

New DOJ Investigative Measures Target Employees And Executives For Corporate Misconduct: The Yates Memo



Providers should be proactive in its risk mitigation efforts by having a robust compliance program that deters, detects, and remedies unlawful conduct.

On September 9, 2015, Department of Justice (DOJ) Deputy Attorney General Sally Yates released a policy memorandum, titled “Individual Accountability for Corporate Wrongdoing,” also known as the “Yates Memo.”

DOJ Changes Its Approach

Essentially, the Yates Memo shifts the DOJ’s approach to fighting corporate fraud and misconduct by focusing its investigative efforts on those individuals within a corporation who perpetrated the wrongdoing. To this end, the Yates Memo sets out six new guidelines for DOJ attorneys to adopt in pursuing civil and criminal claims against culpable individuals.

Healthcare providers should pay careful attention to these guidelines because of its impact on Federal Claims Act investigations, including violations under Stark Law, and the Anti-Kick Back Law. Providers undergoing such investigations can now expect increased pressure to present evidence of individual wrongdoing.

But in order to provide such detailed information, providers must have conducted an adequate internal investigation that identifies responsible individuals. Thus, providers may want to consider whether its policies regarding internal investigations should be enhanced to thoroughly develop facts regarding the individuals responsible for any unlawful misconduct.

The Yates Memo details the following six guidelines, which are effective as of September 9, 2015:

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

Corporations under investigation by the DOJ usually seek cooperation credit to reduce fines and penalties by disclosing improper practices. However, the Yates Memo sets a new standard for receipt of cooperation credit. Now, to be considered for cooperation credit, corporations under investigation must provide full disclosure of all corporate employees and executives involved in the relevant misconduct, including all facts of their misconduct. This is a deviation of the DOJ’s past practice of issuing partial credit to corporations that cooperated despite not identifying culpable individuals. Now information of individual culpability is a “threshold requirement” to receiving cooperation credit.

DOJ attorneys are required to “vigorously review” information received from corporations and compare it to their own investigative findings to ensure that the information provided is complete. DOJ attorneys are also required to include continued cooperation as a condition of any corporate resolution or settlement agreement with a corporation. Thus, continued cooperation may be required even after the matter is resolved at the corporation level.

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

From the very beginning of a corporate investigation, DOJ attorneys are instructed to focus on individual wrongdoing. This measure is designed to avoid delays in the investigation and to ensure ample time to obtain sufficient evidence to pursue criminal and civil claims against individual wrongdoers.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another. Civil and criminal DOJ attorneys are required to keep open lines of communication on the matters they are investigating. This will allow for an exchange of information to help the DOJ build on their fact-gathering and enforcement efforts.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals. *(Continued on page 4.)*

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In order to fight corporate abuse and misconduct, the DOJ is setting a high standard for releasing responsible individuals from liability.

According to the Yates Memo, a corporate resolution or settlement agreement between the DOJ and a corporation will not dismiss civil and/or criminal liability for individuals involved in the misconduct, unless “extraordinary circumstances” exist. As an added measure, DOJ attorneys are required to seek advance written approval from their superiors justifying such “extraordinary circumstances” before releasing individuals from civil and/or criminal liability.

While the term “extraordinary circumstances” is undefined, such circumstances will likely be a rarity due to these aggressive measures for individual liability. Thus, corporate employees or executives that perpetrated the wrongdoing will be pursued by the DOJ even after the matter is resolved at the corporation level.

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.

To ensure DOJ attorneys conduct prompt and diligent investigations into individual accountability they are required to document the following situations:

- a. If there is an ongoing investigation into individual misconduct at the time of a corporate settlement or resolution, the DOJ attorney is required to submit a “clear plan” on the individual investigation(s) for supervisor approval. The plan must include all potentially liable individuals, the current status of the investigation and the remaining work to do be done, and a plan to bring the matter to resolution.
- b. If after an investigation the DOJ attorney decides not to pursue civil and/or criminal charges against an individual, a written justification for the decision must be submitted in advance for supervisor approval.
- c. DOJ attorneys must make every effort to resolve corporate abuse and misconduct cases before the expiration of applicable statute of limitations. When such delays are unavoidable, DOJ attorneys must preserve claims for individual liability by entering into an agreement to extend the applicable statute of limitations period, also known as a tolling agreement.

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.

Lastly, the Yates Memo focuses on the long-term impact of pursuing civil claims against an individual in fighting and minimizing corporate fraud and abuse. Usually, civil attorneys consider an individual’s financial resources and ability to pay damages if found guilty in a court of law before naming them as a defendant in a civil lawsuit. However, the Yates Memo notes that “[a]lthough in the short term certain cases against individuals may not provide as robust a monetary return on the [DOJ’s] investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence.”

Therefore, when determining whether to file civil charges against an individual, DOJ attorneys should not solely focus on an individual’s financial condition. Instead, DOJ attorneys are instructed to consider the seriousness of the individual’s misconduct, whether the misconduct is actionable, whether there is enough against the individual to obtain a judgment, and whether there is an important federal interest in suing the individual.

Time Will Tell

Only time will tell what the full impact of the policy initiatives contained in the Yates Memo and how aggressive the DOJ will be in carrying them out. Nevertheless, it is clear from the Yates Memo that having an effective compliance program remains the best defense to health care liability. Providers must be proactive in their risk mitigation efforts by having a robust compliance program that deters, detects, and remedies unlawful conduct.



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