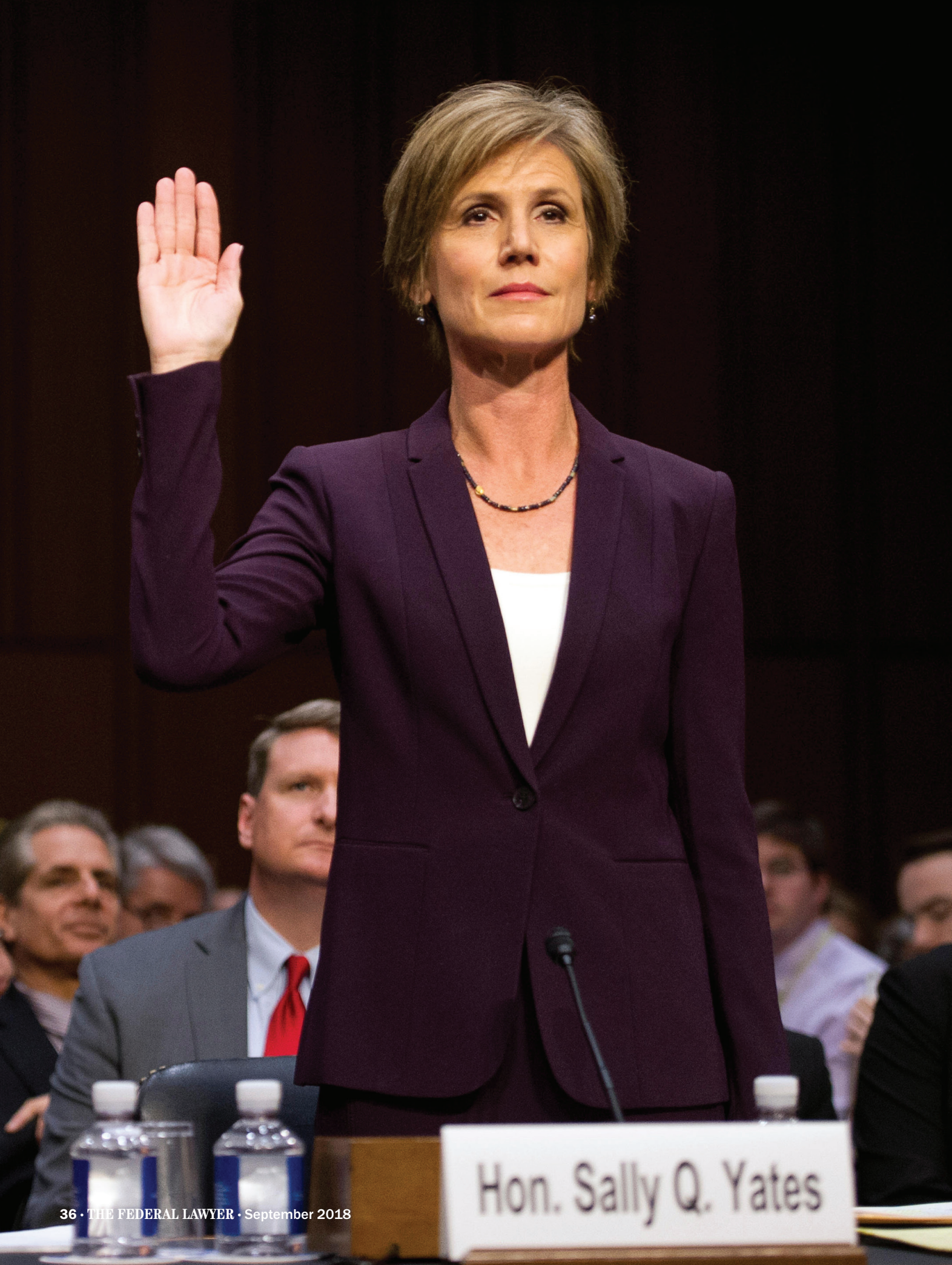
Hon. Sally Q. Yates

THE YATES MEMO AND ITS EFFECTS ON WHITE COLLAR REPRESENTATION AND INTERNAL INVESTIGATIONS—A TWO-YEAR LOOK BACK

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On Sept. 9, 2015, Deputy Attorney General Sally Quillian Yates issued, on behalf of the Department of Justice (DOJ), a memorandum entitled "Individual Accountability for Corporate Wrongdoing."[1] The Yates Memo has broad application for white collar prosecutions, for corporate internal investigations, and in formulating robust corporate compliance policies. According to the Yates Memo, the DOJ's stated goal of individual accountability breeds deterrence of illegal activity and correspondingly incentivizes changes in corporate culture, promotes the federal sentencing goal of retribution by ensuring appropriate individuals are held responsible for their actions, and enhances the public's confidence in the criminal justice system.

The Yates Memo has not been without its critics, though, who contend that the DOJ's apparent change in policy discourages self-reporting to the DOJ and unnecessarily prolongs and complicates internal investigations, among other negative policy effects. Whatever one's viewpoint, knowledge of the Yates Memo is critical for advising individual and corporate clients faced with allegations of wrongdoing.

This article (1) provides context to the Yates Memo by discussing corporate criminal liability generally; (2) outlines and discusses the key points of the Yates Memo; and (3) addresses the Yates Memo's effects on white collar criminal representation and internal investigations, particularly as they have been applied in DOJ actions since the Yates Memo.

Corporate Criminal Liability

To understand the significance of the Yates Memo, it may be helpful briefly to discuss the evolution of corporate criminal liability. Many readers who do not practice in this area may be surprised to learn that corporations can be charged with, convicted of, and punished for criminal activity. While this was not always the case—early authorities were skeptical of corporate criminal liability because it was thought that the element of criminal intent could not be established—the development of the doctrines of strict liability and vicarious liability in the late 19th century led courts increasingly to embrace corporate criminal liability.[2] Corporate criminal liability is a corollary to the law's treatment of corporations as legal persons capable of suing and being sued, which is recognized clearly by the DOJ in its 1999 policy memorandum entitled "Federal Prosecution of Corporations." This was the DOJ's first significant effort to provide guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a case.[3]

The most significant developments for U.S. corporate criminal liability were the institution of the 1991 Federal Sentencing Guide-

lines, the 1999 Federal Prosecution of Corporations Memo, and the Thompson Memo in 2003 (this includes subsequent memoranda expanding on the Thompson Memo).[4]

The significance of the sentencing guidelines was to convey tacit approval for prosecution of corporate entities in the first place, and the guidelines' goals were to promote uniformity in such prosecutions, deter corporate crime, and encourage reporting of offenses and compliance programs to facilitate such detection. Subsequent DOJ policies explain that a federal prosecutor is to consider the following factors in assessing how to treat a corporation under investigation:

1. The nature and seriousness of the offense, including the risk of harm to the public and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or condoning of, the wrongdoing by corporate management;
3. The corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
5. The existence and adequacy of the corporation's compliance program;
6. The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable;
8. The adequacy of prosecution of individuals responsible for the corporation's misconduct; and
9. The adequacy of noncriminal remedies, such as civil or regulatory enforcement actions.[5]

While the existence of guidance such as the nine factors above promotes uniformity in charging decisions, the fact that corporations act only through their employees, officers, or other agents creates unique factual issues when a corporation is under investigation. When is a corporation a criminal and when is it a victim?

Generally, only two requirements need be met for the government to impute criminal liability of an agent to a corporation: (1) the conduct must occur within the scope of the agent's employment, and (2) it must in some way be undertaken for the benefit of the corporation.[6] Both of these elements are interpreted broadly, and courts consistently hold that an agent may act for the benefit of the corporation even while also acting to satisfy personal motives. Some commentators have concluded that the "benefit" element is merely an extension of the general agency element, or that only in instances where there is no conceivable benefit to the corporation may it legally escape criminal liability.[7] The *U.S. Attorneys Manual* section on "Principles of Federal Prosecution of Business Organizations" recognizes that corporate agents act for mixed reasons, and that a corporation need not profit from its agent's actions for it to be held liable.[8] These broad principles bring prosecutorial discretion to the forefront of any corporate criminal investigation; therefore, knowledge of the DOJ's priorities is critical.

Finally, as many practitioners are aware, punishment of corporate crime by the DOJ, the U.S. Securities and Exchange Commission (SEC), and other government entities has resulted in enormous sums of money recouped through sentencing and plea bargaining. The past decade had seen the rise of aggressive government use of deferred prosecution agreements and non-prosecution agreements to punish corporate criminal liability. While their use remains significant, it has declined from the heights reached in previous years. In 2017, for instance, the DOJ entered into 11 deferred prosecution agreements (DPAs) and 11 non-prosecution agreements (NPAs), and these 22 agreements cumulatively resulted in payment of $2.7 billion by corporations.[9] This was a decrease from $4.6 billion the prior year, and only five of the 22 agreements from 2017 exceeded $100 million.[10] The SEC went the entire year of 2017 without entering into a single DPA or NPA.[11]

Given this framework, it is not difficult to understand the rise in corporate criminal investigations and prosecutions in the 21st century. While the Yates Memo did not intend to stop the momentum in government imposition of corporate criminal liability, it did propound a new set of factors and priorities for prosecutors investigating possible corporate misconduct. It is important for practitioners to be aware of the Yates Memo's guidance to federal prosecutors and to understand its implications for clients.

The Yates Memo

The Yates Memo outlined "six key steps" intended to strengthen DOJ pursuit of individual corporate wrongdoing:

1. In order to qualify for any cooperation credit, corporations must provide to the DOJ all relevant facts relating to the individuals responsible for the misconduct;
2. Criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another;
4. Absent extraordinary circumstances or approved departmental policy, the DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;
5. DOJ attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases and should memorialize any declinations as to individuals in such cases; and
6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.[12]

Key 1: All Relevant Facts About Individuals Involved Must Be Provided

The Yates Memo directly acknowledged that some of its key steps represented policy shifts for the DOJ, and none was more pronounced—or made more waves with commentators—than the policy shift that "in order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the [DOJ] all relevant facts about individual misconduct."[13] In the face of substantial criticism of this policy shift, the DOJ issued statements that some commentators believed softened the Yates Memo. Assistant Attorney General Leslie Caldwell, for instance, stated in late September 2015 that "when a company is truly unable to identify culpable individuals, even after an appropriately tailored, careful, thorough investigation, but still provides the government with all the relevant facts, and oth-

erwise assists us in obtaining the relevant evidence, the company will still be eligible for cooperation credit."[14] This commentary, though, really only addressed instances where no individual misconduct is identified. Where individual misconduct is identified, the Yates Memo is clear that to obtain cooperation credit a corporation "cannot pick and choose what facts to disclose."[15]

Key 2: Focus Will Be on Individuals From the Start of the Investigation

The Yates Memo outlined a new priority to focus on building cases against individual wrongdoers from the inception of an investigation. The DOJ contended that this would accomplish three main goals: to "ferret out" the full extent of corporate misconduct, to promote the ultimate outcome of civil or criminal charges against culpable individuals, and to increase likely cooperation from corporate agents against those "higher up the corporate hierarchy."[16] Not surprisingly, it is this last stated goal of this particular key point that caught the attention of corporate executives and certain commentators. Critics of the Yates Memo believed it implicitly endorsed a bottom-up approach to corporate investigations with the goal of securing charges against high-ranking executives.

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Key 3: Civil and Criminal Attorneys Will Be in Routine Communication

The Yates Memo directed that civil and criminal attorneys conducting corporate investigations be in routine communication. For example, even if criminal liability will be sought, a criminal attorney handling corporate investigations "should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability." Likewise, civil attorneys who identify criminally culpable individuals should promptly refer such cases to criminal prosecutors. While the DOJ has endorsed parallel investigations for some time, the Yates Memo placed renewed emphasis on this tactic's value in enforcing federal law.

Key 4: Corporate Resolution May Not Provide Individual Protection Absent Extraordinary Circumstances

DOJ lawyers are advised that during the course of a corporate investigation, absent extraordinary circumstances, they must not agree to dismiss charges against, or provide immunity for, individual officers or employees. A release from either criminal or civil liability based on such extraordinary circumstances must now be approved in writing by the relevant attorney general or U.S. attorney. This policy shift, too, drew substantial criticism, most notably on the basis that it would lead to reluctance to enter into settlement agreements on behalf of the corporation, with resulting prolonged and costly investigations.

Key 5: Corporate Cases Will Not Be Resolved Without a Plan for Individual Cases

The Yates Memo further provided that where authorization for resolution of a case with a corporation is sought but investigation of individual misconduct has not concluded, prosecutors must memorialize potentially liable individuals, the status of the investigation, and an investigative plan to bring the matter to resolution with respect to these individuals. Likewise, declination of charges against individuals at the conclusion of such investigation must now also be memorialized and approved by the relevant attorney general or U.S. attorney. Imposing this additional step on prosecutors, the argument goes, will further the goals enunciated in the Yates Memo.

Key 6: Civil Attorneys Bringing Suit Will Focus on Factors Beyond Ability to Pay

In pursuing civil actions against individuals, the Yates Memo provides that DOJ attorneys should consider the following factors: seriousness of misconduct, whether it is actionable, whether there is enough evidence to obtain a judgment, and whether there are other important federal interests at issue. An individual's ability to pay may be considered, but should not be the only factor considered. This last key step, in some ways, was emblematic of the Yates Memo's aims, as it addresses the "apparent tension" between the "twin aims … of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other."[17]

Practice Points in White Collar Defense and Internal Investigations

The application of the Yates Memo to practitioners' criminal defense matters or internal investigations will vary widely with the circumstances of a given case, but this article addresses a few of the more prominent practice points.

As predicted with the issuance of the Yates Memo, companies that intend to make a disclosure to the government that misconduct has been identified within the corporation are now placed in a precarious position. Where individual misconduct has been identified, the corporation must ensure it has a conducted a robust investigation to uncover "all relevant facts" associated with this misconduct, a high barrier and one whose fulfillment remains to be interpreted by prosecutors and courts. As many practitioners know, the low barrier to determining relevance is not encouraging for companies who have determined it necessary to make a disclosure of individual misconduct. In part because there is no way to track such a statistic and in part because not enough time has elapsed, it is not clear to what degree the Yates Memo has discouraged companies from making disclosures to the government.

Moreover, while Assistant Attorney General Caldwell's remarks explicitly acknowledged instances where a corporation has been "truly unable to identify culpable individuals," when will such

instances arise in the context of a company wishing to make a disclosure of wrongdoing to the government, given that corporate criminal liability arises only from individual actors? In other words, if no culpable individuals have been identified (at least, none acting in the scope of their employment and ostensibly for the corporation's benefit), what is then left to disclose?

The nature of the modern corporate structure has always posed unique issues for practitioners when allegations of corporate misconduct are raised. Very generally, the same three duties of care are owed by directors and corporate officers alike to the corporation: care, obedience, and loyalty. In grand jury and other investigations, corporate counsel often may appropriately co-represent senior management because of the commonality of interest that arises from these duties to the corporation.[18] And while there is no absolute prohibition against representation of both a company and certain officers on constitutional or ethical grounds, the principal duty of corporate counsel is to the company itself.[19]

Where does the Yates Memo leave joint representation? As with disclosure, it may be too soon to tell. Joint representation is thought to enable clients to adopt a coordinated strategy, allow pooling of information, and uphold corporate morale.[20] Perhaps most critically, it significantly reduces the legal fees a company (or individuals) incur as a result of the government investigation. The Yates Memo's focus on individual accountability inherently calls for more conservative decisions when joint representation issues arise, thereby increasing costs to corporations forced to fund separate counsel for each executive who may be potentially culpable. Hiring multiple separate counsel as a Yates Memo prophylactic also undermines the other traditional advantages of joint representation by creating barriers between company employees or executives and undermining company morale. Again, while this is a difficult phenomenon to measure, white collar practitioners across the United States are facing these critical decisions since the Yates Memo was issued.

The Yates Memo also underscores the importance of appropriate Upjohn warnings during witness interviews.[21] Assuming that the Yates Memo's requirement to disclose "all relevant facts about individual misconduct" will lead to more frequent disclosures to the government, it follows that challenges on the basis of claimed attorney-client privilege by employees and executives interviewed during the course of the investigation may arise more frequently.

The new policy barring immunity to individuals as part of criminal or civil corporate resolution "absent extraordinary circumstances" was thought to create reluctance on the part of corporate executives or directors in concluding whether to enter into settlement. The statistics bear this out; the number of corporate DPAs and NPAs has steadily decreased since the issuance of the Yates Memo.[22] It should be noted, however, that Attorney General Jeff Sessions expressed skepticism with the concept of deferred prosecution and NPAs long before the Yates Memo.[23]

The renewed emphasis on civil and criminal coordination is reflected in a number of recent cases, particularly in the health care arena. On July 17, 2017, for example, the DOJ announced a settlement with three companies and two executives resolving allegations that false claims were submitted for unnecessary rehabilitation services at skilled nursing facilities.[24] The terms of the settlement provide that the companies and individuals must pay $19.5 million. In addition, Foundations Health Solutions Inc., one of the companies, entered into a five-year corporate integrity agreement—and its president was required to enter into the corporate integrity agreement as well. The inclusion of a company president as an actual party to a corporate integrity agreement seems traceable directly to the Yates Memo.

Criminal fraud prosecutions certainly still continue to result in substantial prison time for offenders, and perhaps the Yates Memo also partly explains the DOJ's apparent emphasis on exclusion and forfeiture of licenses to practice in health care cases that many practitioners may notice. In a settlement announced on May 30, 2017, a Minnesota nonprofit and two of its principals agreed to pay a combined $4.52 million to resolve allegations that they violated the False Claims Act.[25] The two principals were barred from participating in federal and state health care programs for five and eight years. In another example, the DOJ announced in September 2016 that it had reached a settlement with the CEO of Toumey Healthcare System that required him to pay $1 million, agree to a four-year period of exclusion, and release the company from any claims it might have for indemnification.[26]

Still another example shortly after the Yates Memo was the DOJ's announcement in 2015 regarding a global settlement of claims with Warner Chilcott U.S. Sales LLC and the issue of criminal charges against the company's president, W. Carl Reichel, and several other company district managers.[27] The DOJ announced a settlement with the corporation, a subsidiary of pharmaceutical manufacturer Warner Chilcott PLC, in which the company agreed to plead guilty to charges of health care fraud and pay $125 million to resolve both its criminal and civil liability arising from illegal marketing of a number of prescription drugs. The same day, Reichel's indictment was unsealed, and he was arrested in Boston. The criminal information filed relative to the company's conduct indicates that through employees acting at the direction of management such as Reichel, the company knowingly and willfully paid physicians, in part by hosting lavish "Medical Education Event" dinners that featured no educational component at all, that were calculated to obtain a competitive advantage by inducing the physicians to refer their patients to pharmacies to receive Warner Chilcott's products.

The Warner Chilcott announcement reflects a number of the Yates Memo's key steps in practice. First, the company's payment was relative to all civil and criminal liability associated with the illegal marketing and kickback scheme, demonstrating that civil and criminal attorneys were involved in the investigation. Second, it reflects the bottom up investigative tactics explicitly endorsed by the Yates Memo. There, former district managers involved in the misconduct had previously pled guilty to conspiracy to commit health care fraud and violations of the Health Insurance Portability and Accountability Act, presumably cooperating in the investigation. This investigative approach culminated in the issuance of charges against those "higher up the corporate hierarchy"—namely, Reichel.[28] Finally, it clearly represents that corporate misconduct will no longer be resolved by the company simply writing a check. The arrest and prosecution of Warner Chilcott's president on the day the company resolved its civil and criminal liability serves as a stark reminder of the Yates Memo's effects for corporations and executives facing government investigation.

Conclusion

The Yates Memo remains an important DOJ policy memorandum that changed the landscape of white collar cases and corporate investigations. Among its more momentous policy announcements were the

requirement that for a corporation to obtain cooperation credit it must disclose all relevant facts of individual wrongdoing and the new requirement that individuals must not be granted immunity accompanying corporate settlement absent extraordinary circumstances.

Issued at an already precarious time for corporate executives, the Yates Memo raised the stakes of corporate misconduct allegations. A number of settlements, particularly in the health care space, reflect that the government has begun applying the Yates Memo, and several comments by Attorney General Sessions reinforce the DOJ's emphasis on individual accountability. For instance, in his Senate confirmation hearing, Sessions indicated his believe that in many cases prosecutions of individuals may be more appropriate than blanket penalties against businesses[29] Two years after its issuance, the Yates Memo remains a critical directive for white collar attorneys advising their clients in the context of internal investigations and potential white collar liability. ⊙

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Endnotes

[1]Memorandum from Sally Quillian Yates, Deputy Att'y Gen., to All U.S. Attorneys, Re: Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), http://www.justice.gov/dag/file/769036/download.

[2]*See* Dan K. Webb et al., Corporate Internal Investigations 1-4 (2015).

[3]Memorandum from Eric. H. Holder, Deputy Att'y Gen., to All Component Heads & U.S. Attorneys, Re: Bringing Criminal Charges Against Corporations (June 16, 1999), http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

[4]*See id.* at 1-5 [AU: Should this be "Webb, *supra* note 2, at 1-5"?]; U.S. Sentencing Guidelines Manual § 8 (1991); Holder Memo, *supra* note 3; Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Department Components & U.S. Attorneys, Re: Principles of Federal Prosecution of Business Organizations (Jan. 12, 2003), http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf.

[5]*Principles of Federal Prosecution of Business Organizations*, *in* 9 U.S. Attorneys' Manual 9-28.300 (2008).

[6]*See, e.g.*, Webb, *supra* note 2, at 1-6.

[7]*Id.* at 1-9.

[8]*Id.*

[9]F. Joseph Warin et al., Gibson Dunn, 2017 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs) 2 (Jan. 4, 2018), https://www.gibsondunn.com/wp-content/uploads/2018/01/2017-year-end-NPA-DPA-update.pdf.

[10]*Id.*at 16-19.

[11]*Id.* at 1.

[12]Yates Memo, *supra* note 1, at 3.

[13]*Id.* (emphasis in original).

[14]Randi Val Morrison, *DOJ Eases Yates Memo Cooperation Credit Requirements,* TheCorporateCounsel.net (Oct. 15, 2015), http://www.thecorporatecounsel.net/blog/2015/10/doj-eases-yates-memo-cooperation-credit-requirements.html.

[15]Yates Memo, *supra* note 1, at 4.

[16]*Id.*

[17]*Id.*

[18]*See, e.g.*, Webb, *supra* note 2, at 5-4.

[19]*Id.*

[20]*Id.* at 5-24.1.

[21]*See Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed.2d 584 (1981).

[22]Warin, *supra* note 9, at 2.

[23]*See* Nomination of James Michael Cole, Nominee to be Deputy Attorney General, U.S. Department of Justice: Hearing before the Senate Committee on the Judiciary, 111th Cong. 99 (2010) (questions from Senator Sessions of Alabama).

[24]Press Release, U.S. Dep't of Justice, Three Companies and Their Executives Pay $19.5 Million to Resolve False Claims Act Allegations Pertaining to Rehabilitation Therapy and Hospice Services (July 17, 2017), https://www.justice.gov/opa/pr/three-companies-and-their-executives-pay-195-million-resolve-false-claims-act-allegations.

[25]Press Release, U.S. Dep't of Justice, Minnesota Mental Health Nonprofit And Its Leaders To Pay $4.5 Million To Resolve Fraud Allegations (May 30, 2017), https://www.justice.gov/usao-mn/pr/minnesota-mental-health-nonprofit-and-its-leaders-pay-45-million-resolve-fraud.

[26]Press Release, U.S. Dep't of Justice, Former Chief Executive of South Carolina Hospital Pays $1 Million and Agrees to Exclusion to Settle Claims Related to Illegal Payments to Referring Physicians (Sept. 27, 2016), https://www.justice.gov/opa/pr/former-chief-executive-south-carolina-hospital-pays-1-million-and-agrees-exclusion-settle.

[27]*See* Press Release, U.S. Dep't of Justice, Warner Chilcott Agrees to Plead Guilty to Felony Health Care Fraud Scheme and Pay $125 Million to Resolve Criminal Liability and False Claims Act Allegations (Oct. 29, 2015), http://www.justice.gov/opa/pr/warner-chilcott-agrees-plead-guilty-felony-health-care-fraud-scheme-and-pay-125-million.

[28]Yates Memo, *supra* note 1, at 4.

[29]Jody Godoy, *Sessions Hints Yates Memo, Fraud to Stay on DOJ Radar*, Law360 (Jan. 11, 2017, 8:51 PM), https://www.law360.com/articles/879816/sessions-hints-yates-memo-fraud-to-stay-on-doj-radar.