

## NOTES AND COMMENTS

### The Yates Memo and the Push for Individual Accountability

Jonathan S. Feld and Eric S. Klein

**What is the issue?** In September 2015, the U.S. Department of Justice announced the implementation of more aggressive enforcement policies for corporate and individual prosecution. This fundamental policy shift now requires corporations, including the health care provider community, to identify individual wrongdoers and turn over all relevant facts related to persons responsible for corporate misconduct.

**What is at stake?** Given the “all or nothing” standard for cooperation credit that the DOJ has set, the agency’s emphasis on identifying responsible individuals creates potential conflicts of interest with employees or contractors who may be reluctant to cooperate with the company. Further, health care providers now face an increasing number of questions about how they can tailor their health care audits and investigations to provide the level of completeness that the DOJ might deem satisfactory.

**What should attorneys do?** Attorneys should counsel their health care provider clients on the issue of securing separate counsel for employees; ensure that both the company and its employees understand the distinction between the company’s attorney-client privilege and a personal privilege; and counsel their clients on how to strengthen the company’s corporate compliance program.

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*Author biographies appear on the next page.*



**Jonathan S. Feld** is a Member at Dykema and leader of the firm's Government Investigations and Corporate Compliance Team. His practice focuses on complex civil and criminal matters, including antitrust, health care, financial, and anti-bribery actions. Contact him via email at [jfeld@dykema.com](mailto:jfeld@dykema.com).

**Eric S. Klein** is a Member at Dykema where he devotes his practice to representing clients in the health care sector with respect to corporate and regulatory issues. He counsels corporate and health care clients on compliance and reimbursement issues, fraud and abuse matters, provider practice acquisitions, business transactions, licensure, and Medicare/Medicaid certification matters. Contact him via email at [eklein@dykema.com](mailto:eklein@dykema.com).

## Feld and Klein: The Yates Memo and Individual Accountability

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## Introduction

On September 9, 2015, Deputy Attorney General (DAG) Sally Quillian Yates issued a memorandum titled “Individual Accountability for Corporate Wrongdoing.” Although the U.S. Department of Justice (DOJ) has long enforced a policy of holding individuals and corporations criminally and civilly liable for corporate misconduct, the “Yates Memo” announced the implementation of more aggressive enforcement policies for corporate and individual prosecution. The Yates Memo applies to many industries but once again, the health care industry, which has long been an enforcement priority for the DOJ, will be affected by the advent of this policy.

The Yates memo was, in part, a response to criticism about the lack of individual prosecutions in the aftermath of the 2008 economic collapse. Indeed, that criticism is still prevalent.<sup>1</sup> One key feature of the Yates Memo is the disclosure of “all relevant facts relating to the individuals responsible for the misconduct”<sup>2</sup> before the DOJ will consider any credit for cooperation that may reduce the company’s civil or criminal penalties. As DAG Yates explained on November 16, 2015:

In the past, cooperation credit was a sliding scale of sorts and companies could still receive at least some credit for cooperation, even if they failed to fully disclose all facts about individuals. That’s changed now. As the policy makes clear, providing complete information about individuals’ involvement in wrongdoing is a threshold hurdle . . . .<sup>3</sup>

- 1 See, e.g., Senator Elizabeth Warren, Senate Floor Speech (Feb. 3, 2016), *available at* [www.warren.senate.gov/files/documents/2016-2-3\\_Warren\\_Floor\\_Speech.pdf](http://www.warren.senate.gov/files/documents/2016-2-3_Warren_Floor_Speech.pdf).
- 2 Memorandum from Sally Quinlan Yates, Deputy Attorney Gen. to Assistant Attorney-Gens., Dirs., and All U.S. Attorneys (Sept. 9, 2015), *available at* [www.justice.gov/dag/file/769036/download](http://www.justice.gov/dag/file/769036/download) [hereinafter *Yates Memo*].
- 3 Sally Q. Yates, Deputy Attorney Gen., Office of the Deputy Attorney Gen., Remarks at American Banking Association and American Bar Association Money Laundering Enforcement Conference (Nov. 16, 2015), *available at* [www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0](http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0).

The “cooperation credit” creates a complicated dynamic between health care companies and their employees that has serious implications for internal investigations and the decision on whether to disclose to the DOJ.

This Comment explores the likely ramifications of the Yates Memo for the health care industry with (i) [a brief history of previous DAG memoranda](#) to illustrate how the DOJ’s guidance on corporate investigations has evolved, especially with regard to the protection given to attorney-client privileged information developed during internal investigations; (ii) [an analysis of the elements set forth in the Yates Memo](#) and how the DOJ has interpreted the Yates Memo since its release in September 2015; and (iii) [a review of the impact that the Yates Memo will have on corporate compliance and internal investigations](#).

## The DAG Memos

Over the past 17 years, one of the key functions of the Office of the Deputy Attorney General has been to provide guidance on the DOJ’s policies for criminal corporate prosecutions. From the outset, attorney-client privilege has been integral to the scope of corporate cooperation and voluntary disclosures, which are key factors in corporate prosecution principles. A brief review of the evolution of the DAG policies is instructive.

In 1999, then-DAG Eric Holder set out the factors considered in charging a corporation for criminal misconduct, including, but not limited to, the nature and seriousness of the offense, the pervasiveness of wrongdoing within the corporation, and the corporation’s history of similar conduct.<sup>4</sup> The Holder Memo acknowledged that “[i]n 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 available, to disclose complete results of its internal investigation, and to waive the attorney-client and

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4 Memorandum from the Deputy Attorney Gen. to All Component Heads and U.S. Attorneys (June 16, 1999).

work product privileges.”<sup>5</sup> It further noted that the DOJ does not “consider waiver of a corporation’s privileges an absolute requirement, and prosecutors should consider the willingness of a corporation to waive the privileges when necessary to provide timely and complete information as only one factor in evaluating the corporation’s cooperation.”<sup>6</sup> The Holder Memo also made clear that “[p]rosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation” and that the “imposition of individual criminal liability on individuals provides a strong deterrent against future corporate wrongdoing.”<sup>7</sup>

The principle that corporate prosecution did not insulate or preclude prosecution of responsible individuals continued in successive DAG memos. In 2003, after the Enron and WorldCom scandals, then-DAG Larry D. Thompson issued a revised set of principles that made the Holder Memo guidelines mandatory on federal prosecutors.<sup>8</sup> The Thompson Memo adopted much of the language from the Holder Memo regarding corporate cooperation and voluntary disclosure, including consideration of the waiver of the attorney-client privilege:

One factor the prosecutor may weigh in assessing the adequacy of a corporation’s cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client privilege and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel.<sup>9</sup>

The emphasis placed on voluntary waiver of the attorney-client privilege and work product protection in both the Holder and Thompson

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5 *Id.* at 5.

6 *Id.* at 6.

7 *Id.* at 2.

8 Memorandum from Larry D. Thompson, Deputy Attorney Gen. to Heads of Dep’t Components U.S. Attorneys (Jan. 20, 2003).

9 *Id.* at 7.

Memos was controversial. From the view of defense counsel, it forced a corporation to either abstain from waiving the privilege at the risk of being labeled uncooperative, or release otherwise privileged information in hopes of receiving corporate credit that would mitigate its criminal liability.

That dilemma remained until 2006 when then-DAG Paul McNulty responded to criticism surrounding the DOJ's position on attorney-client privilege and work product protections.<sup>10</sup> The McNulty Memo announced that “[w]aiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government’s investigation.”<sup>11</sup> Nonetheless, the McNulty Memo noted that the “disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company’s voluntary disclosure.”<sup>12</sup> A demonstration of a “legitimate need” for the information requested would be required for prosecutors to seek a waiver of the privilege. The McNulty Memo described two categories of information that prosecutors could request if a legitimate need existed: (i) “purely factual information, which may or may not be privileged, relating to the underlying misconduct” and (ii) “[o]nly if the purely factual information provides an incomplete basis to conduct a thorough investigation should prosecutors then request that the corporation provide attorney-client communications or non-factual attorney work product.”<sup>13</sup>

While, from the industry’s perspective, the McNulty Memo was an improvement from the highly criticized policies set forth in the Holder and Thompson Memos, it still garnered its fair share of criticism. Opponents took issue with the fact that the McNulty Memo retained a policy that allowed prosecutors to not only seek privilege waivers during an investigation, but also created an award for those companies that complied with waiver requests.

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10 Memorandum from Paul J. McNulty, Deputy Attorney Gen. to Heads of Dep’t Components U.S. Attorneys (Dec. 12, 2006).

11 *Id.* at 8.

12 *Id.*

13 *Id.* at 9-10.

In 2008, then-DAG Mark Filip articulated a revised position. He explained that waiver of the “attorney-client privilege and work product protections has never been a prerequisite under the Department’s prosecution guidelines for a corporation to be viewed as cooperative.”<sup>14</sup> The Filip Memo specifically stated that “while a corporation remains free to convey non-factual or ‘core’ attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so.”<sup>15</sup> Corporate cooperation would depend on the entity’s readiness to disclose relevant facts relating to the alleged criminal misconduct, rather than its willingness to surrender otherwise privileged information.<sup>16</sup>

Eight years later, the Yates Memo relies on the same basic principles in evaluating allegations of corporate misconduct, but it has renewed questions regarding the level of deference that the DOJ will give to the attorney-client privilege and work product doctrine when deciding cooperation credit. DAG Yates has said she does not want to change existing DOJ policy. In her May 2016 speech, she explained her position:

[T]here is nothing in the Individual Accountability Policy that requires companies to waive attorney-client privilege or in any way rolls back protections already in place. The policy specifically requires only that companies turn over all relevant non-privileged information. We’re asking for the facts. And we have always asked for the facts. The only difference now is that companies cannot—in the name of privilege or otherwise—pick and choose which facts to provide if they want credit for cooperation. But, of course, if there is a valid claim

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14 Memorandum from Mark Filip, Deputy Attorney Gen. to Heads of Dep’t Components U.S. Attorneys, at 8 (Aug. 28, 2008).

15 *Id.* at 9.

16 *Id.* at 9-11.

of privilege as to a relevant fact, we expect that it will be brought to the prosecutor's attention.<sup>17</sup>

While the broader policies of corporate cooperation and individual accountability have existed throughout the various DAG memos, the characterization that the privilege has been “misused” is an important shift and has ratcheted up the potential for tension when a company seeks to make voluntary disclosures. How the new policies of the Yates Memo will actually play out remains to be seen.

## What the Yates Memo Says

The DOJ identified four reasons in the Yates Memo for strengthening its pursuit of individual corporate wrongdoing: (i) deterring future illegal activity; (ii) incentivizing change in corporate behavior; (iii) ensuring that proper parties are held accountable for their actions; and (iv) promoting the public's confidence in the justice system. This rationale is not new—rather, it affirms well established DOJ objectives. As discussed [later](#), what it does is signal a much greater emphasis on meaningful corporate compliance programs and voluntary disclosures.

The Yates Memo identified six directives to federal prosecutors regarding the enhanced focus on individual prosecutions:

1. To be eligible for any cooperation credit, corporations must provide the DOJ with 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. Civil and criminal attorneys handling corporate investigations should be in routine communication with one another.

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17 Press Release, Deputy Attorney Gen. Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference (May 10, 2016), [available at www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association](http://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association) [hereinafter *May 2016 Speech*].

4. Absent extraordinary circumstances or approved DOJ 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.
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.<sup>18</sup> This sixth factor will be especially important to the health care sector because of the growth in civil False Claims Act matters, both by the government and whistleblowers.

The day after issuing the Yates Memo, DAG Yates delivered a speech on the DOJ's new policy where she described the DOJ's fundamental policy shift to requiring corporations to turn over all relevant facts related to individuals responsible for the misconduct. In her speech, DAG Yates decried past practices of "limited" disclosure:

Effective immediately, we have revised our policy guidance to require that if a company wants any credit for cooperation, any credit at all, it must identify all individuals involved in the wrongdoing, regardless of their position, status or seniority in the company and provide all relevant facts about their misconduct. It's all or nothing. No more picking and choosing what gets disclosed. No more partial credit for cooperation that doesn't include information about individuals.<sup>19</sup>

DAG Yates noted that while the DOJ has long emphasized the importance of identifying culpable individuals, "until now, companies could

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18 *Yates Memo*, at 3-7.

19 Press Release, U.S. Dept of Justice, Deputy Attorney Gen. Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), available at [www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school](http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school).

cooperate with the government by voluntarily disclosing improper corporate practices, but then stop short of identifying who engaged in the wrongdoing and what exactly they did.”<sup>20</sup> She also emphasized that “we’re not going to let corporations plead ignorance . . . If they want any cooperation credit, they will need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals.”<sup>21</sup> DOJ attorneys, DAG Yates explained, will be “vigorously testing” the information provided and comparing it to the DOJ’s own investigation to validate its completeness and to ensure that the company does not attempt to minimize the role of any culpable individuals.<sup>22</sup>

Senior DOJ officials have attempted to ease concerns that unlimited investigations will be needed to satisfy the DOJ’s new standard. DAG Yates noted that the DOJ is not asking companies to “boil the ocean.” Rather, the “purpose of this policy is to better identify responsible individuals, not to burden corporations with longer or more expensive internal investigations than necessary . . . We expect thorough investigations tailored to the scope of the wrongdoing.”<sup>23</sup> Just how health care providers should tailor their health care audits or investigations to provide the level of completeness that the DOJ will deem satisfactory is murky, especially given the DOJ’s “all or nothing” standard for cooperation credit.

The reverberations of the Yates Memo have made their way into the health care industry, with attorneys involved in the defense of criminal and civil False Claims Act cases paying close attention to the speeches of DOJ officials in the months following the Yates Memo. On September 22, 2015, Assistant Attorney General (AAG) for the Criminal Division Leslie Caldwell affirmed that “companies seeking cooperation credit must affirmatively work to identify and discover relevant information about culpable individuals through independent, thorough investigations . . . And internal investigations cannot end with a conclu-

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20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

sion of corporate liability, while stopping short of identifying those who committed the criminal conduct.”<sup>24</sup> For those investigations that “will not bear fruit,” Caldwell said a company will be eligible for cooperation credit if it provides the government with relevant facts and otherwise assists in obtaining evidence, even if the company “truly is unable to identify culpable individuals following an appropriately tailored and thorough investigation . . . .”<sup>25</sup> Nonetheless, Caldwell reaffirmed that the DOJ “will carefully scrutinize and test a company’s claims that it could not identify or uncover evidence regarding the culpable individuals, particularly if we are able to do so ourselves.”<sup>26</sup> Caldwell also tried to assuage concerns that the DOJ’s “new guidance does not change existing department policy regarding the attorney-client privilege or work product protection. Prosecutors will not request a corporate waiver of these privileges in connection with a corporation’s cooperation.”<sup>27</sup>

### Reaffirmation of the Yates Memo in May 2016

On May 10, 2016, DAG Yates spoke at the New York City Bar Association White Collar Crime Conference where she again emphasized that the DOJ expects companies to conduct thorough investigations tailored to the scope of the wrongdoing. She recognized how determining the “appropriate scope and how to proceed is always case specific—it’s not possible to lay out hard and fast rules.”<sup>28</sup> DAG Yates reiterated that the DOJ expects that “cooperating companies will continue to turn over the information to the prosecutor as they receive it.”<sup>29</sup> Addressing concerns regarding the attorney-client privilege, she stated that “there is nothing in the Individual Accountability Policy that requires companies to waive

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24 Press Release, U.S. Dep’t of Justice, Assistant Attorney Gen. Leslie R. Caldwell Delivers Remarks at the Second Annual Global Investigations Review Conference (Sept. 22, 2015), available at [www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-second-annual-global-0](http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-second-annual-global-0).

25 *Id.*

26 *Id.*

27 *Id.*

28 *May 2016 Speech*.

29 *Id.*

attorney-client privilege or in any way rolls back protections already in place. The policy specifically requires only that companies turn over all relevant non-privileged information.”<sup>30</sup> While claiming that defense attorneys’ concerns are exaggerated, the lack of any clear guidance about what constitutes a “complete” internal investigation while trying not to “boil the ocean” leaves health care providers to formulate their own structure.

### The Yates Memo and civil cases

The Yates Memo primarily addressed criminal prosecutions, but its principles have been embraced by agencies involved in civil enforcement cases, especially False Claims Act cases, prevalent in the health care sector. Recent statements have demonstrated that the DOJ intends to pursue civil cases vigorously using the Yates Memo principles. On June 9, 2016, Acting Associate Attorney General Bill Baer extended the “individual accountability” and corporate cooperation standards of the Yates Memo “with equal force and logic to the department’s civil enforcement.”<sup>31</sup> AAG Baer explained how genuine corporate cooperation “involves prompt, no slow-walking, and fulsome, no hiding the ball, responses to government requests for information.”<sup>32</sup> While AAG Baer echoed prior statements about investigations being tailored to the scope of the wrongdoing, the DOJ expects “cooperating companies to make their best effort to determine the facts with the goal of identifying the individuals involved.”<sup>33</sup>

In addition, AAG Baer underscored that timing, meaning early voluntary disclosure, is of the essence and that “[m]aximum credit will be reserved for situations where the company not only fully cooperates but also voluntarily discloses . . . .”<sup>34</sup> He continued that companies should

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30 *Id.*

31 Press Release, U.S. Dep’t of Justice, Acting Associate Attorney Gen. Bill Baer Delivers Remarks on Individual Accountability at American Bar Association’s 11th National Institute on Civil False Claims Act and Qui Tam Enforcement (June 9, 2016), available at [www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-individual-accountability](http://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-individual-accountability).

32 *Id.*

33 *Id.*

34 *Id.*

understand that “the converse is also true: the conduct of those companies that fail to act promptly, fail to promptly disclose or fail to help us understand who participated in the violation also will be factored into our overall view of the appropriate resolution of the matter.”<sup>35</sup> The message is that if the disclosure is not complete or not voluntary, the prospect of meaningful reduction of penalties or treble damages under the False Claims Act is unlikely.

## The Reverberations of the Yates Memo for Health Care

The DOJ’s heightened emphasis on early voluntary disclosure will increase the need for health care companies to conduct internal investigations when allegations of improper health care practices arise. A key component for the internal investigation is obtaining complete and accurate information from company personnel. Yet, the DOJ’s emphasis on identifying responsible individuals creates potential conflicts of interest with employees or contractors who may be reluctant to cooperate with the company. The Yates Memo may result in employees having to make a Hobbesian choice—either cooperate or face termination or sanctions for a failure to do so.<sup>36</sup> In addition, health care companies will need to collect and assess information when there is a credible allegation of impropriety. The need for internal investigations conducted by experienced counsel should therefore be considered at early stages of allegations. Health care providers should involve external independent counsel to avoid claims that advice and reports by in-house counsel constituted “business advice” and not privileged legal advice.

The Yates Memo, with the DOJ emphasis on cooperation and identification of persons involved, will result in more interaction with prosecutors during the internal investigation. Full cooperation, accord-

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<sup>35</sup> *Id.*

<sup>36</sup> See *Gilman v. Marsh & McLennan Cos.*, 826 F.3d 69 (2d Cir. 2016) (holding that an employer had cause to terminate two employees for refusing to be interviewed after they were identified as co-conspirators in a criminal bid-rigging scheme).

ing to the DOJ, includes timely updates and production of documents no matter the stage of the internal review. These two factors, which are examples of the company's cooperation obligations under the Yates Memo, necessitate a health care company to strongly consider obtaining separate counsel for employees. While this approach may increase costs, the benefits are significant. Separate counsel will eliminate both the appearance that the company is stifling information and any potential ethical pitfalls. Even if separate counsel represent individual employees, the company's counsel will inevitably have to interview employees as part of the company's internal investigation. Health care companies should therefore expect longer, and likely more costly, internal investigations as a result of the Yates Memo.

While it may increase cooperation with the government, the Yates Memo may impede joint defense agreements between companies, executives, and employees. A joint defense agreement is often used to share privileged information and strategy where the parties have a common interest, such as defending clients in a criminal investigation. Yet, such cooperation between company counsel and individuals' counsel may create the impression of not cooperating fully with the government. This may undermine the willingness of companies to enter into a joint defense agreement. Further, the parties may decide not to share strategy or information out of concern that the company will be asked to divulge information that comes, in part, from employees.

### Increased importance of *Upjohn* warnings to employees

With the Yates Memo's focus on identification of accountable individuals, it is more important than ever to ensure that employees understand the distinction between the company's attorney-client privilege and a personal one. When conducting interviews, counsel should provide *Upjohn* warnings that convey the following key elements:

- The attorney represents the company and is gathering information to provide legal advice to the company.

- The attorney does not represent the employee in his/her personal capacity.
- The attorney is speaking to the employee in his/her capacity as an employee of the company.
- The interview is an attorney-client communication that is privileged, but the holder of the privilege is the company, not the employee.
- The company can disclose what it learns from the employee during interviews without consulting the employee.
- The company can use or disclose to a third party, including the government, the information employee provides, even if it is against the employee's interests.

The central point for *Upjohn* warnings is to ensure that employees understand who the attorney represents. For corporate counsel, the company is the client for purposes of the attorney-client privilege. Employees should understand that interviews and communications are being held solely under the company's privilege, not the employee's privilege. The company, not the individual employee, will make any decision to waive the privilege in order to meet the DOJ's concerns.

Providing *Upjohn* warnings to employees in the post-Yates Memo era will likely result in employees becoming more reluctant to cooperate in investigations, especially without their own counsel. Yet failing to provide *Upjohn* warnings will likely increase the risk that employees will claim information cannot be disclosed because the employee holds the attorney-client privilege. "Watered-down" *Upjohn* warnings, or none at all, could result in a potential legal and ethical mine field.<sup>37</sup> Health care companies should retain separate counsel for employees to allay these concerns. While this practice is not uncommon, health care companies'

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37 See, e.g., *Butler v. Am. Heritage Life Ins. Co.*, No. 4:13-CV-199 (E.D. Tex. Jan. 29, 2016) (where plaintiff claimed that defendant failed to give *Upjohn* warning in connection with an interview and, therefore, the attorney-client privilege did not attach to any evidence obtained through the interview).

in-house counsel should consider, at the outset of any investigation, finding counsel for employees whose conduct or decisions may be at issue to ensure that no conflicts arise that would interfere with the review.

### Concerns regarding attorney-client privilege and work product protection

Despite the DOJ's denial of any impact on the attorney-client privilege or attorney work product protection, the Yates Memo chips away at the privilege by: (i) not considering the context in which "facts" may become known to counsel and (ii) allowing for a "qualified" or "limited" privilege that equates the attorney-client privilege with the work product doctrine.

The attorney-client privilege protects "communications" with a client in order to foster "full and frank" discussions.<sup>38</sup> The applicability of the attorney-client privilege to internal investigations is well established as "obtaining or providing legal advice was one of the significant purposes" of the communication.<sup>39</sup> In *In re Kellogg Brown and Root*, the D.C. Circuit court found, as did the Supreme Court in *Upjohn*, that the company's privilege claim applied to those facts gathered in an internal investigation.<sup>40</sup> Thus, the privilege protects the giving of professional advice, as well as the factual information obtained from the client that is the basis of the legal advice.<sup>41</sup>

In other words, health care companies have an attorney-client privilege that exists to protect not only the legal advice, "but also the giving of information to the lawyer to enable him to give sound and informed advice."<sup>42</sup> While telling factual information to an attorney does not change otherwise non-privileged information to privileged, the Yates

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38 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

39 *In re Kellogg Brown & Root Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014).

40 *Id.* at 757.

41 *See Upjohn*, at 391.

42 *Id.* at 390.

Memo glosses over the well-settled principle that the attorney-client privilege protects the entire flow of communication, including facts, between attorney and client. Once it is determined that giving or receiving legal advice is the “predominant purpose” of the communication, “other ‘considerations and caveats’ are not severable and the entire communication is privileged.”<sup>43</sup>

The Yates Memo appears to divide the attorney-client privilege into two components: (i) the factual information communicated and (ii) the legal or advice component provided. Under the Yates Memo, the DOJ appears to take the position that the factual component is not privileged and thus, should be disclosed. Yet this approach would nullify the attorney-client privilege, which protects the entire communication, including factual information conveyed to one’s attorney.

While it is too early to tell how the DOJ will apply the new guidance, the Yates Memo signals a more restrictive, and potentially contentious, view of the attorney-client privilege in internal investigations. Companies should be aware of the potential consequences of the government’s steps toward unraveling the attorney-client privilege. As precautionary measures, in-house counsel should document the steps taken to (i) preserve the privilege by separating legal memos and internal investigation documents and (ii) provide legal—not just business—advice about the potential topics for disclosure.

### Impact on administrative actions

One of the greatest risks to a health care entity or practitioner is the threat of being suspended or excluded from participation in federal health care programs. The Office of Inspector General (OIG) is legally required to exclude individuals and entities convicted of the following types of criminal offenses from participation in federal health

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43 Fox News Network, LLC v. United States Dep’t of the Treasury, 911 F. Supp. 2d 261, 271 (S.D.N.Y. 2012); see also *Upjohn*, at 396.

care programs: (i) Medicare or Medicaid fraud, or any other offense related to the delivery of items or services under Medicare or Medicaid; (ii) patient abuse or neglect; (iii) felony convictions for other health care-related fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; and (iv) felony convictions for unlawful handling of controlled substances.<sup>44</sup>

The OIG also has discretion to exclude individuals and entities from participation in health care programs on a number of other grounds. On April 18, 2016, the OIG revised its policy statement regarding the non-binding criteria to be used by the OIG in assessing whether to impose exclusion.<sup>45</sup> The OIG's revised policy details two limited circumstances in which the OIG will "usually" give a person a release of exclusion without requiring integrity obligations: (i) when the person self-discloses the fraudulent conduct to the OIG, cooperatively and in good faith, or (ii) when the person agrees to sufficiently robust integrity obligations with a state or the DOJ.<sup>46</sup> These narrow limitations leave the OIG a range of administrative options it can exercise based on the facts and circumstances of each case.

Consistent with the policy changes outlined in the Yates Memo, the OIG has called for increased individual accountability. Recently, the former CEO of Tuomey Healthcare Systems paid \$1 million to resolve his role in Tuomey's illegal compensation arrangements with physicians.<sup>47</sup> Tuomey's former CEO was also excluded for four years from participation in federal health care programs, including providing management or administrative services paid for by federal health care programs.<sup>48</sup> In another case, the board chairman of skilled-nursing facility company North

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44 42 U.S.C. § 1320a-7.

45 OIG, CRITERIA FOR IMPLEMENTING SECTION 1128(b)(2)(7) EXCLUSION AUTHORITY (Apr. 18, 2016), available at <https://oig.hhs.gov/exclusions/files/1128b7exclusion-criteria.pdf>.

46 *Id.*

47 Press Release, 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), available at <https://www.justice.gov/opa/pr/former-chief-executive-south-carolina-hospital-pays-1-million-and-agrees-exclusion-settle>.

48 *Id.*

American Health Care Inc. (NAHC) paid \$1 million to resolve claims for medically unnecessary rehabilitation services.<sup>49</sup> NAHC's Senior Vice President of Reimbursement Analysis also paid \$500,000 for her role in creating the improper billing scheme.<sup>50</sup>

Because the OIG has discretion to exclude entities from participation in health care programs for a multitude of factors, companies have a strong incentive to assist governmental investigations in hopes of obtaining mitigation credit to offset misdeeds. As under the Yates Memo, to avoid exclusion, health care entities will need to divulge incriminating information about senior executives to avoid allegations that the company reluctantly supported the DOJ's investigation. This will necessarily create an internal conflict within the company as individuals feel pitted against an employer more concerned with cooperation than individual exoneration.

In the health care industry, both employees and employers are well aware that the costs of noncompliance are unquestionably severe. In response to the DOJ's health care fraud enforcement efforts, the Centers for Medicare and Medicaid Services (CMS) have suspended payments to several health care providers based on credible allegations of fraud. In one case, CMS suspended Medicare payments to a Florida cardiologist in March 2015 based on credible allegations that he submitted claims to Medicare for physician services that were not medically reasonable and necessary.<sup>51</sup> The suspension letter issued by CMS noted that, of the 17,258 claims reviewed, 10,057 claims were denied, a 58% denial rate.<sup>52</sup> In addition, the letter provided several examples where the physician billed for over 24 hours of time-based procedure codes on unique dates of service.<sup>53</sup> In another case, CMS suspended Medicare payments to Sacred Heart

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49 Press Release, Dep't of Justice, North American Health Care Inc. to Pay \$28.5 Million to Settle Claims for Medically Unnecessary Rehabilitation Therapy Services (Sept. 19, 2016), available at [www.justice.gov/opa/pr/north-american-health-care-inc-pay-285-million-settle-claims-medically-unnecessary](http://www.justice.gov/opa/pr/north-american-health-care-inc-pay-285-million-settle-claims-medically-unnecessary).

50 *Id.*

51 CMS, Notice of Suspension of Medicare Payment to Asad Qamar, MD and Institute of Cardiovascular Excellence, PLLC, Mar. 6, 2015 (on file with authors).

52 *Id.* at 3.

53 *Id.* at 5.

Hospital in Chicago in May 2013 as a result of credible allegations that the hospital offered illegal kickbacks in exchange for the referral of hospital patients.<sup>54</sup> Accentuating the severity of CMS's decision to suspend Medicare payments, Sacred Heart Hospital closed shortly after the suspension took effect.<sup>55</sup>

For health care companies subject to the Food Drug & Cosmetic Act (FDCA), exclusions for senior executives may be based on the Responsible Corporate Officer (RCO) doctrine, regardless of whether they actually participated or knew of any violation. The FDCA permits corporate officers to be held criminally liable as “responsible corporate agents” for the failure to prevent or remedy conditions or conduct of subordinates.<sup>56</sup> Even though RCO violations are strict liability misdemeanors, they can be the predicate for exclusions from Medicare or other federal health care programs.<sup>57</sup> In light of the Yates Memo's focus on individual accountability, prosecutions and administrative exclusions of both health care companies and executives based on the RCO doctrine may well increase.

### Increased importance of compliance programs

One of the most significant reverberations from the Yates Memo is the critical importance of compliance programs. DAG Yates declared that “[w]e want to restore and help protect the corporate culture of responsibility. That's only possible with strong compliance programs—and with rigorous internal controls that help companies self-assess and self-correct.”<sup>58</sup>

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54 Andrew L. Wang & Kristen Schorsch, *Sacred Heart Hospital Closes*, *CRAIN'S CHICAGO BUS.*, July 1, 2013, available at [www.chicagobusiness.com/article/20130701/NEWS03/130709987/sacred-heart-hospital-closes](http://www.chicagobusiness.com/article/20130701/NEWS03/130709987/sacred-heart-hospital-closes).

55 *Id.*

56 *United States v. DeCoster*, No. 15-1890 (8th Cir. July 6, 2016).

57 42 U.S.C. § 1320a-7(b)(1); see *Friedman v. Sebelius*, 686 F.3d 813, 816 (D.C. Cir. 2012).

58 Press Release, U.S. Dep't of Justice, Deputy Attorney General Sally Quillian Yates Delivers Remarks at American Banking Association and American Bar Association Money Laundering Enforcement Conference (Nov. 16, 2015), available at [www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0](http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0).

On November 13, 2015, the DOJ hired its first Compliance Officer, Hui Chen, who formerly served as a federal prosecutor and compliance officer at multinational companies in the private sector. Based on her statement, companies must view compliance as an “evolving” process. Ms. Chen emphasized five aspects of an effective compliance program: (i) the design of the program should be tailored to address the problematic areas of the business; (ii) the audit and internal investigations should effectively find and mitigate potential problems; (iii) the communications and culture within the company must encourage employees to raise any concerns; (iv) the company should show both economic and personnel commitment to the compliance program; and (v) the board of directors should be committed and be informed about the compliance programs and potential risks.<sup>59</sup> The DOJ has continued to stress that having a compliance program is not a defense to claims of corporate wrongdoing, but rather a critical factor for a resolution to an investigation.

## Conclusion

The Yates Memo increases the need for health care companies to conduct internal investigations when allegations of improper health care practices arise. While it has long been the DOJ’s practice to fully evaluate the evidence in determining both individual and corporate culpability, the Yates Memo embodies the DOJ’s fundamental policy shift by requiring corporations to turn over all relevant facts related to individuals responsible for misconduct. Since the turning over of such information is a prerequisite for cooperation credit, the Yates Memo creates a complicated dynamic between any health care company and its employees when noncompliance occurs. Employees will likely be more reluctant to cooperate in investigations. Now, more than ever, health care companies need

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59 Dep’t of Justice, Roundtable Discussion on Compliance with Andrew Weissmann and Hui Chen (Nov. 13, 2015), available at [www.youtube.com/watch?v=pRTGZmmbc5o](http://www.youtube.com/watch?v=pRTGZmmbc5o).

to strongly consider establishing protocols for internal investigations that include obtaining separate counsel for employees.

Although recent DOJ settlements have included settlements with executives, it is too early to assess whether the Yates Memo will increase individual prosecutions or exclusions. While the results are not complete, it is undeniable that the Yates Memo is a firm admonishment that health care companies must develop and adhere to robust compliance programs to meet all areas of business risk. The days of “paper programs” are gone. Both large and small health care companies and their employees must understand their compliance responsibilities in light of the Yates Memo. Failure to do so will leave health care companies and their employees increasingly vulnerable to prosecution.

The change in administrations creates uncertainty regarding how the Yates Memo will be followed. Indeed, DAG Yates addressed this uncertainty in late November 2016 as she tried to forecast its impact. She observed that “individual accountability isn’t a [D]emocratic principle or a [R]epublican principle, but is instead a core value of our criminal justice system that perseveres regardless of which party is in power.”<sup>60</sup> Given Attorney General designate Jeff Sessions’s work as a United States Attorney, it is likely that health care enforcement will remain a top priority. The other lesson of the Yates Memo—the need for a robust compliance program—will certainly continue to have significance.

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60 Sally Q. Yates, Deputy Attorney Gen., Office of the Deputy Attorney Gen., Remarks at the 33rd Annual International Conference on Foreign Corrupt Practices Act (Nov. 30, 2016), available at [www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-33rd-annual-international](http://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-33rd-annual-international).