harm.⁷⁹ Furthermore, commentators have suggested that as long as the social cost of both corporate and individual liability is similar, the state is indifferent as to which type of liability it applies.⁸⁰ The underlying explanation of this principle is that corporations and individuals may internalize each other's liability exposure. More specifically, when only individuals face a risk of liability, corporations internalize this risk through the salaries they pay their employees, which must compensate employees for their expected liability associated with their work. Similarly, when only corporations face a liability risk, they induce their employees to internalize this risk by imposing sanctions on employees who commit crimes that are equal to their own liability

79. See Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144 (Keith N. Hylton & Alon Harel eds., 2012); Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345 (1982); A. Mitchell Polinsky & Steven Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. ECON. 239 (1993); Kathleen Segerson & Tom Tietenberg, *The Structure of Penalties in Environmental Enforcement: An Economic Analysis*, 23 J. ENVTL. ECON. & MGMT. 179 (1992); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984).

80. See Kornhauser, *supra* note 79, at 1357–72; Polinsky & Shavell, *supra* note 79, at 239–42, 246–53; Segerson & Tietenberg, *supra* note 79, at 185–88; Sykes, *supra* note 79, at 1233–59.

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

exposure. Therefore, under the assumption of the neutrality principle (i.e., optimal level of sanctioning), when corporations are held liable for their employees' bribery practices, there is no justification for holding the involved employees liable for the same actions as well.

Nevertheless, the principal weakness of the neutrality theory seems to be the demanding assumption upon which it is based—that the expected liability is indeed adequately set at the optimal level. In actuality, due to various challenges such as low detection rates, corporate wealth constraints, and a limited enforcement budget, states are often unable to impose on corporations a socially optimal expected liability that equals the social cost of the crime.⁸¹ Under these circumstances, corporate liability is likely to fall short of inducing corporations to impose optimal sanctions on employees.⁸²

Additionally, there may be several further justifications for holding individuals personally accountable for bribery and corrupt practices, even when undertaken within the scope of the employment. First and foremost, while it may be more cost-effective for corporations to detect and investigate instances of bribery by individual employees, they lack the ability to sanction employees in the same manner that a government authority can. Indeed, corporations may discipline their employees, discontinue their employment, and under certain circumstances also apply financial consequences such as bonus forfeiture. Nevertheless, corporations possess neither the legal powers equivalent to those of the government (civil, administrative, and criminal law) nor the incentive to make bribery publicly known through legal proceedings.

Furthermore, even when corporations are able to take legal action against their rogue employees, for instance, in order to recover their own losses resulting from the bribery, they may be discouraged from doing so, given the risk to the corporation of legal exposure and reputational damage. Similarly, if corporate executives are involved in the illegal activity, they may influence the corporate decision such that the organization does not pursue the individuals involved.⁸³ From this perspective, corporate incentive schemes often deviate from the overall social interest with which enforcement authorities are entrusted.

Moreover, in the absence of individual accountability, one may argue that corporations may treat eventual fines as the costs of doing business and might thereby be more inclined to take risks when the probability of detection and the expected fine are insufficient to outweigh the anticipated gain.⁸⁴ Conversely, lack of individual accountability may increase the agency cost between corpora-

81. See Arlen, *supra* note 79.

82. See, e.g., Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 *YALE L.J.* 857, 857 (1984).

83. See Arlen, *supra* note 79, at 171 (referring to the agency costs between corporate managers and shareholders as a potential element preventing corporations from pursuing their employees for their involvement in misconduct).

84. See Yates, *supra* note 12 (“[B]y 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.”).

tions and their employees and encourage employees to engage in bribery to achieve their business targets and personal benefits while knowing that the corporation alone bears the risk of liability. Lastly, the imposition of individual liability, even when the bribery is undertaken within the scope of the employment, serves to strengthen the credible commitment of employees and managers to avoid bribery. Hence, individual accountability cannot be relinquished simply due to the existence of corporate liability.

E. The Economic Function of Regulatory Credit

Corporate control over employees in preventing, detecting, and investigating bribery is costly, and this cost increases as the size of the company increases. Therefore, while corporate liability as well as reputational concerns often motivate corporations to exercise control, their own expected liability might increase with regard to self-reporting and cooperation. Corporate expected liability is a function of the probability and the severity of sanctions being levied by the government.⁸⁵ When corporations self-report wrongdoing, the probability of detection increases (one hundred percent probability), and so does the expected liability. Therefore, in the absence of other sources of motivation (e.g., a reduction of the severity of the fine due to self-reporting), one should not expect rational corporations to voluntarily self-report bribery and to cooperate with public investigations.⁸⁶

Corporate self-reporting and cooperation can be crucial to the success of an investigation. Without this cooperation, the likelihood of detection is limited, and so are the odds of securing sufficient evidence to reach a conviction. Therefore, U.S. enforcement policy has used cooperation credit as a motivation tool to induce corporate self-reporting and cooperation, thereby reducing corporate liability exposure (for example, by decreasing the odds that U.S. authorities will bring charges against the corporation). This credit may also allow cooperative corporations to enter into a settlement agreement such as a DPA or NPA rather than going through a full trial. In this way, cooperation credit places cooperative corporations in a more advantageous position compared to those that do not work together with authorities. Accordingly, this credit may motivate corporations to self-report bribery and to cooperate with the public investigation.⁸⁷

85. Cf. COOTER & ULEN, *supra* note 69, at 488; *supra* text accompanying note 72.

86. The underlying logic of corporations' self-reporting decision-making resembles the example provided *supra* in Section III.B with respect to the rational choice theory. Corporations juxtapose the expected costs and benefits of alternative behavioral choices and eventually opt for the behavior that maximizes their own objectives. Only when the net expected benefits of self-reporting outweigh the net expected costs of self-reporting would corporations self-report. See Oded, *supra* note 76, at 273.

87. Various law and economics commentators—including the author of this Article—have thoroughly explored the socially desirable structure of corporate liability and cooperation credits. See generally Arlen, *supra* note 76; Arlen, *supra* note 79; Arlen & Kraakman, *supra* note 76; Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003); Kimberly D.

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

IV. YATES MEMO: EVALUATION

Following the description of the law and economics analytical framework in Part III, I turn now to evaluating the newly emerged enforcement policy promulgated by the Yates Memo. At the outset, individual liability for bribery conducted within the scope of employment is justifiable from a social welfare maximization point of view. Criminal and civil actions against corporate individuals have the potential to influence corporations and their employees in a way that enforcement actions against corporations alone may not always achieve. The increased focus of U.S. authorities on individual accountability therefore coincides with the objectives of increasing deterrence and bringing effective change in corporate conduct. The question remains, however, whether the new policy as announced in the Yates Memo can also be supported from the social welfare maximization perspective.

Should turning in culpable employees be a condition of granting corporations cooperation credit from a social welfare maximization point of view? To answer this question, recall the combined aim of anti-bribery enforcement policy: the policy announced in the Yates Memo is socially desirable if the resulting social benefits—minimizing the cost of bribery and its prevention—outweigh its negative ramifications. In the following, I explore certain possible influences that the Yates Memo could have on individual and corporate incentives. The analysis is based on the rational choice theory framework presented in Section III.B, according to which corporations and individuals consider their course of action—e.g., whether to engage in bribery, self-report, or cooperate with the investigation—by assessing their expected net payoff in each possible scenario. Each actor will choose the course of action that yields the greatest net payoff. The Yates Memo may have serious ramifications for this decision-making process. The ramifications stem from (i) the conflict of interest promoted by the Yates Memo between corporations and their employees, and (ii) the chilling effect that this policy has on the cooperative enforcement model the DOJ has promoted since the 1990s. As such, the policy promulgated by the Yates Memo threatens to undermine the key purpose of U.S. anti-bribery enforcement policy. Both ramifications are discussed below.

A. Conflict of Interest

The Yates Memo is focused on increasing *individual* accountability. To achieve this, the Memo goes beyond influencing individual incentives. In fact, the Memo restructures corporate incentives in a way that seeks to encourage companies to turn in their own employees in order to benefit from cooperation

Krawiec, *Organization Misconduct: Beyond the Principal Agent Model*, 32 FLA. ST. U. L. REV. 571 (2005); Oded, *supra* note 76. Scholarly literature in the field reveals that the circumstances under which cooperation credit is awarded, including conditions and the size of the award, are of considerable importance. Inadequate cooperation credit may lead to over- or under-deterrence and thereby sub-optimally affect the social cost of bribery and of its prevention. However, the scholarly debate over the apparently unresolved issue of the optimal structure of corporate liability and cooperation credit is outside the scope of this Article.

credit. In this manner, the Memo aims to increase liability exposure for individual employees and thereby to strengthen the deterrence effect of the enforcement policy. While seeking to increase deterrence in terms of individual actors, however, the Memo creates a conflict of interest between corporations and their employees which may be counterproductive to the goal of the Memo.

Like the preceding DOJ enforcement policy (the Filip Memo), the Yates Memo relies on the superior ability of corporations to control, monitor, and investigate employee conduct compared to the lesser ability of enforcement authorities.⁸⁸ The Memo attempts to leverage this ability of corporations to further increase the deterrent effect of the U.S. enforcement policy. However, the Yates Memo interrupts the tangible balance of interests between corporations and their employees which existed under earlier enforcement policies. In the pre-Memo world, when self-reporting and cooperation with investigations were focused on sharing information about the *wrongdoing*, rather than the *wrongdoers*, corporations and their employees were motivated to cooperate with the investigation to the extent that by doing so they could sufficiently mitigate the overall liability exposure related to the wrongdoing.⁸⁹ The Memo interferes with this balance, as corporations are now required to share incriminating information regarding their involved employees, i.e., the wrongdoers, as a precondition for any cooperation credit. By turning corporations against their employees, the Yates Memo creates a conflict of interest, because it forces culpable corporations to take a clear stand: namely, cough up your executives or roll the dice.

1. Corporate Perspective

The Yates Memo exerts substantial pressure on corporations to obtain incriminating information about employees and to trade it with the DOJ in exchange for cooperation credit. This pressure may lead corporations to take an excessively expansive view of individual involvement in wrongdoing, thereby putting individuals needlessly at risk of criminal or civil liability. It could also lead corporations to follow an unnecessarily coercive approach toward employees while jeopardizing their constitutional rights.

Federal courts have long rejected the use of coercive approaches toward employees in gathering incriminating information in internal investigations. In *Garrity v. New Jersey*,⁹⁰ for instance, the appellants, police officers in New Jersey, were questioned during the course of a state investigation concerning alleged traffic ticket “fixing.” The officers were warned that if they refused to answer questions, they would be subject to removal from office. Eventually, the officers’ answers led to their conviction in subsequent prosecutions. The U.S. Supreme Court held that the officers’ statements resulted from coercion and

88. See *infra* Section IV.C.

89. As corporations are held vicariously liable for their employees’ wrongdoing conducted within the scope of employment, under the previous enforcement policy both employees and their employing corporations had a common interest: act in a way that would minimize the liability exposure relating to the wrongdoing.

90. 385 U.S. 493 (1967).

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

therefore were inadmissible in the state criminal proceedings.⁹¹ The coercion the court rejected in the *Garrity* case may now be encouraged by the Yates Memo. By denying cooperation credit to companies that disclose incomplete information regarding individual culpability, including those that fail to learn of it, the Yates Memo puts corporations under pressure to gather incriminating information regarding their employees as a way of demonstrating their own cooperation.

The impact of prosecutorial pressure on corporations regarding their actions toward employees was also discussed in the 2006 *KPMG* case.⁹² In that instance, KPMG and several of its employees were investigated by the U.S. Attorney's Office for the Southern District of New York in connection with a tax evasion scheme. Based on the enforcement policy applicable at the time (the Thompson Memo), U.S. prosecutors were asked to assess the corporation's willingness to cooperate in the investigation of its agents, including its readiness to make witnesses available to the prosecution and its promise to support culpable employees by advancing attorney fees.⁹³ The prosecution informed KPMG that in the absence of a legal obligation stating otherwise, the advancement of attorney fees to employees could be held against KPMG. Accordingly, KPMG decided to depart from its long-standing practice of advancing reasonable attorney fees to its employees. It capped the fees and informed its employees that no further remunerations would be advanced to anyone who failed to provide prompt, complete, and truthful information to the prosecution. The court concluded that KPMG's decision was a direct consequence of the pressure applied by the prosecution policy, and that the government's conduct violated the constitutional rights of KPMG employees. Consequently, the court dismissed the indictments against several employees who had been forced to limit their defense due to the prosecution's interference with their attorney fees and the violation of their right against self-incrimination.⁹⁴

A similar coercive approach and suppression of employee rights may now be encouraged by the Yates Memo, which in practice penalizes corporations for failing to secure incriminating information in order to demonstrate their cooperation with the DOJ. The Yates Memo does not explicitly require corporations to threaten employees' employment or legal representation. Nevertheless, by denying cooperation credit to corporations that fail to produce full information about involved employees, the Memo has the potential to encourage corpora-

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91. *Id.* at 500. The court held that the choice given to the employees either to forfeit their jobs or to incriminate themselves constituted coercion, which jeopardized their constitutional rights.
92. *See* United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).
93. *See* Thompson Memo, *supra* note 25, § VI.
94. *See* Elkan Abramowitz & Jonathan Sack, *Deferred Prosecution Agreements in Decline? Enforcement Implications*, N.Y. L.J. (Jan. 5, 2016), <http://www.newyorklawjournal.com/id=1202746229390/Deferred-Prosecution-Agreements-in-Decline-Enforcement-Implications?slreturn=20161121105650> [<http://perma.cc/5KDE-EAGL>].

tions to press their employees and to violate their constitutional rights by threatening to terminate or withhold legal representation.

2. Individual Perspective

In the post-Yates Memo world, employees realize the strong incentive corporations have to throw them under the bus in order to save their own interest. The memo effectively enlists corporations as members of DOJ enforcement teams and places them in a confrontational position with regard to their own employees and executives. Applying the rational choice theory framework presented in Section III.B above, corporate employees would determine their approach toward the corporate investigation by assessing their expected net payoff in each possible scenario. Their ultimate response is determined by the maximization of employees' net payoff. Accordingly, the more that employees perceive corporate investigations as conducted on behalf of or for the benefit of the DOJ, the greater the likelihood that employees may decline to cooperate and complicate or challenge corporate investigations in order to defend themselves and minimize their liability exposure. For instance, employees could be less motivated to raise red flags or provide reports of misconduct, particularly when sharing this information could lead to unfavorable conclusions about their own involvement. They could also demand separate representation early on in the internal investigation process; some may choose to fully revoke their employment, privacy, and other rights and thereby jeopardize corporate efforts to investigate matters. Ultimately, the competing interests of corporations and employees may make such investigations less effective and more expensive.

This conflict of interest may lead employees to adopt a confrontational approach even after the corporate investigation has been concluded. Employees could challenge corporate internal investigations and demand legally privileged material relating to the investigation, claiming that these would be required for their defense. This phenomenon appeared in the recent "Bridgegate" case in New Jersey, in which several individual defendants sought the interview minutes of internal investigators, arguing that that they may contain inconsistent statements and other evidence that supports their defense.⁹⁵

B. *Chilling Cooperation*

The Yates Memo changes the incentive schemes of corporations and their employees. To benefit from cooperation credit, corporations may indeed choose to turn in their culpable employees and thereby increase the level of deterrence, as originally sought by the Yates Memo. Yet while seeking to increase corporate cooperation with the DOJ in order to hold individuals accountable, the memo may adversely affect corporate as well as individual incentives to cooperate with the DOJ.

95. See *United States v. Baroni*, No. 2:15-cr-00193 (D.N.J. Dec. 16, 2015), ECF No. 16.

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

1. Corporate Perspective

The all-or-nothing approach of the Yates Memo increases the costs associated with corporate cooperation with the DOJ. The increased costs may be a result of various factors. At the outset, the Yates Memo might induce employees to challenge and complicate corporate investigations, thereby forcing corporations to invest additional resources in gathering relevant facts from alternative sources, like financial systems, email accounts, or call records. In that respect, the Memo erodes some of the advantages corporations have enjoyed in comparison to enforcement authorities in detecting and investigating wrongdoing by employees. Additionally, corporate internal investigations may need to increase in scope and in granularity. This is directly linked to the Memo's internal investigation goals, given the requirement to provide *all* relevant facts about the individuals involved in corporate misconduct. The Yates Memo currently provides no detailed guideline as to what would be considered "all" relevant facts, thereby leaving corporations to make choices about cooperation with a greater degree of uncertainty. The new requirement may be understood by some corporations as implying further detailed investigation, with a focus on each individual. In the same vein, the costs of cooperation may also increase due to the current policy's expectation that corporations will continue devoting resources to assist prosecutors in going after individuals even after the company has settled.

Moreover, the Yates Memo may reduce the readiness of corporations to cooperate with the DOJ, as some companies might find that the cost of cooperation outweighs the benefits. For instance, one strong motivation for corporate cooperation thus far is the organization's ability to minimize the reputational damage that might follow from long-running criminal proceedings.⁹⁶ As discussed above in Section I.B.2, corporate cooperation is taken into consideration when prosecutors decide to enter into a DPA or a NPA as an alternative to prosecution. Thus far, by cooperating with the investigation—based on standards preceding the Yates Memo—corporations have been able to limit adverse publicity relating to enforcement actions. By entering into DPAs and NPAs, as an alternative to a full court trial, corporations were able to avoid long periods of recurring negative media reports, which would otherwise damage their reputation. Additionally, by entering into DPAs or NPAs, corporations may sometimes be able to negotiate the text of the statement of facts that is attached to the DPA or NPA, as well as the DOJ's or the SEC's press release, thereby reducing reputation damages. Under the Yates Memo, this DPA- and NPA-related advantage is threatened.

As discussed above in Part II, the Yates Memo instructs U.S. Attorneys not to provide any protection against individual liability in corporate resolutions and to resolve individual cases following resolution of the corporate matter. Further, under the Yates Memo, enforcement cases against individuals are expected in instances where they were not previously initiated due to individuals' limited ability to pay. In some cases, the resolution of enforcement actions against individuals may be reached long after the corporation has settled its

96. Minimizing the adverse impact on reputation is often discussed in the context of reducing collateral effects due to DPAs and NPAs. See Oded, *supra* note 30, at 79.

case. In such cases, corporations must face recurring adverse publicity. This was the situation with Siemens, which resolved its FCPA investigation in 2008 with a record-breaking settlement of \$800 million. Eight former Siemens executives and consultants were subsequently indicted in the United States, and seventeen related individuals were charged in Argentina. Years after Siemens had put the case behind it and invested immense resources in boosting its compliance program, the company's name and its FCPA scandal are still frequently featured in media reports on enforcement actions against individuals. Most recently, Siemens' case was canvassed again in the press in September 2015—seven years after its settlement—following a guilty plea of its former Chief Financial Officer in Argentina, Andres Truppel.⁹⁷

Siemens is certainly not the only case where adverse publicity resurfaces due to follow-up enforcement actions against former corporate employees. Noble, for instance, dealt with publicity following the 2014 settlement reached with its former CEO, Mark Jackson, and the head of the company's Nigeria unit, William Ruehlen, even though Noble had settled an FCPA matter relating to bribery of Nigerian officials with the DOJ in 2010.⁹⁸ Something similar may recur in the case of *Alstom*, which settled its FCPA matter with the DOJ in 2014. Several Alstom employees have faced charges in the United States and the United Kingdom.⁹⁹ Hearings in some of these proceedings are currently scheduled for 2017. The threat of adverse publicity that continues to follow a corporation years after reaching a settlement erodes the benefits that corporations receive from cooperating with the DOJ. This outcome could become even more significant given the current focus on individual accountability, thereby dampening corporate incentives to self-report wrongdoing and to cooperate with investigations.

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97. See Press Release, U.S. Dep't of Justice, Former Chief Financial Officer of Siemens Argentina Pleads Guilty to Role in Multimillion Dollar Foreign Bribery Scheme (Sept. 30, 2015), <http://www.justice.gov/opa/pr/former-chief-financial-officer-siemens-argentina-pleads-guilty-role-multimillion-dollar> [<http://perma.cc/KB7A-WUX8>].
98. For Noble's settlement, see Letter from Dennis McInerney, Chief Fraud Section, U.S. Dep't of Justice, to Mary C. Spearing, Baker Botts L.L.P. (Nov. 4, 2010), <http://www.justice.gov/sites/default/files/opa/legacy/2010/11/04/noble-npa.pdf> [<http://perma.cc/CH3H-4WTU>]. For Jackson's settlement, see *Comm'n v. Jackson et al.*, No. 4:12-cv-00563 (S.D. Tex. Feb. 24, 2012).
99. For Alstom's settlement with the DOJ, see *United States v. Alstom S.A.*, No. 14-CR-246 (D. Conn. Dec. 22, 2014), <http://www.justice.gov/file/189331/download> [<http://perma.cc/Y628-2PRV>]. For individual actions relating to Alstom's matter, see Press Release, U.S. Dep't. of Justice, Alstom Pleads Guilty and Agrees To Pay \$772 Million Criminal Penalty To Resolve Foreign Bribery Charges (Dec. 22, 2014), <http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery> [<http://perma.cc/C6AG-HVD4>]; and Press Release, Serious Fraud Office, Criminal Charges Against Alstom in the UK (July 24, 2014), <http://www.sfo.gov.uk/2014/07/24/criminal-charges-alstom-uk/> [<http://perma.cc/WQK2-TX4K>].

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

A recent development in DOJ enforcement policy following the release of the Yates Memo suggests that the DOJ may have realized that the Memo presents a high risk of chilling corporate cooperation. Attempting to restore corporations' incentives to self-report and cooperate with the DOJ on FCPA matters, on April 5, 2016, DOJ Fraud Section Chief Andrew Weissmann announced a new one-year pilot program ("Pilot Program") to provide greater transparency on the expectations for mitigation credit for voluntary self-disclosure, cooperation, and remediation in FCPA investigations.¹⁰⁰ Under this program, companies that voluntarily self-report FCPA-related violations, cooperate fully with the DOJ investigation, and appropriately remediate the misconduct may receive up to a fifty percent reduction in fines below the minimum level in the Organizational Guidelines fine range. In such circumstances, the DOJ will also consider declining prosecution altogether. For companies that do not voluntarily self-report but otherwise cooperate and undertake appropriate remediation, the DOJ will provide at most a twenty-five percent reduction in fines below the minimum in the Organizational Guidelines range.¹⁰¹ The Pilot Program specifically endorses the Yates Memo and clarifies that, in applying the program, companies' cooperation will be assessed by the DOJ, among other actors, based on the completeness of the report, including disclosure of all relevant facts about the individuals involved in any FCPA violation.

The Pilot Program has already led to several highly publicized decisions to decline prosecution by the DOJ.¹⁰² Those decisions cited cooperation by the companies as a factor, including their disclosure of all known relevant facts about the individuals involved in or responsible for the misconduct. In another case, the DOJ entered into a NPA with BK Medical under the Pilot Program and awarded the company a thirty percent discount off the applicable Organizational Guidelines fine range.¹⁰³ The DOJ specifically mentioned that the deci-

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100. Memorandum from Andrew Weissman, Fraud Section Chief, U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), <http://www.justice.gov/opa/file/838386/download> [<http://perma.cc/2S8C-2WQ8>].
 101. The Pilot Program also sets forth eleven threshold requirements that should be met in order for the program to apply.
 102. See Letter from Daniel Khan, Deputy Chief, Criminal Div., U.S. Dep't of Justice, Re: Akamai Technologies, Inc. (June 6, 2016), <http://www.justice.gov/criminal-fraud/file/865411/download> [<http://perma.cc/MZP2-WQXR>]; Letter from Daniel Khan, Deputy Chief, Criminal Div., U.S. Dep't of Justice, Re: Nortek, Inc. (June 3, 2016), <http://www.justice.gov/criminal-fraud/file/865406/download> [<http://perma.cc/5274-58XB>]; Press Release, Johnson Controls, Inc., Johnson Controls Settles Investigation of Its Marine Business in China After Self-Reporting to U.S. Government (July 11, 2016), <http://www.johnsoncontrols.com/media-center/news/pressreleases/2016/07/11/johnson-controls-settles-investigation-of-its-marine-business-in-china-after-selfreporting-to-us-government> [<http://perma.cc/EVW9-RGQV>].
 103. Press Release, U.S. Dep't of Justice, Analogic Subsidiary Agrees To Pay More than \$14 Million To Resolve Foreign Bribery Charges (June 21, 2016), <http://www>

sion to award only a partial discount resulted from the fact that the company “did not initially disclose certain relevant facts that it learned in the course of its internal investigation.”¹⁰⁴ While the Pilot Program has the potential to partially cure the demotivating impact of the Yates Memo on corporate cooperation with the DOJ, it is not expected to be the ultimate solution to the adverse effects of the Yates Memo, given its temporary nature.

2. Individual Perspective

Employee cooperation may promote the battle against corporate financial crime, including bribery and corruption. Employee reports of red flags and concerns through whistleblowing systems or otherwise have sparked many investigations of corporate financial crime.¹⁰⁵ Similarly, employee cooperation with the investigation, such as sharing relevant information in interviews, promotes the accuracy, efficiency, and speed of criminal and corporate investigations. Nevertheless, applying the rational choice theory framework presented in Section III.B, corporate employees determine their level of cooperativeness such that their net payoff is maximized. In the post-Memo world, when employees fear that their employer may sacrifice them in order to protect itself, it should not come as a surprise if employees adopt a less cooperative approach. Some might even refuse altogether to cooperate with internal investigations—e.g., to participate in interviews or to provide information—even if by doing so they risk disciplinary action.

Additionally, as the Yates Memo threatens to increase the legal exposure of individual executives, those sitting in the corporate driver’s seat might steer the organization away from cooperation with the DOJ. In other circumstances, corporate executives might decide to delay self-reporting or other cooperation with the DOJ until the internal investigation yields a clearer picture of the involvement of possibly responsible individuals.

.justice.gov/opa/pr/analogic-subsiary-agrees-pay-more-14-million-resolve-foreign-bribery-charges [http://perma.cc/P9QQ-JDKN].

104. *Id.*

105. On the importance of employee reporting and the special monetary incentive provided to employees to report corporate wrongdoing, see, for example, U.S. SEC. & EXCH. COMM’N, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 2, 16 (Nov. 16, 2015), <http://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf> [http://perma.cc/64BT-FSCD] (“In Fiscal Year 2015, we received nearly 4,000 whistleblower tips, a 30% increase over the number of tips received in Fiscal Year 2012, the first year for which we have full-year data. Many of the tips have led staff in the SEC’s Division of Enforcement . . . to open an investigation or are being considered in connection with an existing investigation. . . . Of the award recipients who were current or former employees, approximately 80% raised their concerns internally to their supervisors or compliance personnel, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.”).

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

C. The Yates Memo: Efficiency Outcome

Having described the possible impacts of the Yates Memo on the incentives of individuals and corporations, this Section evaluates the ultimate outcome of the Memo from the point of view of welfare maximization. Its evaluation focuses on the extent to which the policy promulgated by the Memo satisfies the combined goal of anti-bribery enforcement policy: namely, minimizing the cost of bribery and its prevention. The basis for this analysis is the rational choice theory framework presented in Section III.B above, under which corporations and individuals consider their course of action—whether to engage in bribery, whether to self-report, or whether to cooperate with the investigation—by assessing their expected net payoff in each possible scenario. Actors will ultimately choose the course of action that maximizes their net payoff. Given this backdrop, the analysis below reveals that the Memo threatens to increase the overall cost of anti-bribery enforcement and eventually also the overall social cost of bribery.

1. Cost of Anti-Bribery Enforcement

As discussed above in Section IV.B.1, by enhancing the personal liability risk of corporate executives and increasing the net cost of cooperation, the Yates Memo may dampen corporations' motivation to cooperate with the DOJ's investigation. In so doing, the Memo erodes many of the advantages of the cooperative enforcement model that preceded its promulgation. As discussed above in Section III.A, the new policy prevents U.S. prosecutors from awarding partial credit even for actions that are highly valuable from an enforcement perspective.

Consider, for instance, the case of Ralph Lauren.¹⁰⁶ In 2013, the corporation entered into dual NPAs with the DOJ and the SEC in relation to a bribery payment by its Argentinian subsidiary to government officials. Both U.S. authorities decided not to charge the company in response to its cooperation with the investigation. In this case, Ralph Lauren provided the prosecution with complete information, including details about the involvement of employees in the bribery scheme. But according to the authorities' press releases, the company also cooperated in various other valuable ways. The firm (i) voluntarily self-reported the bribery on its own initiative within two weeks of its discovery; (ii) voluntarily and expeditiously produced documents from the internal investigation, including summaries of interviews conducted by the corporate investigator overseas; (iii) provided an English language translation of documents to the authorities; (iv) made overseas witnesses available for interviews with the au-

106. See Press Release, U.S. Dep't. of Justice, Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees To Pay \$882,000 Monetary Penalty (Apr. 22, 2013), <http://www.justice.gov/opa/pr/ralph-lauren-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay> [<http://perma.cc/WKF7-SGCE>]; Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780> [<http://perma.cc/YBR5-D7BN>].

thorities, including by bringing witnesses to the United States; (v) implemented significant remedial measures, including a comprehensive new compliance program throughout its operations; (vi) terminated employment and business arrangements with all individuals involved in the wrongdoing; (vii) strengthened its internal controls and its procedures for third-party due diligence; (viii) instituted a whistleblower hotline; (ix) hired a designated corporate compliance attorney; and, eventually, (x) ceased its entire operation in Argentina. Both the DOJ and SEC praised the level of Ralph Lauren's cooperation.

Ralph Lauren's cooperative measures were undoubtedly socially valuable, even in the absence of a complete report regarding the involvement of employees. These actions promoted the combined goal of anti-bribery enforcement, which is to reduce the social cost of bribery and its prevention.¹⁰⁷ But consider: what would happen today if Ralph Lauren had undertaken all these actions short of providing all relevant facts about the individuals involved in corporate misconduct? Under the Yates Memo's "all-or-nothing" approach, the DOJ would have to disregard all of Ralph Lauren's cooperative actions, and it would have to refuse to award any cooperation credit in the form of a NPA, a DPA, or mitigated sentencing. Given these consequences, Ralph Lauren might have preferred not to cooperate with the investigation altogether, including by not disclosing the violation in the first place.¹⁰⁸ Ralph Lauren, or other companies in similar situations, would have little incentive to detect bribery and invest resources in investigating it. Instead, corporations in these situations could be motivated to invest in covering their tracks, thereby reducing the likelihood of U.S. authorities ever discovering the wrongdoing.

The Yates Memo, therefore, may actually increase the public costs of anti-bribery enforcement. In order to maintain the same level of deterrence, U.S. authorities would be required to compensate for the lack of corporate cooperation by investing further resources in detecting, investigating, and prosecuting culpable corporations and employees.¹⁰⁹

Moreover, the Yates Memo threatens to increase anti-bribery enforcement in various other previously mentioned ways. As indicated above in Section IV.B.2, it may lead corporate executives to steer the company away from cooperation or to otherwise delay self-reporting and cooperation until the internal investigation yields a clearer picture regarding involvement and the individuals who may have been responsible. Additionally, as described above in Section IV.A.2, the conflict of interest between corporations and employees fueled by the Yates Memo could induce employees to challenge and complicate corporate investigations, and thereby make these investigations less effective and more expensive. Furthermore, as discussed above in Sections III.B and IV.B, under the Yates Memo, enforcement cases against individuals are expected in cases where they were not initiated previously due to individuals' limited ability to

107. Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 106 ("Ralph Lauren Corporation's cooperation saved the agency substantial time and resources ordinarily consumed in investigations of comparable conduct.").

108. See *supra* Section IV.B.1.

109. For the type of costs associated with anti-bribery enforcement, see *supra* Section III.A.

COUGHING UP EXECUTIVES OR ROLLING THE DICE?

pay. Such enforcement actions have little value from a social welfare point of view, as they do not increase the deterrence effect.¹¹⁰ Although generally a larger fine has greater deterrent potential than a smaller one, once the fine outweighs the total wealth of the person, further increases have little, if any, deterrent effect. Similarly, as described above in Section IV.A.1, the pressure exerted by the Yates Memo on corporations may lead them to take an excessively expansive view of individual involvement in wrongdoing, thereby needlessly expanding their investigations and putting individuals at risk of criminal or civil liability.

2. Cost of Bribery

While seeking to deter bribery, thereby reducing the social costs involved in corrupt practices, the Yates Memo may achieve the opposite result. Given the Memo's impact on individual and corporate incentives, it may dilute the deterrence generated by U.S. anti-bribery enforcement policy and under certain circumstances lead to more—rather than less—bribery and corruption. The Yates Memo propels U.S. enforcement policy closer to a purely strict liability system under which corporations are insufficiently incentivized to self-report and cooperate with investigative authorities.¹¹¹ Such a regime does not reap the advantages of a cooperative enforcement system but rather increases public spending on a cat-and-mouse enforcement game between authorities and corporations.¹¹² As such, the Memo may lead to alienation, resistance, and antagonism on the part of corporations, which ultimately undermines their willingness to play a meaningful role in combating bribery and corruption.¹¹³ As a result, U.S. enforcement authorities may lose an important enforcement partner and thus dilute—rather than reinforce—the deterrent effect of the enforcement policy.

Furthermore, given the potential reduction of corporate cooperation with the DOJ, the Memo may lead to a decrease in the number of agreed-upon resolutions. Under such circumstances, detected bribery may eventually go unpunished if corporate non-cooperation prevents the DOJ from obtaining the required evidence to meet the standard of proof required in criminal and civil proceedings. This shortage of effective enforcement is most likely when its execution is most needed: namely, in bribery cases involving large multinational corporations where detection is most challenging, and those in which corporate executives are involved in wrongdoing.

Lastly, the increased cost of anti-bribery enforcement discussed above in Section IV.C.1 may also erode deterrence. Given the increased costs that would have to be devoted to each FCPA investigation, the DOJ's limited resources may need to be allocated to a smaller number of matters, leaving others untended.

110. See ODED, *supra* note 20, at 31; Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232 (1985); Steven Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45 (1986).

111. See *supra* Section III.E.

112. See ODED, *supra* note 20, at 36.

113. *Id.* at 38.

CONCLUSION

The Yates Memo formalizes the focus of U.S. enforcement authorities on individual accountability and thereby seeks to deter corporate wrongdoing. It does so by declining cooperation credit unless organizations provide the DOJ with all relevant facts about individual misconduct or about who is responsible for the misconduct in question, regardless of their position, status, or seniority. In this manner, the Memo essentially enlists corporations as members of enforcement investigation teams and places them in a confrontational position toward their own employees and executives. Indeed, one could argue that the DOJ should elevate the importance of individual prosecutions and extend its efforts beyond corporate settlements. Nevertheless, the question remains whether awarding cooperation credit on the condition that corporations turn in their culpable employees promotes the U.S. anti-bribery enforcement goal: namely, minimizing the costs relating to bribery and its prevention.

This Article has presented a law and economics perspective of the social desirability of the Yates Memo from a welfare maximization perspective. The analysis is based on the proposition that the Memo is socially desirable if the resulting social benefits outweigh its negative ramifications. Against this backdrop, however, the Article reveals two basic pitfalls in the Yates Memo. First, the Memo generates a conflict of interest between employees and corporations, thereby challenging corporate ability and motivation to effectively control, monitor, and investigate employees. Second, the Memo may produce a chilling effect on corporate cooperation with the DOJ's anti-bribery enforcement. By setting a demanding threshold for cooperation credit, the Memo may diminish the appeal of cooperating altogether. These dangers may lead the Yates Memo to unnecessarily complicate U.S. anti-bribery enforcement while weakening its deterrent effect. Although the full impact of the Memo remains to be seen, the analysis in this Article casts serious doubts on the social desirability of the policy shift announced by the Yates Memo and calls for its prompt reconsideration.

Holding individual actors accountable for wrongdoing within the scope of their employment is undoubtedly an important measure that may have a real impact on corporate culture, possibly more than corporate liability alone may achieve. Corporations may certainly play an important role in promoting this goal. However, the Yates Memo's all-or-nothing approach may not necessarily bring us there. Future research may identify preferred enforcement policy mechanisms that might more efficiently encourage corporations to actively promote individual accountability. Such mechanisms may, for instance, assign a greater role to corporations in executing actions against employees whose fraudulent behavior caused losses to the company. The DOJ's current enforcement policy may deter corporations from initiating civil proceedings against fraudulent employees because such actions may publicly reveal their own culpability and lead to the initiation of a criminal investigation. An enforcement policy that recognizes and rewards corporate efforts to hold individual employees accountable for wrongdoing, such as through preferred treatment or immunity, may utilize corporations' embedded advantages in controlling their employees while truly reinforcing individual accountability and corporate cooperation.