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## DOJ: No “Yates” Relief in the Near Term

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Those hoping for some relief from the provisions of the so-called "Yates Memorandum" ought not be holding their breath. Contrary to expectations, the widely anticipated changes once hinted at by Deputy Attorney General Rod J. Rosenstein do not appear in the September 25, 2018 release of the updated United States Attorneys' Manual<sup>[1]</sup> (USAM). Thus, it remains "business as usual" for health care lawyers, compliance officers, audit committees, and the board, in terms of the importance of individual accountability and of securing cooperation credit.

### Background—Yates

As most health care lawyers are well aware, "Yates" refers to the September 9, 2015 Department of Justice (DOJ) guidelines on corporate prosecution, with the somewhat ominous title "Individual Accountability for Corporate Wrongdoing." The guidance, presented in the form of a memo to federal prosecutors from Deputy Attorney General Sally Quillan Yates, is premised on DOJ's belief that one of the most effective ways to deter corporate wrongdoing is to hold individuals accountable—both civilly and criminally—for their individual misconduct.

The guidance incorporates six key steps to be pursued in any DOJ investigation of corporate conduct: (1) condition eligibility for corporation credit on disclosure of what the corporation knows about individual misconduct; (2) focus on individual conduct from the inception of any investigation; (3) enhance communication between civil and criminal prosecutors handling investigations; (4) resolution of allegations against the corporation will not, except in extraordinary circumstances, provide liability relief for any individuals; (5) corporate cases should not be resolved before deciding how to resolve related individual cases; and (6) an individual's ability to pay should not be a factor in determining whether to pursue civil actions against individuals.

The Yates Memorandum has gained almost "mythical status" across industries in terms of achieving awareness of the reality of individual accountability within the context of corporate wrongdoing.

### The "Rosenstein Review" of Yates

In public speeches in September and October 2017, Mr. Rosenstein announced the Department's intention to identify, review, and revise certain outstanding "white collar" memoranda previously issued by former Deputy Attorneys General, and incorporate them in an updated version of the United States Attorneys Manual. In an October 6, 2017 speech,<sup>[2]</sup> he specifically stated that the Yates memorandum was one of those policies under review.

That comment prompted widespread speculation within the bar of what changes might be forthcoming. The expectation was for a "soft repeal" of key portions of Yates; e.g.:

- relaxing the circumstances under which corporations must provide information about potentially culpable employees in order to qualify for corporation credit;
- attributing higher value to "truly robust" compliance programs;
- directing prosecutors to take into consideration an individual's "ability to pay" when making decisions on civil enforcement actions;

- extending prosecutorial deference to corporations where the nexus between corporate leadership and individual misconduct is highly attenuated; e.g., by geographic distance, or location within the corporate hierarchy; and
- allowing corporate cases to be resolved before there is a "clear plan" to resolve related cases against individuals.

The sense at the time was that changes would be consistent with administration policies intended to reduce what it perceives as unnecessary regulatory burdens on corporations. However, any such changes, if implemented, would obviously have significant impact on corporate compliance programs and their oversight by audit committees and the full board.

### **Overview—the USAM**

The USAM is an internal reference document that contains DOJ's policies and procedures. It was designed as a quick and ready comprehensive guide for United States Attorneys, Assistant United State Attorneys, and DOJ attorneys responsible for the prosecution of violations of federal law. While limited in legal significance to an internal reference and policy document, the USAM provides important insight into the policy positions and thought process that goes into DOJ's determination on if, and how, to prosecute a federal crime.

### **The Updated Manual**

On September 25, 2018, DOJ released the updated USAM, now titled the Justice Manual. It was presented as the first comprehensive review and overhaul of the USAM in more than 20 years. According to DOJ, specific changes include expanding the Principles of Federal Prosecution to incorporate current charging and sentencing policies, and adding new policies on religious liberty litigation, third-party settlement payments, and disclosure of foreign influence operations. But, no changes at all to existing policies and procedures on individual accountability; no "soft repeal" of Yates. Deputy Attorney General Matthew Miner of the DOJ Criminal Division spoke about the implications of the new manual on September 27, 2018.<sup>[3]</sup> While emphasizing new programs designed to provide concrete rewards to companies that disclose the misconduct of "bad actors," he repeatedly referenced DOJ's continued interest in individual accountability.

So what to do?

### **The Implications for the Compliance Program**

The overall message for all corporate constituents is that "Yates stands as written." The focus on individual accountability for corporate wrongdoing remains as strong as it was when Yates was released. And it is certainly worth noting the number of significant health care fraud matters in which DOJ has pursued civil and criminal remedies against individual corporate executives, including, for example, three separate health system chief executive officers in the last several years.

For the Board, and Compliance Committee, it means at least three specific things. First, that now would be the wrong time to start cutting back on the scope, emphasis, and funding of the Compliance Program. Second, that the Board's support for the Compliance Program, and those who administer it (e.g., the General Counsel and the Chief Compliance Officer) should continue at a high-profile internal level. Third, that the awkward internal board/executive dynamic between corporate cooperation credit and individual executive exposure remains.

For the workforce, including executives and employed physicians, it means that focused legal exposure remains for those who are risk-insensitive and who are inclined to "push the edge of the (legal and regulatory) envelope with their work style. Continued education not only on the substance of regulatory requirements, but also on the consequences for individuals who disregard applicable law and regulation, should be a component of every Compliance Program, as should a visible and consistent policy of discipline for those individuals who flaunt the rules.

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[1] See Department of Justice, Justice Manual, *available at* <https://www.justice.gov/jm/justice-manual>.

[2] See [https://wp.nyu.edu/compliance\\_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/](https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/).

[3] Justice News, Deputy Assistant Attorney General Matthew S. Miner of the Justice Department's Criminal Division Delivers Remarks at the 5th Annual GIR New York Live Event, *available at* <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division>.

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