

DEPARTMENT OF JUSTICE ANNOUNCES IMPORTANT UPDATES TO YATES MEMO REQUIREMENTS

On November 29, 2018, Deputy Attorney General Rod Rosenstein announced some significant changes to the Department of Justice's ("DOJ's") policies on investigating corporate wrongdoing. These changes pull back some of the guidance that was first announced in a public memorandum issued by former Deputy Attorney General Sally Quillian Yates ("Yates Memo") in 2015, especially with respect to civil investigations. Even in light of these changes, corporations, including health care providers, who are subject to DOJ investigations will still benefit from strong corporate compliance practices.

BACKGROUND

The DOJ frequently uses its criminal and civil enforcement authority to combat health care fraud, waste and abuse. Since the initial publication of the Federal Sentencing Guidelines for Corporations in 1991, federal policies have created incentives for corporations to develop effective compliance programs aimed at detecting and preventing misconduct. Through a series of memoranda and revisions to its internal manuals, the DOJ has interpreted the Federal Sentencing Guidelines and its own enforcement authorities to give corporations credit for providing meaningful assistance when the corporation is the subject of a federal investigation.

Through the Yates Memo, the DOJ established several new policies and reaffirmed its preexisting commitment to others. Importantly, the Yates Memo demonstrated that the DOJ would closely scrutinize individuals who contributed to corporate misconduct and would expect corporations to fully disclose the facts relating to the individuals responsible for the misconduct. Additionally, the Yates Memo described the DOJ's policy of not using corporate settlements to release individuals of liability absent extraordinary circumstances.

ROSENSTEIN REVISIONS

In his November 29 address, Deputy Attorney General Rosenstein, while still endorsing the fundamental principles of the Yates Memo, explained that based on the experience of the DOJ's civil litigators since the Yates Memo first went into effect, the DOJ would pull back on some of its more aggressive guidance, especially with respect to civil investigations. The main shifts in civil enforcement policy are as follows:

1. **Threshold for Cooperation Credit.** Previously, a corporation was not eligible for cooperation credit unless it provided "all relevant facts" about individuals responsible for the misconduct. Under the new guidelines, corporations will be eligible for cooperation credit if they provide "meaningful assistance" to the government as it conducts its investigation. Maximum credit is available if the corporation completes a timely investigation and proactively identifies all individuals who were substantially involved in, or responsible for, the misconduct.
2. **Settling Claims against Individuals.** The new guidelines relax the DOJ's policy of not resolving individual liability through settlement with the corporation. Under the Yates Memo, a corporate settlement could only result in a release of liability against an individual in extraordinary circumstances, and each case had to be approved by the appropriate Assistant Attorney General. The new policy does not require extraordinary circumstances, and each DOJ constituent is authorized to select the level of supervisory authority needed to approve such a settlement.
3. **Determinations for Pursuing Individual Suits.** The previous iteration of the guidelines provided that government attorneys would consider numerous factors, including ability to pay, when deciding whether to sue individuals for their roles in corporate misconduct. The DOJ eliminated this requirement, and Deputy Attorney General Rosenstein did not elaborate on the rationale for doing so.

The DOJ also made several changes to its criminal enforcement policies:

1. **Eligibility for Cooperation Credit.** While the Yates Memo policy required a corporation under criminal investigation to provide "all relevant facts" with respect to individuals, the new policy recognizes that there may be situations in which a corporation is unable to get access to evidence despite its best effort or is legally prohibited from disclosing the evidence to the government. In these situations, the corporation may still be eligible for sentencing credit. However, the DOJ has made clear under the revised policy that corporations

seeking to earn maximum cooperation credit in criminal cases must still identify individuals who were substantially involved in or responsible for the criminal conduct.

2. **Compliance Programs.** The government has long incentivized the creation of corporate compliance programs. Under the new policy, the government will consider not only the corporation's preexisting compliance program, but also the adequacy and effectiveness of the compliance program at the time of sentencing.

PRACTICAL TAKEAWAYS

While the Yates Memo remains an important component of DOJ enforcement policy, health care providers whose compliance programs are designed to meet the Office of Inspector General's Seven Elements of an Effective Compliance Program will be well positioned to benefit from the DOJ's common-sense reforms. Under the all-or-nothing policies announced in the Yates Memo, factors outside of a provider's control could prevent it from receiving any cooperation credit even if it invested significant resources in developing a compliance program. Under the more flexible guidelines, DOJ attorneys regain discretion to resolve each case consistent with relevant facts and circumstances, including the extent of cooperation credit given to a provider. So, in addition to the often-acknowledged benefits of an effective compliance program, such as a reduced likelihood of misconduct and early detection of potential issues, the new DOJ policies reinforce the importance of self-reporting noncompliance, implementing swift and effective remedial measures and completing thorough internal investigations into alleged misconduct. Providers can expect DOJ attorneys to look favorably on these compliance measures when investigating and moving a matter to settlement.

Hall Render attorneys are available to assist with a broad range of compliance matters, including internal investigations, responses to government inquiries and compliance program effectiveness assessments. For more information about this topic, please contact:

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