

MCO INTERNAL INVESTIGATIONS OF ALLEGATIONS OF MISCONDUCT AFTER THE YATES MEMO AND THE “ROSENSTEIN REVISION”

Jim Sheehan, Chief, NY AG Charities Bureau
Heather L. Fields, Reinhart Boerner Van Deuren s.c.
Lisa Estrada, SVP and Chief Compliance Officer,
Fresenius Medical Care

The Yates Memo-2015

- For a corporation to be eligible for cooperation credit, corporation must provide to DOJ “all relevant facts” “about individuals involved in corporate misconduct.”
- “if the corporation does not disclose such facts, it will not be entitled to receive any credit for cooperation.”
- Prosecutors are directed to pursue senior individuals criminally and civilly even after criminal resolution for corporation.
- No civil releases for individuals as part of corporate settlement

Rod Rosenstein, Deputy Attorney General 2017-?



THE “ROSENSTEIN REVISION”

- November 29, 2018: DAG Rosenstein announced revisions to the DOJ’s policy concerning individual accountability in corporate cases (previously set forth by the Yates Memo).
- Rosenstein reaffirmed that:
 - pursuing individuals responsible for wrongdoing is as top DOJ priority
 - absent extraordinary circumstances, a corporate resolution should not protect individuals from criminal liability
- Rosenstein acknowledged that Yates requirement that companies identify every employee who played any role in conduct is not practical and often wasn’t enforced because it would have “impeded investigations and wasted resources.”

“ROSENSTEIN REVISION”

Criminal Enforcement	Yates Memo Requirement	Rosenstein Revisions
Eligibility for Cooperation Credit in Criminal Case	Must provide all relevant facts about all individuals involved in corporate misconduct	Must identify every individual who was substantially involved in or responsible for the criminal conduct
Consequences for Company if Individuals Refuse to Cooperate	No Cooperation Credit Available	Full Cooperation Credit available provided company makes good faith efforts to cooperate fully

“ROSENSTEIN REVISION”

- Criminal provisions incorporated in Justice Manual 9-28.000 – 9-28.1500 Principles of Federal Prosecution Of Business Organizations
- Some Yates Memorandum materials are shown as the November 2015 updates which are still effective; Rosenstein revisions are the November 2018 updates
- Current (as of December 2018) Justice Manual materials attached as Exhibit 1.

“ROSENSTEIN REVISION”

Key Implications for Criminal Cases

- If the company is unable to identify all relevant individuals or provide complete factual information despite its good faith efforts to cooperate fully, the organization may still be eligible for cooperation credit.
- If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization’s efforts to cooperate fully, the organization may still be given credit for full cooperation.”).
- “Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case.”

“ROSENSTEIN REVISION”

Civil Enforcement	Yates Memo Requirement	Rosenstein Revisions
Eligibility for <u>Any</u> Cooperation Credit in Civil Case	Must provide all relevant facts about all individuals involved in corporate misconduct	Must identify all wrongdoing by senior officers, including members of senior management or the board of directors
Eligibility for <u>Partial</u> Cooperation Credit in Civil Case	Not Available	Must honestly and meaningfully assist the government’s investigation – credit offered at discretion of DOJ civil attorney with supervisory review
Eligibility for <u>Maximum</u> cooperation credit in Civil Case	Must provide all relevant facts about all individuals involved in corporate misconduct	Must identify every individual who was substantially involved in or responsible for the misconduct (same as standard for cooperation credit in criminal case)

“Rosenstein Revision” Key Implications for Civil Cases

- Restores flexibility/discretion for civil DOJ attorneys to give partial credit in cases where
 - Company **has** cooperated in honest and meaningful way
 - Company **has** disclosed all information about wrongdoing by senior officials
 - But Company **has not** collected and disclosed information about all employees substantially involved/responsible for the conduct

“Rosenstein Revision” Impact Conduct of Internal Investigations

- Scope limitations should make investigations more manageable
- Substantially reduced likelihood that information collected about employees below director level will need to be disclosed to government to resolve cases
- Less likelihood that individuals can prevent resolution of a corporate case by refusing to cooperate, asserting privilege, etc.
- But, in any case where senior officials may be involved/responsible, cases will present same difficult issues that arose under Yates (Upjohn, separate representation, divergent interests)

Decision Points in Healthcare Investigations

- Investigation-compliance or under privilege and work product
- Who is represented? Who has common counsel?
- Joint defense agreement?
- What records to make of investigation (written report?)
- Full(!) Cooperation
- Employee Discipline/resolution
- Evidence of compliance, remediation

The Managed Care Investigation

- Health Care Partners allegations-Independent Physicians Association submitted “inflated” diagnoses to obtain higher reimbursement
- Searched records for support for diagnoses not reported by treating physicians
- Hired outside vendor- vendor only reported diagnoses which increased reimbursement; plan employees reported diagnoses to Medicare Advantage
- Hypothetical: contract signed by CMO, who received bonus for increasing revenues per MA member

Rosenstein-Full Corporate Credit for Cooperation-“Lack of Cooperation of Particular Individual(s)”

- Corporate Miranda disclosures in internal investigations” (Rule 1.13 of the attorney Rules of Professional Conduct)
- Identify Scope of Representation: Explain who the attorney represents.
 - “I am a lawyer for MCO . **I represent only the MCO and do not represent you personally.** If you would like legal advice, you should consult your own attorney.”
- Explain Purpose of Interview: Lawyer must explain to the employee that the purpose of the communications with the employee is to gather facts in order to provide legal advice **for the corporation.**

Corporate Response to Rosenstein Investigation

- Question 1: How should compliance officer or counsel advise its employees of the risk/likelihood that company must “identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct.” (training programs, employee manual, specific investigation)
- Question 2: Does Rosenstein require reporting on individuals at a contractor “involved in or responsible” for the conduct? If yes, how should corporation obtain information about individuals at the contractor “involved in or responsible” for the conduct? (compliance programs, contract clauses, specific investigation)
- Question 3: How should the corporation or counsel advise employees of its decision regarding cooperation in a specific investigation? Of the facts that it discloses to the Government? Of facts implicating specific individuals?

Corporate Response to Rosenstein Investigation

- Question 4: You were the Chief Compliance Officer at the times the diagnosis data was submitted to Medicare Advantage.
- You were part of the review chain for the vendor contract, and you reviewed the reporting document submitted to MA.
- You obtained a required certification from the Chief Medical Officer that all data submitted by the Plan to MA was “true, accurate, and complete.”
- Do any of these facts bar your participation in the investigation?

The Penn State /Spanier Case

- (Penn State counsel) Ms. Baldwin also communicated with Spanier and expressed her belief that no conflict existed between her joint representation of Schultz, Curley and Spanier.
- Attorney Rule of Prof Professional Conduct 1.18(b) ("Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal information which may be significantly harmful to that person").
- When corporate counsel clarifies the potential inherent conflict of interest in representing the corporation and an individual and explains that the attorney may divulge the communications between that person and the attorney because they do not represent the individual, the individual may then make a **knowing, intelligent, and voluntary decision** whether to continue communicating with corporate counsel. This is all the more essential where the purpose of the individual seeking advice relates to an appearance and testimony before a criminal investigating grand jury.

Corporate Response to Rosenstein Investigation

- “What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of (attorney-client or attorney work product) protections, but rather the facts known to the corporation about the putative criminal misconduct under review.”
- Justice Manual 9-28.710

Yates and Rosenstein DOJ Process-9-28.710

- “while a corporation remains free to convey non-factual or "core" attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so.”

Yates/Rosenstein DOJ Process- 9-28.720

- the company may be eligible for cooperation credit regardless of whether it chooses to waive privilege or work product protection in the process, if it provides all relevant facts about the individuals who were involved in the misconduct.

Yates/Rosenberg DOJ Process- 9-28.710

- Many corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact-gathering that does not have that effect—for example, having employee or other witness statements collected after interviews by non-attorney personnel. Whichever process the corporation selects, the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct

Corporate Response to Yates/Rosenberg Investigation

- Question 5: How can counsel for the corporation provide all relevant facts about the individuals who were involved in the misconduct if it obtained the relevant facts as the result of attorney-client communications within the corporation or the attorney work product of investigation?

Yates/Rosenstein DOJ Process- 9-28.720

- To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the interviews conducted by counsel for the corporation. To earn such credit, however, the corporation does need to produce, and prosecutors may request, relevant factual information—including relevant factual information acquired through those interviews.

Corporate Response to Yates/Rosenstein Investigation

- Question 6: VP of Finance states that diagnosis data submitted to managed care entities and Medicare was probably not accurate-the consulting firm told him they only looked for chart information that would result in an upcode, and was paid on a contingency basis for successful upcodes. What is the “factual” information in this admission? How should the MCO provide this information?

Yates/Rosenberg Investigation: Auditor Disclosure

- Question 7: VP of Finance disclosed to Auditor information in Question 6-must Deloitte produce work papers?
- Documents shared with Deloitte are protected from disclosure. See *United States v. Deloitte LLP*, 610 F.3d 129, 142 (D.C. Cir. 2010) (holding that documents disclosed to Deloitte by client did not waive work product protection); *In re Weatherford Int'l Sec. Litig.*, No. 11CIV1646LAKJCF, 2013 WL 12185082, at *5 (S.D.N.Y. Nov. 19, 2013) (“Ernst & Young functioned as Weatherford's outside auditor. In this circuit, disclosure to an outside auditor does not generally waive work product protection.”);

Yates/Rosenstein Investigations
DOJ Manual- 9-28.730
Joint Defense Agreement with
Vendor

- “the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit. “

Corporate Response to
Yates/Rosenstein Investigation

- Question 8: May the corporation ever enter into a joint defense investigation with employees?
- Question 9: How should the joint defense agreement be drafted to avoid being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government?

Yates and Rosenstein-Corporate Response and Remediation-9-28.1000

- “Among the factors prosecutors should consider and weigh (in deciding whether to prosecute the corporation) are whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct.
- “Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. Prosecutors should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.
- “(a) corporation's quick recognition of the flaws in the (compliance) program and its efforts to improve the program are also factors to consider as to the appropriate disposition of a case.

Corporate Response to Yates/Rosenstein Investigation

- Question 10: How should the corporation appropriately discipline wrongdoers during the course of the investigation? Can the corporation consider employee cooperation in deciding on appropriate discipline? Can the corporation resolve disciplinary charges by settlement?
- Question 11: When are employees “ identified by the corporation as culpable for the misconduct?” Should the compliance officer who failed to detect the wrongdoing as part of the program be considered a wrongdoer?

Question 12: What has happened in Yates Prosecutions?

- Acclarent, Inc. medical device company \$18 million False Claims Act civil settlement.
- CEO William Facticeau, VP Sales Patrick Fabian acquitted of felony charges, convicted of misdemeanors relating to unlawful distribution of medical devices. (2016)

Question 12: What has happened in Yates Prosecutions?

- Warner Chilcott-specialty drug manufacturer-guilty plea, \$22 million criminal fine and \$102 million settlement for kickbacks to physicians
- Carl Reichel, president, acquitted of single count of conspiracy
- District managers entered guilty pleas
- Physician charged with accepting kickbacks (\$23,500 in meals and speaker fees) (case pending)

What has happened in Rosenstein Prosecutions?

- Insys-\$150 million civil settlement in principle-August 2018-off-label marketing of sublingual fentanyl based opioid
- Criminal indictments of individuals :
- Michael L. Babich, the former CEO and President of the company
- Alec Burlakoff former Vice President of Sales
- Richard M. Simon, former National Director of Sales;
- Former Vice President of Managed Markets, Michael J. Gurry

Thank You for Your Attention

James G. Sheehan
NYAG Charities Bureau
James.Sheehan@ag.ny.gov

Heather L. Fields
Reinhart Boerner Van Deuren s.c.
HFields@reinhartlaw.com

Lisa A. Estrada
SVP and Chief Compliance Officer
Fresenius Medical Care North
Lisa.Estrada@fmc-na.com