2025

A Promise Yet Unfulfilled: The Yates Memo's Impact on Individual Accountability for Corporate Wrongdoing Eight Years On

Kevin P. Turner

A Promise Yet Unfulfilled:
The Yates Memo's Impact on Individual Accountability
for Corporate Wrongdoing Eight Years On

Kevin P. Turner

I. Introduction

The United States Supreme Court has observed that "the only way in which a corporation can act is through the individuals who act on its behalf."[1] Just as McDonalds Corporation cannot walk into a bank to request a loan and the Ford Motor Company cannot sit at a bargaining table with United Auto Workers union negotiators without a human representative present, nor can a pharmaceutical company pay a bribe to a Ministry of Health official to secure a major drug approval except through its employees or agents. This is a reality that the U.S. Department of Justice (DOJ) has accepted and acknowledged repeatedly.[2]

DOJ appeared to reinforce and reinvigorate its focus on individual accountability in 2015, when Deputy Attorney General (DAG) Sally Quillian Yates issued a memorandum titled "Individual Accountability for Corporate Wrongdoing,"[3] which has since become known simply as the "Yates Memo." The Yates Memo announced policy changes intended to increase the rate of civil and criminal enforcement actions against relevant individuals related to corporate wrongdoing.[4] Following the Yates Memo's release, the legal community worked itself into a frenzy over the Memo's potential implications. Buzzy law firm articles and blog posts were

[1] *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).
[2] *See, e.g.,* Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Justice to All Component Heads and U.S. Att'ys, Bringing Criminal Charges Against Corporations, 2 (June 16, 1999), Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, on Principles of Federal Prosecution of Business Organizations To Heads of Dep't Components and U.S. Attorneys (Dec. 12, 2006).
[3] Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice to All U.S. Att'ys et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter, the "Yates Memo"].
[4] The terms "corporate" and "corporation" are used throughout to refer to any type of business entity.

published with titles referring to the Memo as a "watershed event"[5] or warning readers of "danger ahead."[6] While observers acknowledged that the Yates Memo's impact would not be felt overnight—or even with a few years[7]—retrospectives began appearing frequently trying to predict and reflect on its consequences. Over time, these commentaries generally slowed to a trickle.

Now, with more than eight years having passed since the Yates Memo's publication, there is a significant volume of relevant enforcement actions to analyze for its impact on individual accountability. One dataset for such an analysis is DOJ's enforcement of the U.S. Foreign Corrupt Practices Act (FCPA).[8] The FCPA prohibits a U.S. person or company from offering, paying, or promising to pay or provide anything of value to a foreign official in order to improperly obtain or retain business.[9] The FCPA is enforced by the DOJ and the U.S. Securities and Exchange Commission (SEC). It is important to note that SEC is not bound by any enforcement policies promulgated by DOJ and, as it brings civil charges against corporations and individuals, is bound by a lower standard of proof in establishing liability.

DOJ publishes all unsealed FCPA enforcement actions on its website[10] and the volume and details of such cases allow for a systematic review to analyze this topic. In its web pages for specific corporate FCPA enforcement actions, DOJ lists other cases against corporate and

---

[5] Richard Bistrong, *Joseph Spinelli: Yes, the Yates Memo is a watershed event*, https://fcpablog.com/2016/05/18/joseph-spinelli-yes-the-yates-memo-is-a-watershed-event/ (last visited Dec. 3, 2023).
[6] Baker Donelson, *Danger Ahead? The Yates Memo and Some Strategic Considerations for Corporations and Individuals*, https://www.bakerdonelson.com/danger-ahead-yates-memo-some-strategic-considerations-corporations (last visited Dec. 2, 2023).
[7] Not all observers allowed the Yates Memo more than a year to assess its impact. A Google search of "yates memo one year later" returned eight results reflecting articles commenting on its impact "one year later" within the first fifteen search results. Two articles in those search results attempted to analyze its impact even after six and ten months.
[8] 15 U.S.C.S. § 78dd-1.
[9] *Id.*
[10] https://www.justice.gov/criminal/criminal-fraud/foreign-corrupt-practices-act.

individual defendants that are based on substantively related underlying conduct.[11] It is thereby possible to determine in which cases DOJ chose to bring actions against individuals for conduct related to that for which it prosecuted corporations. By examining DOJ's reported corporate FCPA enforcement actions over the eight-year period leading up to the Yates Memo against the subsequent eight years, it is possible to gauge the Yates Memo's impact on one segment of DOJ's overall enforcement activities against individuals for corporate wrongdoing. Such an analysis supports a conclusion that DOJ's focus on individual accountability for corporate wrongdoing, emphasized and promulgated by DAG Yates and subsequent DOJ memoranda, has inconsistently born out in the eight years since the Memo's publication. This lack of enforcement is especially apparent when reviewing cases against corporate defendants in the health care industry and prosecutions of individuals generally when a corporation is prosecuted for related misconduct.

II. Individual Accountability Prior to the Yates Memo

A. DOJ's stance on individual accountability

DOJ has long considered individual accountability a critical tool for influencing corporate behavior. In 1999, then-DAG Eric Holder issued a memo titled "Bringing Criminal Charges Against Corporations," which noted that "imposition of individual criminal liability on such individuals provides a strong deterrent against corporate wrongdoing."[12] The Holder Memo, while acknowledging that "it will often be difficult to determine which individual took which

[11] *See, e.g.,* United States v. Sargeant Marine Inc.: Docket No. 20-CR-00363, https://www.justice.gov/criminal/criminal-fraud/fcpa/cases/sargeant-marine-inc (last visited Dec. 2, 2023). The analysis hereinafter relies on such associations made by DOJ on its website. No inconsistencies that would impact this analysis were noted. The author does, however, acknowledge the prompt assistance of DOJ's Webmaster in fixes made to DOJ's website following an interface upgrade implemented by DOJ in the course of the research for this analysis.

[12] Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Justice to All Component Heads and U.S. Att'ys, Bringing Criminal Charges Against Corporations, 2 (June 16, 1999) [hereinafter, the "Holder Memo"].

action on behalf of the corporation,"[13] encouraged prosecutors to "consider the corporation, as well as the responsible individuals, as potential criminal targets."[14] Taken as a whole, however, the Holder Memo amounted to a series of permissive suggestions to DOJ prosecutors.

In subsequent years, successive DOJ DAGs published supplemental memoranda evolving—slightly—the Department's stance on the topic. Memoranda were issued by DAGs Larry D. Thompson in 2003[15], Paul J. McNulty in 2006[16], and Mark R. Filip in 2008.[17] The guidelines promulgated in these memoranda were ultimately incorporated into the U.S. Justice Manual (then titled the U.S. Attorney's Manual) as the Principles of Federal Prosecution of Business Organizations.[18] These principles would come to be known as the "Filip Factors." While continuing to advocate for prosecutors encouraging corporate cooperation by disclosing implicated individuals, none of the guidance issued up to the Filip Memo made such disclosure a precondition for cooperation credit in sentencing.

III. The Yates Memo and Its Progeny

A. The roll-out

On September 9, 2015, DAG Sally Yates issued her memorandum on "Individual Accountability for Corporate Wrongdoing," echoing sentiments familiar from previous such DAG-issued memoranda:

---

[13] *Id.* at 5.
[14] *Id.* at 2.
[15] Memorandum from Larry D. Thompson, Deputy Att'y Gen., Dep't of Justice, on Principles pf Fed. Prosecution of Bus. Orgs. To Heads of Dep't Components and U.S. Attorneys (Jan. 20, 2003) (superseded and replaced by the McNulty Memo).
[16] Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. To Heads of Dep't Components and U.S. Attorneys (Dec. 12, 2006).
[17] Memorandum from Mark R. Filip, Deputy Att'y Gen., U.S. Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Attorneys (Aug. 28, 2008) [hereinafter the "Filip Memo"]
[18] U.S. Dep't of Just., Just. Manual § 9-28.000 (2018).

> One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.[19]

DAG Yates acknowledged the "substantial challenges unique to pursuing individuals for corporate misdeeds": the diffusion of responsibility and decisions across individuals throughout a company, the difficulty of establishing knowledge and intent beyond a reasonable doubt, and the frequent insulation of high-level executives from day-to-day misconduct.[20] Those challenges create the reality that investigators are often forced to rely on mountains of documents that can be difficult to discover due to legal restrictions.[21] The policy changes outlined in the Memo are meant to respond to these challenges and encourage great cooperation from companies to offset the complexity of conducting international corporate investigations.

The Memo lays out six policy statements, some of which represented shifts for DOJ. These "key steps," as Yates describes them are:

> (l) in order to qualify for any cooperation credit, corporations must provide to the Department 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 Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department 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. [referenced hereinafter as Yates 1 through Yates 6][22]

---

[19] Yates Memo at 1.
[20] *Id.* at 2.
[21] *Id.*
[22] *Id.* at 2-3.

In broad strokes, these policy statements appear to center on three themes. First, corporate cooperation must include the provision of information on individuals responsible for the wrongdoing in order to qualify for any cooperation credit. Second, DOJ attorneys must work efficiently with one another and work to hold individuals accountable through the investigatory and enforce mechanisms available. Third, DOJ will implement accountability measures to ensure DOJ attorneys are implementing these themes. The Memo clarified that these policy statements would be incorporated into the Justice Manual.[23] In case anyone expected a grace period for implementation, Yates made clear that the Memo "will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so."[24]

Several of these key steps were likely not surprising to the Memo's audience. DOJ attorneys probably found it obvious that they should focus on individuals from the outset of an investigation (Yates 2). Criminal attorneys already knew that they should communicate and play nice with their colleagues in the Civil Division (Yates 3).[25] The most significant and rigid provision of the Memo was Yates 1: a company thereafter would receive no consideration for cooperation if it did not "completely disclose to the Department all relevant facts about individual misconduct"[26] (emphasis added). The decision to apply cooperation credit had turned from one of permissive discretion to one determined by strict criteria.

A day after issuing, DAG Yates spoke at the New York University School of Law to announce these new policies. In her remarks, she acknowledged former-DAG—and former

[23] *Id.* at 3.
[24] *Id.*
[25] *See* Holder Memo at 9.
[26] Yates Memo at 3.

Attorney General—Holder and his focus on individual accountability.[27] She harkened back to comments he himself had made at NYU one year prior: "He made clear that, as a matter of basic fairness, we cannot allow the flesh-and-blood people responsible for misconduct to walk away, while leaving only the company's employees and shareholders to pay the price."[28] After she summarized what was changing—and what was not changing—she concluded by prompting a contemplation on the effects the Memo would have: would corporations choose to protect their executives over earning cooperation credit? would we see fewer corporate settlements? would we see fewer individuals pleading guilty in favor of rolling the dice at trial?[29]

"Only time will tell" was her response.[30] "We look forward to the work that will be required as we seek greater accountability from those who use corporations to lie, cheat and steal. It won't always be easy, but we're ready for it. Our nation and its citizens deserve nothing less."[31] As noted above, commentators were champing at the bit to scrutinize DOJ's every move post-Yates Memo. One commentator, Walt Palvo, a recognized lecturer on white collar crime and law enforcement, analyzed the Yates Memo's first year.[32] After providing context on recent high-profile corporate investigations and enforcement actions against Valeant Pharmaceuticals International, Inc., Deutsche Bank A.G., and Wells Fargo & Company, Palvo noted the absence of cases against any individual executives or employees.[33, 34] Palvo concluded his article by

---

[27] Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Just., *Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing* (Sep. 10, 2015).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] Walt Palvo, *The Yates Memo: The Promise and Reality A Year Later*, Program on Corporate Compliance and Enforcement at New York University School of Law (Nov. 2, 2016), https://wp.nyu.edu/compliance_enforcement/2016/11/02/the-yates-memo-the-promise-and-reality-a-year-later/ (last visited Dec. 2, 2023).
[33] *Id.*

saying, "It may sound oversimplified, but the public's perception of the Yates Memo was that we were going to see Enron, Worldcom and Adelphia-type prosecutions of top executives – that is *real* 'individual accountability.' A year after that memo, we're still waiting. . ." (emphasis in original).[35] Many may describe Mr. Palvo as impatient, but to many observers this sentiment persisted.

B. A change in administration

Six days after Mr. Palvo's article published, America elected Donald J. Trump President of the United States on November 8, 2016. Despite his seeming enthusiasm for individual accountability,[36] the Trump administration DOJ would roll back some of the Yates Memo's punches two years later. On November 29, 2018, DAG Rod J. Rosenstein announced an easing of certain Yates Memo pronouncements and revisions to the Justice Manual.[37] In justifying those changes, he shared that DOJ "learned that the policy was not strictly enforced in some cases because it would have impeded resolutions and wasted resources. Our policies need to work in the real world of limited investigative resources."[38]

The first change he announced was to Yates 1. Going forward, to qualify for any cooperation credit, a company "must identify all wrongdoing by <u>senior officials</u>" (emphasis added).[39] To qualify for maximum credit, the company would need to identify "every individual

---

[34] Ultimately, in 2020, three former Valeant executives did agree to settlements including financial penalties with the U.S. Securities and Exchange Commission.
[35] Palvo, *The Yates Memo: The Promise and Reality A Year Later*.
[36] *See* Peter W. Stevenson, *A brief history of the 'Lock her up!' chant by Trump supporters against Clinton*, Wash. Post (Nov. 22, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/22/a-brief-history-of-the-lock-her-up-chant-as-it-looks-like-trump-might-not-even-try/ (last visited Dec. 2, 2023).
[37] Rod J. Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just., *Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2018).
[38] *Id.*
[39] *Id.*

who was substantially involved in or responsible for the misconduct" (emphasis added).[40] Rosenstein's other substantive changes were to Yates 4 and Yates 6.[41] As an update to Yates 4, DOJ could now negotiate civil releases for individuals under corporate civil settlement agreements. Going back on Yates 6, DOJ attorneys were again permitted to consider a defendant's ability to pay fines and penalties when deciding whether to pursue civil charges against the defendant.

The policy changes were met with mixed reactions, ranging from open arms from corporate counsel[42] to direct criticism of the Trump Administration DOJ as caving to big business.[43] "The amendments to the Yates Memo, however modest, were a capitulation to corporations and the defense bar . . ."[44]

C. "Back to the Future" Yates Memo

On November 3, 2020, Joseph R. Biden was elected President of the United States with a promise to make politics boring again.[45] Under Attorney General Merrick Garland, the Yates Memo was ready for a boomerang. On October 28, 2021, DAG Lisa Monaco issued a memorandum reinstating Yates 1 as promulgated in the Yates Memo: "To receive any consideration for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority, and

[40] *Id.*
[41] *Id.*
[42] *See, e.g.*, Ryan D. Junk, et al., *DOJ Announces Revisions to Yates Memorandum Policy*, Skadden, Arps, Slate, Meagher & Flom LLP (Dec. 10, 2018), https://www.skadden.com/insights/publications/2018/12/doj-announces-revisions-to-yates-memorandum-policy (last visited Dec. 2, 2023).
[43] *See* Dylan Tokar, *The Department of Justice is Turning Back the Clock on Corporate Accountability*, The Nation (March 6, 2019), https://www.thenation.com/article/archive/financial-crisis-justice-department-corporate-prosecutions-yates-memo/ (last visited Dec. 2, 2023).
[44] *Id.*
[45] *See* Michael Grunwald, *America Votes to Make Politics Boring Again*, Politico Magazine (Nov. 7, 2020), https://www.politico.com/news/magazine/2020/11/07/can-joe-biden-make-politics-boring-again-434584 (last visited Dec. 2, 2023).

provide to the Department all non-privileged information relating to the misconduct."[46] The rationale provided was that DOJ attorneys are best situated to determine the level of culpability of an implicated individual, even if the company does not believe him or her to be "substantially involved."[47] Further, those individuals that a company may not consider substantially involved may yet provide valuable information to DOJ investigators.[48]

DAG Monaco announced Monaco Memo 1 in a speech at an American Bar Association event on the day the memo was released. In discussing the reversion to the original Yates rule, Monaco opined that "such distinctions are confusing in practice and afford companies too much discretion in deciding who should and should not be disclosed to the government."[49]

Less than a year after issuing Monaco Memo 1, DAG Monaco updated Yates 1 with a single word: "timely."[50] The revision added the new requirement that, to receive full cooperation credit, companies must "produce on a timely basis all relevant, non-privileged facts and evidence about individual misconduct . . ." (emphasis included in original).[51] Monaco also beefed up the charging decision policy of Yates 5. Going forward, if DOJ prosecutors sought to resolve a corporate enforcement action prior to completing investigations into relevant individuals, they would be required to obtain the approval of the supervising U.S. Attorney or Assistant Attorney General.

---

[46] Memorandum from Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Justice to All U.S. Att'ys et al., Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (Oct. 28, 2021) [hereinafter, "Monaco Memo 1"].
[47] *Id.*
[48] *Id.*
[49] Lindsay O. Monaco, Deputy Att'y Gen., U.S. Dep't of Just., *Keynote Address at American Bar Association's 36 National Institute On White Collar Crime* (Oct. 28, 2021).
[50] Memorandum from Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Justice to All U.S. Att'ys et al., Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022) [hereinafter, "Monaco Memo 2"]
[51] *Id.*

The changes effected in Monaco Memos 1 and 2 turned back the clock to continue in the direction set by the Yates Memo in 2015. As one law firm article framed it: "Back to the Future: DOJ Announces Significant Changes to Corporate Enforcement Policy."[52]

IV. Individual Accountability by the Numbers Pre-Yates Memo

A. Individual accountability in action pre-Yates

In the eight years preceding publication of the Yates Memo (i.e., September 9, 2007, to September 8, 2015), DOJ brought FCPA-related cases against ninety-three corporate entities.[53] For each twelve-month period ending September 8 in those eight years, DOJ announced charges against an average of 11.6 entities per year, with a maximum of twenty entities in the twelve months ending September 8, 2012.[54] These cases were all settled through a plea agreement, deferred prosecution agreement (DPA), or non-prosecution agreement (NPA).[55] Plea agreements, typically the least advantageous settlement form for a company, accounted for approximately twenty-six percent of all resolutions. DPAs and NPAs, which absolve the defendant from receiving a criminal conviction, accounted for fifty-one and twenty-four percent of resolutions, respectively.

[52] Clifford Chance US LLP, *Back to the Future: DOJ Announces Significant Changes to Corporate Enforcement Policy*, https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/11/Back-to-the-Future-DOJ-Announces-Significant-Changes-to-Corporate-Enforcement-Policy.pdf (last visited Dec. 2, 2023).
[53] *See* https://www.justice.gov/criminal/criminal-fraud/enforcement-actions.
[54] *Id.*
[55] *Id.*

Table 1. DOJ FCPA enforcement actions in the eight years preceding the Yates Memo[56]

12 months ending Sept. 8	Count of DOJ FCPA enforcement actions against…	
	Corporations	Individuals associated with a corporate action
2015	7	1
2014	11	13
2013	5	-
2012	10	6
2011	20	12
2010	15	10
2009	12	19
2008	13	4
Total	93	65

A total of sixty-five individuals were prosecuted for FCPA-related conduct related to these corporate settlements. This rate reflects an average of 0.7 individuals prosecuted for every 1.0 corporation. For the twenty-two corporations that received an NPA (the gold standard of corporate FCPA settlements short of an enforcement declination), only four individuals were prosecuted, reflecting an average of only 0.18 individuals for every 1.0 NPA.

In the context of the importance of individual accountability expounded by the Holder Memo and subsequent DAG memoranda, it is perhaps surprising to find such low rates of enforcement actions brought against individuals for wrongdoing related to corporate enforcement actions in these years. However, the Principles of Federal Prosecution of Business Organization promulgated by the Filip Memo in 2008, only nudged DOJ prosecutors toward using disclosure of individual wrongdoers as a tool for encouraging corporate cooperation.[57] In the Principles, prosecutors were provided with several factors to consider in weighing a corporation's cooperation in an investigation, and thereby consideration for reduced charging and

[56] *Id.*
[57] *See* Filip Memo (2008).

advantageous resolutions.[58] "In gauging the extent of the corporation's cooperation, the prosecutor may consider . . . the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives" (emphasis added).[59] Such permissive guidance, coupled with the inherent difficulties in executing global FCPA investigations, likely left prosecutors with limited recourse to pressure corporate wrongdoers into offering up executives and employees.

It is also helpful to consider DOJ enforcement of individuals in totality during this period, as DOJ does at times bring FCPA charges against individual defendants without a corresponding corporate enforcement action. While individual action associated with corporate actions provide a potential indication of the level of corporate cooperation in regard to culpable individuals, "standalone" individual actions would also tend to reflect DOJ's focus on individual accountability. In the same eight-year period noted above, DOJ brought FCPA-related actions against 109 individuals, regardless of whether they were associated with a related corporate resolution. On average, for the twelve-month periods ending September 8 in that window of time, DOJ charged 13.6 individuals per year, with a maximum of twenty-eight defendants in the twelve months ending September 8, 2010.[60, 61]

B. Focus on the health care industry

The health care industry is one particularly susceptible to FCPA enforcement as, in countries with nationalized health care schemes, physicians and other health care providers are

[58] *Id.*
[59] *Id.* at 7.
[60] *See* https://www.justice.gov/criminal/criminal-fraud/enforcement-actions.
[61] FCPA prosecutions of individuals in the twelve months ending September 8, 2010, include those charged under DOJ's failed sting operation and prosecution of twenty-two executives and employees of defense companies for alleged bribes to an African defense minister. *See Rewind: Remembering The DOJ's Embarrassing Africa Sting Case*, https://fcpaprofessor.com/rewind-remembering-dojs-embarrassing-africa-sting-case/ (last visited Dec. 1, 2023).

often considered "foreign officials" under the FCPA's definition as it relates to employees of "a foreign government or any department, agency, or instrumentality thereof . . ."[62] Eight of the corporate defendants in the eight years preceding the Yates Memo represent pharmaceutical or medical device manufacturers.[63] Each of these health care companies settled DOJ's case with either a DPA (7) or an NPA (1).[64] Not one of those eight settlements reflected any associated individual defendant prosecutions.[65]

DOJ charging and settlement documents are, at times, painfully light on details that would enhance their instructional value to corporate legal and compliance professionals, as well as their legal advisors. For example, in its 2012 Criminal Information against Pfizer H.C.P. Corporation, DOJ declined to cite even one specific individual actor, instead attributing every action of the defendant to "PFIZER HCP through its employees and agents."[66] Fortunately, other DOJ documents offer a bit more detail as to the human beings behind corporate wrongdoing. In its 2011 Criminal Information against Johnson & Johnson (DePuy) (J&J), DOJ references at least ten implicated individuals, including "'DPI President,' a British citizen, . . . President of DePuy International" or "'Executive B,' a U.S. citizen, . . . an officer and senior executive of defendant DePuy."[67] Without details like these, it is difficult to approximate the breadth of,

---

[62] *A Resource Guide to the Foreign Corrupt Practices Act, 2d Ed.*, U.S. Dep't of Just. and U.S. Secs. and Exch. Comm'n, 9 (updated Aug. 11, 2023).
[63] *See* https://www.justice.gov/criminal/criminal-fraud/enforcement-actions. These manufacturers were AGA Medical Corporation (2008), Novo Nordisk A/S (2009), Johnson & Johnson (DePuy) (2011), Smith & Nephew, Inc. (2012), Zimmer Biomet, Inc. (2012), Orthofix International, N.V. (2012), Pfizer H.C.P. Corporation (2012), and Bio-Rad Laboratories, Inc. (2014).
[64] *See* https://www.justice.gov/criminal/criminal-fraud/enforcement-actions.
[65] *Id.*
[66] U.S. Dep't of Just., Criminal Information re Pfizer H.C.P. Corp., 6 (Aug. 7, 2020), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/08/15/2012-08-07-pfizer-info.pdf.
[67] U.S. Dep't of Just., Criminal Information re DePuy, Inc., 3 (Feb 8, 2011), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-08-11depuy-info.pdf.

pervasiveness of, and human involvement in bribery schemes described in DOJ FCPA corporate enforcement actions.

The Criminal Information documents for the eight pre-Yates Memo health care defendant entities acknowledge at least 36 individuals implicated in the foreign bribery schemes described.[68] These individuals include corporate owners, executives, managers, agents, and external third parties.

Of the eight corporate defendants, the case against J&J, noted above, appears to implicate the most individuals in its case documentation. That Criminal Information notes at least ten specific implicated individuals, including J&J executives, presidents, vice presidents, counsel, accountants, employees, and agents.[69] In its DPA with J&J, DOJ acknowledged, among other things, that "J&J voluntarily and timely disclosed the majority of the misconduct described in the Information and Statement of Facts; . . . J&J reported all of its findings to the Department;" and that "J&J has agreed to continue to cooperate with the Department in any investigation of the conduct of J&J and its directors, officers, employees, agents, consultants, subsidiaries, contractors, and subcontractors relating to violations of the FCPA and related statutes . . ."[70]

While this is largely template language utilized in many settlement documents, the facts presented indicate that J&J shared significant information it had regarding implicated individuals, that DOJ ultimately became aware of at least ten implicated individuals, and that

---

[68] *See* https://www.justice.gov/criminal/criminal-fraud/enforcement-actions. This count is based on a review of each charging or settlement document's statement of facts. Where an individual is defined with a specific title (e.g., "Employee A"), that individual was assigned a value of one. To maintain a conservative methodology, where multiple individuals are described in general terms (e.g., "employees of the subsidiary"), those individuals were assigned a value of two, even though the underlying facts could have been referring to more than two individuals.

[69] U.S. Dep't of Just., Criminal Information re DePuy, Inc., 3-4 (Feb 8, 2011).

[70] U.S. Dep't of Just., Deferred Prosecution Agreement between Johnson & Johnson and the U.S. Dep't of Just., Criminal Division, Fraud Section, 2 (Jan. 14, 2011), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-08-11depuy-dpa.pdf.

DOJ ultimately declined to bring charges against any of them.[71] Similar statements of corporate cooperation appear in the other pre-Yates Memo case documents.

V. Individual Accountability by the Numbers Post-Yates Memo

A. Adding it all up: Yates + Rosenstein + Monaco 1 + Monaco 2

It must be acknowledged that the Yates Memo was not allowed a straight-line upbringing, especially as it pertains to the cooperation mandate. DOJ lawyers, the defense bar, and legal observers could be forgiven for claims of whiplash as their corporate defendants struggled to keep up with DOJ's expectations and how to adjust their investigation and disclosure strategies accordingly.

Monaco Memos 1 and 2, while reviving certain components of the Yates Memo, did not reverse all changes implemented by DAG Rosenstein in 2018. Neither memo makes any mention of Yates 4 (release of individuals under corporate resolutions) or Yates 6 (encouraging individual prosecutions even without ability to pay), so those remained as is: DOJ attorneys are only prohibited from dismissing charges or granting immunity to individuals under corporate resolutions in criminal matters and they are still permitted to consider an individual's ability to pay fines and penalties when making charging decisions.

Despite its rocky trajectory, it is worth noting that for the past eight years, significant portions of the Yates Memo remained in full force. While Yates 1 (cooperation credit) was put on pause for approximately three years, Yates 2 (focus on individuals from inception of investigation) and Yates 3 (coordination between criminal and civil attorneys) were never

[71] DOJ does bring charges against defendants under seal, restricting researchers' ability to account for and quantify such cases until they are unsealed. However, for purposes of this analysis, considering the broad period of time under review, any such still-sealed cases are disregarded.

impacted by administration changes. Yates 4 (release of individuals under corporate resolutions) was only partially defanged by DAG Rosenstein's policy adjustment.

In fact, Yates 5 (requirement to resolve individual investigations prior to corporate resolution) developed on a straight line, only to be strengthened with additional accountability measures under Monaco Memo 2. To summarize, we are left with a strengthened policy on cooperation credit, direction to prosecutors to focus on individuals from the inception of a corporate investigation, instructions for criminal and civil attorneys to talk to one another, a prohibition on releasing individuals from prosecution in criminal matters under a corporate resolution, and an approval requirement for resolving corporate enforcement action prior to completion of individual investigations.

B. The proof is in the prosecutions

Based on the survival of large swaths of the Yates Memo's enforcement policies, one would reasonably expect to see increased prosecution of individuals in recent FCPA enforcement actions, especially those related to companies having settled charges. In the eight years since DAG Yates issued her memo (i.e., Sept. 9, 2015, to Sept. 8, 2023), DOJ brought FCPA-related cases against sixty-two corporate entities.[72] For each twelve-month period in those eight years, DOJ announced charges against an average of 7.8 entities per year, with a maximum of fourteen actions in the twelve months ended September 8, 2017, likely driven by the impending change in administrations in January 2017.[73]

[72] *See* https://www.justice.gov/criminal/criminal-fraud/enforcement-actions.
[73] *Id.*

Table 2. DOJ FCPA enforcement actions in the eight years following the Yates Memo[74]

12 months ending Sept. 8	Count of DOJ FCPA enforcement actions against…	
	Corporations	Individuals associated with a corporate action
2023	7	-
2022	4	-
2021	8	16
2020	6	-
2019	7	6
2018	11	10
2017	14	21
2016	5	-
Total	62	53

Notably, this level of enforcement represents a thirty-three percent decrease in total corporate cases brought from the same period pre-Yates. This trend tracks a similar decrease in FCPA corporate enforcement actions brought by SEC for the same period.[75] Some in the legal community attribute this decline in enforcement to DOJ's heightened self-disclosure expectations and intimidation by potential sanctions.[76]

Plea agreements accounted for approximately twenty-nine percent of all resolutions during that period, a three percent increase compared to the pre-Yates years.[77] DPAs and NPAs, accounted for fifty-three and eighteen percent of resolutions, respectively.[78] This indicates a potential trend of fewer NPAs granted to defendants in favor of increased use of DPAs and plea agreements, potentially in light of reduced cooperation in the face of increased expectations from DOJ.

---

[74] *Id.*
[75] *See* Anna B. Roach, *Records show decline in new FCPA cases at SEC continues*, Global Investigations Review (Nov. 15, 2023), https://globalinvestigationsreview.com/just-anti-corruption/article/records-show-decline-in-new-fcpa-cases-sec-continues (last visited Dec. 1, 2023).
[76] *Id.*
[77] *See* https://www.justice.gov/criminal/criminal-fraud/enforcement-actions.
[78] *Id.*

A total of fifty-three individuals implicated by those post-Yates corporate resolutions were charged by DOJ during the period. This reflects an average of 0.85 individuals prosecuted for every 1.0 corporation implicated, a twenty-one percent increase in that rate from pre-Yates.[79] Eleven entities entered into NPAs with DOJ during the period, yet none of those cases led to the prosecution of any individuals, a decrease from the pre-Yates Memo era where each NPA involved an average of 0.18 individuals charged.[80]

Table 3. Corporate versus related individual FCPA prosecutions pre- and post-Yates Memo

8 years ended Sept. 8	Count of DOJ FCPA enforcement actions against…		Ratio	Change vs. pre-Yates
	Corporations	Individuals associated with a corporate action		
2015	93	65	0.70	N/A
2023	62	53	0.85	+21%
Total	155	118	0.76	+8.6%

Table 4. Corporate FCPA NPAs versus related individual prosecutions pre- and post-Yates Memo

8 years ended Sept. 8	Count of DOJ FCPA enforcement actions against…		Ratio	Change vs. pre-Yates
	Corporations resulting in NPA	Individuals associated with a corporate action resulting in NPA		
2015	22	4	0.18	N/A
2023	11	0	0.00	-100%
Total	33	4	0.12	-33%

Perhaps surprisingly in light of the preceding statistics, in the same eight-year period, DOJ's prosecution of individuals overall for FCPA violations increased significantly. In the eight years following the Yates Memo, DOJ brought FCPA-related actions against 185 individuals, regardless of whether those individuals were associated with a related corporate resolution.[81] This case volume represents a seventy percent increase in such actions over the same period pre-

[79] *Id.*
[80] *Id.*
[81] *Id.*

Yates Memo. On average, for the twelve-month periods ending September 8 in that window of time, DOJ charged 23.1 individuals per year, with a maximum of forty defendants in in the twelve months ending September 8, 2018.[82]

Table 5. Individual FCPA prosecutions pre- and post-Yates Memo

8 years ended Sept. 8	Count of DOJ FCPA enforcement actions against individuals	Average enforcement actions per 12-month period	Change vs. pre-Yates
2015	109	13.6	N/A
2023	185	23.1	+69.9%
Total	294	18.4	+35.3%

The current Justice Manual has incorporated the edicts of the Yates Memo and Monaco Memos. In reference to corporate cooperation credit, it states:

> In order for a corporation to receive any consideration for cooperation under this section, the corporation must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and timely provide to the Department all relevant facts relating to that misconduct. If a corporation seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals involved in or responsible for the misconduct, its cooperation will not be considered a mitigating factor under this section. Nor, where a corporation is prosecuted in such a case, will the Department support a cooperation-related reduction at sentencing.[83]

It is puzzling why, if DOJ was able to achieve a 70% increase in individual prosecutions overall in the eight years post-Yates and grant a significant number of NPAs, why the Department still settles corporate cases with apparently minimal individual accountability. Unlike those enforcement actions against unaffiliated individuals (i.e., those with no related corporate enforcement action), individuals implicated in corporate foreign bribery should have a

[82] *Id.*
[83] U.S. Dep't of Just., Just. Manual § 9-28.700.

powerful investigative mechanism working against them and at DOJ's disposal: the corporations and their investigations counsel.

C. Focus on the health care industry

Eight of the sixty-two corporations settling FCPA violations during the period were pharmaceutical manufacturers, medical device manufacturers, or health care service providers.[84] These cases were settled through two plea agreements, four DPAs, and two NPAs.[85] Continuing the trend established by the eight pre-Yates health care industry settlements, not a single one of these settlements involved related charges being brough against an individual.[86]

For the eight corporate health care industry defendants charged in the post-Yates period, the Criminal Complaints, Criminal Information documents, and NPAs for these eight defendants indicate at least 36 individuals implicated in the relevant misconduct.[87] Like the pre-Yates individuals seen in health care FCPA cases, these individuals roles spanned from executives to low-level employees to third-party agents. In review, across the sixteen-year pre- and post-Yates periods, DOJ settled FCPA enforcement actions with sixteen health care industry defendants. In total, the charging and settlement documents for those cases describe at least seventy-two individuals employed or engaged by the corporate defendants, but the DOJ appears to have not brought a single prosecution against any of those seventy-two executives, directors, employees, or agents.

It is notable that the post-Yates health care FCPA cases appear to provide even fewer specific details on the human actors in the wrongdoing described than those Pre-Yates Memo.

---

[84] These defendants were Olympus Latin America, Inc. (2016), BK Medical ApS (2016), Teva LLC (2016), Teva Pharmaceutical Industries Ltd. (2016), JERDS Luxembourg Holdings Sàrl, Fresenius Medical Care AG & Co. KGaA (2019), Novartis Hellas S.A.C.I. (2020), and Alcon Pte Ltd. (2020).
[85] *See* https://www.justice.gov/criminal/criminal-fraud/enforcement-actions.
[86] *Id.*
[87] *See* https://www.justice.gov/criminal/criminal-fraud/enforcement-actions.

This may be due to the increase in NPAs in the period, which typically relay fewer details and are often drafted in the form of an informational letter. But even in the Criminal Complaints and Criminal Information documents for DPAs and plea agreements, the "Relevant Entities and Individuals" sections often offer scant details on individuals, while clearly identifying corporate entities. The subsequent Statement of Facts narratives often attempt to ascribe actions obviously taken by human beings. For example, in the 2019 NPA for Fresenius Medical Care AG & Co. KGaA (FMC), the narrative describes that "FMC Spain [a subsidiary] made payments to publicly employed doctors and other healthcare professionals in Spain, in connection with public tenders in which FMC Spain sought to compete."[88] Logic tells us that a human being arranged for those payments to be made to the Spanish doctors. If DOJ seeks to spotlight the actions of individual wrongdoers, it is unclear why DOJ let those individuals hide behind their corporations in these documents.

DOJ had the opportunity to reach five health care corporate FCPA resolutions in the time between the Yates Memo's issuance and the end of the Obama Administration. In one of those four, DOJ executed a 2016 DPA with Teva Pharmaceutical Industries Ltd. (Teva). Under the "Relevant Considerations," DOJ stated that

> The Company received credit for its cooperation with the Fraud Section's investigation, including voluntarily making U.S. and foreign employees available for interviews; at the request of the government in certain limited circumstances, deferring personnel actions in order to allow U.S. and foreign employees to be available for interviews, and deferring witness interviews to de-conflict with the Fraud Section's investigation; collecting, analyzing, translating and organizing voluminous evidence from multiple jurisdictions; providing updates to the Fraud Section as to the conduct and results of the Company's internal investigation; providing all non-privileged facts relating to individual involvement in the conduct described in the Statement of Facts and conduct disclosed to the Fraud

[88] U.S. Dep't of Just., Non-Prosecution Agreement between Fresenius Medical Care AG & Co. KGaA and the U.S. Dep't of Just., Criminal Division, A-18 (Feb.25, 2019), https://www.justice.gov/media/997971/dl?inline.

> Section prior to the Agreement; and disclosing to the Fraud Section conduct in Russia and Ukraine of which the Fraud Section was previously unaware. The Company did not receive full credit because of issues that resulted in delays to the early stages of the investigation, including vastly overbroad assertions of attorney-client privilege and not producing documents on a timely basis in response to certain Fraud Section document requests; (emphasis added)[89]

This settlement and that with Teva's affiliate, Teva LLC, were the last DPAs to be reached during the Obama Administration and under the pre-Rosenstein Yates Memo's cooperation requirements. Although it appears Teva met Yates 1's cooperation standards, no individuals were charged by DOJ in relation to this foreign bribery scheme.

In its last enforcement action of the Obama Administration, DOJ reached a plea agreement with JERDS Luxembourg Holdings Sàrl (JERDS). In the 2017 plea agreement, JERDS received full cooperation credit based on the U.S. Sentencing Guidelines: ". . . the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 2 points . . ."[90] Again, no individuals were charged in relation to this action.

Under the Trump Administration, DOJ reached three corporate health care FCPA resolutions. In its 2020 DPA with Alcon Pte Ltd. (Alcon), under "Relevant Considerations," DOJ granted "the Company full credit for its cooperation . . . with the Fraud Section's and the Office's investigation, including conducting a thorough internal investigation; making regular factual presentations to the Fraud Section and Office; producing extensive documentation, including documents located outside of the United States, after taking steps that the Company and its affiliates determined complied with applicable foreign data privacy, confidentiality, and

[89] U.S. Dep't of Just., Deferred Prosecution Agreement between Teva Pharmaceutical Industries Ltd. and U.S. Dep't of Just., 18 (Dec. 22, 2016), https://www.justice.gov/media/870886/dl?inline.
[90] U.S. Dep't of Just., Plea Agreement between JERDS Luxembourg Holdings Sàrl and U.S. Dep't of Just., 11 (Jan. 12, 2017), https://www.justice.gov/media/875251/dl?inline.

discovery laws; and providing translations of foreign language documents . . ."[91] Nowhere in the DPA is there a mention of Alcon having provided information to DOJ on any individuals involved in the wrongdoing. Even under the heightened Rosenstein standard of "substantial" involvement in place at the time, in order to receive maximum credit, Alcon would have been expected to "identify every individual person who was substantially involved in or responsible for the misconduct."[92]

In this particular case, if one affords DOJ the benefit of the doubt, one must arrive at the assumption that Alcon provided DOJ with all information it collected on each individual substantially involved in the schemes described. With no individuals charged with FCPA violations related to the Alcon matter, one is left to wonder how Alcon could be in a position to receive full cooperation credit, while DOJ could find no individuals to charge. Even if DOJ exercised its prosecutorial discretion or felt that it lacked sufficient evidence to achieve a conviction against any individuals, it seems a missed opportunity—if DOJ were looking to incentivize corporate disclosure of individual wrongdoing—not to highlight Alcon's specific disclosure and cooperation efforts regarding individuals in the settlement document. Details such as this could only lead to develop a model for other defendants and their counsel to emulate to in similar situations.

VI. Conclusion

The Yates Memo, with its goal of increased accountability for individuals involved in corporate wrongdoing, has yielded inconsistent results. Yes, we have observed a net increase in individuals prosecuted under the FCPA and an increase in such prosecutions in relation to

[91] U.S. Dep't of Just., Deferred Prosecution Agreement between Alcon Pte Ltd. and U.S. Dep't of Just., 4 (Jun. 25, 2020), https://www.justice.gov/media/1075676/dl?inline.
[92] Rod J. Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just., *Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2018).

corporate enforcement in the time since the Yates Memo's implementation versus the same period prior to implementation. However, it is still true that, on average, DOJ prosecutes less than one individual for each corporate FCPA settlement. Further, as illustrated above, certain industries have incredibly troubling track records of individual enforcement. In total, these metrics fail to present a convincing case that DOJ has truly put its full force into prosecuting individuals eight years on from the issuance of the Yates Memo.

Likely the single-most impactful factors in the Yates Memo's fate are the shifts in political administrations that have taken place since its issuance. It is hard to imagine a policy thriving when DOJ's leaders' prosecutorial philosophies move like a pendulum from Democratic administration to Republican administration and back again. Successful corporate investigations and enforcement take an enormous amount of time to execute, spanning administrations. It is highly likely that the shifting administration cycles create an environment where it will take longer than the eight years that have passed to truly tell whether the Yates Memo has moved the needle at all. Then again, if the administration changes again in 2025, we may need to reset the clock once more.

The Yates Memo created significant incentives for corporations to cooperate with DOJ investigations by providing information on implicated individuals. Eight years on, it is perhaps time for DOJ to reexamine its incentive structure for corporate defendants. If competing incentives and enforcement mechanisms in DOJ policy are inhibiting disclosure and cooperation,[93] it may be time for DOJ leadership, together with the defense bar and corporate counsels, to take the car apart and put it back together again. Indeed, Attorney General Merrick

[93] *See* Anna B. Roach, *Records show decline in new FCPA cases at SEC continues*, Global Investigations Review (Nov. 15, 2023), https://globalinvestigationsreview.com/just-anti-corruption/article/records-show-decline-in-new-fcpa-cases-sec-continues (last visited Dec. 1, 2023).

Garland in December 2022 reminded prosecutors to prioritize "individualized assessment" of criminal cases to ensure the "effective administration of [the Nation's criminal laws]."[94] Perhaps such a reflection on Department prosecutorial priorities may lead to increased transparency into DOJ's charging decision-making process in the context of individual accountability related to corporate wrongdoing.

However DOJ is able to accomplish what the Yates memo set out to achieve, it is an effort worth undertaking. It is through individual accountability that DOJ is likely to provide the most effective and efficient deterrent to prevent corporate lying, cheating, and stealing, as DAG Yates described corporate wrongdoing in her 2015 NYU remarks. As she stated then, "our Nation and its citizens deserve nothing less."[95]

[94] Memorandum from Merrick B. Garland, Att'y Gen., U.S. Dep't of Justice, on General Department Policies Regarding Charging, Pleas, and Sentencing, to All Federal Prosecutors, 1 (Dec. 16, 2022).
[95] Yates, *Remarks at New York University School of Law* (Sep. 10, 2015).