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Yates Memo Puts Health Care Employees, Execs On Notice

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Law360, New York (October 20, 2015, 4:52 PM ET) -- “Fighting corporate fraud and other misconduct is a top priority of the U.S. Department of Justice. ... One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.”

With these simple, straightforward words by Deputy Attorney General Sally Quillian Yates, health care executives and administrators were put on notice that the DOJ will continue to leverage and coordinate its extensive resources in order to identify and pursue individuals who may be responsible for corporate wrongdoing.

In a memorandum issued on Sept. 9, 2015, the DOJ identified six key steps for the leaders of each division within the department and U.S. attorneys to use in pursuing culpable individuals at all levels of corporate management and administration. These steps include:

- in order to be eligible for any cooperation credit, companies must provide to the DOJ all relevant facts relating to the individuals involved in corporate misconduct;
- criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
- criminal and civil attorneys handling corporate investigations should be in routine communication with one another;
- absent extraordinary circumstances or approved DOJ policy, no corporate resolution will provide protection from civil or criminal liability for any culpable individuals;
- corporate cases should not be resolved without a clear plan to resolve related individual cases and declinations in individual cases must be memorialized; and

- civil attorneys should consistently focus on individuals as well as the company and should evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

Some of these steps reflect current DOJ practices, while others represent shifts from established policy. Taken together, however, these steps continue to expand the groundwork that the DOJ and the U.S. Department of Health and Human Services Office of Inspector General has laid over the past several years to target physicians, executives and other individuals who may have been complicit in a fraud scheme.

For years, the DOJ and OIG have emphasized that fraudulent conduct by physicians and corporate executives will not change unless and until individual actors who may be involved in a fraud scheme see their peers convicted of similar offenses, or exposed to significant financial penalties or exclusion from federal health care programs ("FHCPs"). The Yates memorandum also builds off of recent DOJ efforts to facilitate cooperation and collaboration between its Civil and Criminal Divisions when investigating alleged False Claims Act violations. Most notably, the Yates memorandum follows on the heels of an announcement by Assistant Attorney General for the Criminal Division Leslie Caldwell in September 2014 that DOJ prosecutors will automatically review all new civil qui tam complaints in order to determine whether a complaint outlines any criminal conduct.

The government's efforts to target individuals have already begun to bear fruit, as evidenced by the steady parade of physicians, executives and employees pleading guilty to health care fraud allegations. A well-publicized national Medicare fraud takedown this past June, for example, resulted in charges against 243 individuals for approximately $712 million in false billing. A similar takedown in May 2014 resulted in charges against 90 individuals for approximately $260 million in false billing.

The new policy changes outlined in the Yates memorandum, combined with the heightened enforcement environment for physicians and other health care executives, will create several new and important challenges for health care companies that are the subject of a government investigation. As an initial matter, these changes will place significant additional pressure on providers and other health care companies to conduct a thorough internal investigation of any allegations of corporate misconduct. Since "complete" disclosure of individual wrongdoing will be required to receive any cooperation credit, providers and other health care companies will need to have a thorough understanding of the individuals involved in a potential fraud scheme, along with the extent of each individuals' role and potential culpability. This may prove to be a daunting task for companies with operations across multiple states and jurisdictions. This also increases the likelihood that companies that do not conduct a thorough internal investigation, or that take steps to limit the scope of an internal investigation, will be seen by the DOJ as noncooperative and treated accordingly.

At the same time, the requirement for a company to completely disclose all relevant facts about the individuals involved in corporate misconduct in order to be eligible for cooperation credit is likely to complicate efforts by in-house or outside counsel to investigate allegations of corporate misconduct. In order to avoid any questions about the sufficiency of the standard Upjohn warnings given during interviews of key executives and employees, legal counsel will need to explain at the outset of their investigation that the company will need to disclose all relevant facts relating to any individuals involved in corporate misconduct to the DOJ. Counsel will also need to explain that the DOJ may prosecute potentially culpable individuals. Not only will this require additional thought and analysis into the structure and implementation of an internal investigation, but it may also result in directors, officers, employees and agents of a health care company being more cautious about participating in internal investigations without their own legal representation. Many executives and key employees may ultimately decide not to cooperate with a

company’s investigation depending on the particular facts-and-circumstances.

In addition, this continued “culpability creep” up the corporate ladder creates new questions about whether and how the DOJ’s civil attorneys will make decisions about bringing suit against individuals “based on considerations beyond ... ability to pay.” Historically, attorneys with the DOJ’s Civil Division have been focused to a significant (if not exclusive) degree on the amount of money that could be recovered through an enforcement action. The Yates memorandum upsets this paradigm by introducing a range of as-yet-to-be defined variables into decisions by DOJ attorneys to pursue individuals who may have been involved in fraudulent conduct. What remains to be seen, however, is whether these new considerations will result in a net increase or net decrease in enforcement actions against health care executives and other employees.

Finally, the Yates memorandum’s prohibition on corporate settlement agreements that provide protection from criminal or civil liability for individuals means that a provider or other health care company may be dealing with the fallout from FCA litigation or a DOJ investigation long after it has resolved all allegations of corporate wrongdoing. Given the difficulties inherent in establishing individual accountability for intent-based crimes, for example, investigation of executives or administrators who may have been involved in fraudulent conduct could drag out well past any resolution of corporate conduct. The negative publicity, ongoing costs of document review and production and expense of providing for individual legal counsel can all exact a significant toll on a health care company’s financial performance.

The Yates memorandum applies to all future investigations of corporate wrongdoing, as well as pending matters to the extent practical. Legal counsel representing companies currently responding to government subpoenas or civil investigative demands, or that are aware of a DOJ investigation, will need to inform their clients of this new directive and consider how it will affect and apply to the company’s response to the investigation. General counsel and outside legal counsel will also need to have conversations with the executives to whom they report in order to explain the implications of this directive for the company and its employees. It may also be necessary to review and update company policies for indemnification of senior executives and board members in connection with their official responsibilities.

Clearly, the DOJ’s new policy steps are another attempt to align the corporate defendant with the government prosecutor in order to identify executives and employees engaged in fraudulent conduct. Over time, this may have a dramatic effect on corporate cultures and attitudes toward the compliance and risk management functions. With the increased prospect of criminal liability for health care executives and senior managers, however, the days of treating liability for health care fraud and abuse violations as a necessary cost of doing business may be drawing to a close.

—By Jonell B. Beeler and Ted Lotchin, Baker Donelson Bearman Caldwell & Berkowitz PC

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