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Beware the Feds: Emerging Risks to Health Care Executives Under the Yates Memo

Last month's "Yates Memo" from the Department of Justice (DOJ) ([available here](#)) promises to be a game-changer in the world of government investigations and enforcement activity. While several U.S. Attorney Offices had been applying many of these principles already, the Yates Memo now establishes the principles expected to be followed by all U.S. Attorney Offices and Main Justice.

Named for DOJ Deputy Attorney General Sally Quillian Yates, a career prosecutor and former United States Attorney for the Northern District of Georgia, the Memo sets forth guiding principles, applicable to both civil and criminal investigations, to ensure that *individuals* are held accountable for corporate wrongdoing. As noted in the Memo, "One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing." In this way, the Memo aims to deter future illegal activity, incentivize changes in corporate behavior, ensure the proper parties are held responsible for their actions, and promote public confidence in the justice system.

While the guiding principles are not themselves new,¹ they reflect important policy shifts in DOJ's approach. In light of the vastly escalating numbers of civil False Claims Act cases brought in recent years by whistleblowers against health care and life sciences entities – whether based on false claims, kickbacks, Stark violations, or a multitude of other theories² – the Yates Memo represents a significant development for the health care delivery system as a whole.

New Guiding Principles The specific principles are as follows:

- 1. To be eligible for any cooperation credit, corporations must provide to DOJ all relevant facts about the individuals involved in corporate misconduct.**

Under the Principles of Federal Prosecution of Business Organizations,³ cooperation by a corporation is deemed to be a mitigating factor. Nonetheless, in remarks delivered the day after the Memo was announced, Deputy Attorney General Yates explained that the principle has not been fully applied in white-collar cases – corporations have been able to stop short of identifying culpable individuals and still obtain some credit.⁴ Now, she stated, companies must identify “*all*” culpable individuals “regardless of their position, status, or seniority”:

The rules have just changed. Effective today, if a company wants any consideration for its cooperation, it must give up the individuals, no matter where they sit within the company. And we’re not going to let corporations plead ignorance. If they don’t know who is responsible, they will need to find out.... While this is new for the corporate world, there’s nothing radical about the concept. It’s the same rule we apply to cooperators in any other type of criminal investigation. A drug trafficker can decide to flip against his co-conspirators. He can proffer to the government the full scope of the criminal scheme. He can take the stand for the government and testify against a dozen street-level dealers. But if he has information about the cartel boss and declines to share it, we rip up his cooperation agreement and he serves his full sentence. The same is true here. A corporation should get no special treatment as a cooperator simply because the crimes took place behind a desk.

Importantly, she emphasized that the same principle will apply to civil investigations as well as criminal ones, stating that, “Similarly, it will be the department’s position going forward that in order to qualify for the reduced damages provision under the False Claims Act, the company must identify any culpable individuals and provide all material facts about those individuals.”

Finally, according to Deputy Attorney General Yates, the cooperation requirement in no way means that DOJ “will sit back and wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, department attorneys will be actively investigating individuals at every step of the process – before, during and after any corporate cooperation.”

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

A focus on individuals from the beginning of investigations is aimed at determining the full scope of corporate misconduct, improving the likelihood of cooperation by knowledgeable individuals who will “provide information against individuals higher up the corporate hierarchy,” and maximizing the

chances for DOJ to bring civil or criminal charges against both corporations and individuals.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

The third principle dovetails with the second, and is designed to require “early and regular communication” between criminal prosecutors and civil attorneys, in order to permit consideration of the full range of potential remedies by the government, “including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment.”

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

5. Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires, and declinations as to individuals in such cases must be memorialized.

The fourth and fifth principles require litigating attorneys within DOJ, going forward, effectively to seek permission *not* to pursue individual liability. Thus, in her remarks on the Memo, Deputy Attorney General Yates stated:

If...DOJ attorneys decide it is necessary to resolve the corporate case first, they will only be permitted to do so once they have demonstrated a clear plan to their supervisors for resolving the related individual cases – promptly and before the statute of limitations expires. If at the conclusion of the investigation the DOJ attorneys decide not to bring charges against individuals, they will be expected to memorialize their justification and then obtain approval from the U.S. Attorney or the Assistant Attorney General overseeing the investigation. Likewise, we are instructing our attorneys that they should not release individuals from civil or criminal liability when resolving a matter with [a] corporation, except under the rarest of circumstances. When such circumstances do arise, the litigating attorneys will be required to obtain written approval from the relevant U.S. Attorney or Assistant Attorney General.

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.

In her remarks, Deputy Attorney General Yates acknowledged that some prosecutors in the past have prioritized large-scale corporate investigations over civil enforcement actions against the individuals who perpetrated

the wrongdoing, in light of a lowered likelihood of financial recovery from individuals. However, as stated in the Yates Memo, “[the] twin aims – of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other – are equally important.... Pursuit of...actions against culpable individuals should not be governed solely by those individuals’ ability to pay.” Thus, the Memo instructs DOJ attorneys to consider whether the conduct was serious, actionable and sufficient to obtain and sustain judgment.

Impact on Investigations Continuing operations while an investigation is going on has always presented challenges, but the Yates Memo exacerbates these. Among the issues for health care entities and their in-house and outside counsel to consider are:

- At what point must the standard “Upjohn warnings” be given, and to which employees – just those being interviewed, or also those collecting information or turning over records? At what point should counsel be made available, and to which employees? When and how fully should entities disclose the investigation to employees, independent contractors (e.g., those functioning as sales reps), and the like?
- How extensive must internal investigations be in the wake of the Yates Memo? On the one hand, Deputy General Yates tried in her remarks to provide reassurance on this point, stating:

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 are not asking companies to “boil the ocean,” so to speak, and embark upon a multimillion-dollar investigation every time they learn about misconduct. We expect thorough investigations tailored to the scope of the wrongdoing.

- At the same time, to the extent that corporations are supposed to work aggressively to identify responsible individuals, the cost and length of internal investigations could well increase.
- What is the impact on joint defense agreements? Counsel for the company and counsel for individual employees often enter into joint defense agreements in order to share information without waiving the attorney-client privilege. Now, with the premium placed by the Yates Memo upon complete disclosure of culpable employees by the corporation to receive cooperation credit, counsel for the company must carefully consider when to enter into a joint defense agreement. If a culpable employee admits to wrongdoing in a joint defense interview, how can counsel for the corporation disclose such admission to the government to comply with the cooperation expectations in the Yates Memo?

- Many company codes of conduct provide that employees are expected to cooperate with internal investigations. How do you encourage employees to cooperate, when the company is expected to disclose to the government “all” relevant facts concerning “all” culpable employees in order to receive cooperation credit? How do you manage the distrust that may result between employees and the company in this incentivized environment?

Emerging Governmental Investigative Approaches and Techniques

In addition to raising troubling questions about conducting internal investigations in the future, the Yates Memo likely presages governmental uses of different investigative approaches and techniques:

- Going forward, we will doubtless see increasing numbers of parallel civil/criminal investigations. Several earlier speeches by DOJ Assistant Attorney General Leslie Caldwell indicated that this would be the case,⁵ and the Yates Memo confirms it. Thus, we can also expect increasing use of search warrants or Civil Investigative Demands, along with undercover operations, including having employees wear wires, so that civil prosecutors can use all evidence obtained without violating the grand jury secrecy protections afforded by Rule 6(e) of the Federal Rules of Criminal Procedure.
- Finally, the Office of Inspector General’s new administrative and civil remedies branch is likely to work in close cooperation with DOJ, with both seeking out cases of individual accountability. At a recent American Health Lawyers Association conference, both DOJ and OIG officials confirmed this in their presentations, identifying an example of such cooperation as DOJ handling the investigation of a drug or device manufacturer for alleged kickbacks or improper off-label promotion, with OIG simultaneously pursuing actions against the individual physicians with whom the company was interacting.

Conclusion The government has acknowledged that the approach set forth in the Yates Memo may well result in corporations deciding not to cooperate with the government, and in potentially smaller overall recoveries. However, per Deputy Attorney General Yates, this is a cost the government is prepared to bear in order to “truly deter corporate wrongdoing.” For health care entities and individuals caught in the middle of investigations, the government has clearly stated its intention to use its substantial power in order to bring criminal and civil actions against individuals, rather than pursuing such cases against corporations alone.

¹ DOJ has been espousing the need to pursue individuals since at least 1999, when then-Deputy Attorney General Eric Holder issued another memo entitled, “[Bringing Criminal Charges Against Corporations](#).” The principles enunciated in the Holder Memo continued via statements from later Deputy Attorneys General ([Thompson Memo](#) (2003), [McNulty Memo](#) (2006), [Filip Memo](#) (2008)), and were eventually articulated more officially in the U.S. Attorney’s Manual (“USAM”) as the Principles of Federal Prosecution of Business Organizations (USAM § 9 28.000). More recent

DOJ pronouncements include those by Leslie R. Caldwell, Assistant Attorney General, on Nov. 19, 2014 (<http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st>) and Sept. 17, 2014 (<http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-140917.html>); and one by Marshall L. Miller, Principal Deputy Assistant Attorney General for the Criminal Division, on Sept. 17, 2014 (<http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-1409171.html>).

- ² See 11/20/14 DOJ Press Release, noting that while there typically were 300-400 qui tam/whistleblower cases filed in each fiscal year between 2000 and 2009, more than 700 cases were filed in each of the last two fiscal years. <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014>
- ³ USAM 9-28.000
- ⁴ <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>
- ⁵ For example, in September 2014, DOJ Assistant Attorney General Leslie Caldwell stated that that DOJ's civil and criminal prosecutors would simultaneously review all new qui tam complaints to evaluate whether parallel investigations are appropriate, and also make increasing use of undercover operations. <http://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-taxpayers-against>

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