



The Role of "Recidivism"
in Government Investigations

October 30, 2017
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Agenda

- 1 Format: A Conversation Between Three Former Prosecutors
- 2 Goal: Insights on the Government's View of "Repeat" Defendants
- 3 Questions Welcomed

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What is a "recidivist?"

- How does the government define a recidivist company?
 - Does the number of prior investigations matter? Or resolutions/settlements?
 - How does being or having been under a corporate integrity agreement (CIA) factor into the perception of recidivism?
 - Is there a particular set definition?

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What kind of Government guidance is there on the issue of recidivism?

- **9-28.600 - The Corporation's Past History**
- **General Principle:** Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges and how best to resolve cases.
- **Comment:** A corporation, like a natural person, is expected to learn from its mistakes. A history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs. Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the misconduct in spite of the warnings or enforcement actions taken against it. The corporate structure itself (e.g., the creation or existence of subsidiaries or operating divisions) is not dispositive in this analysis, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates may be considered, if germane. See USSG § 8C2.5(c), cmt. (n. 6).

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How is the issue tackled more informally or practically?

- Company-by-company, matter-by-matter evaluation
- The "them again?" reaction
- How a company conducted itself in the earlier investigations (e.g., aggressively) can affect later perception by DOJ
- On civil side, definitely a factor in considering the multiplier in an FCA case. Criminally, it can affect whether a criminal disposition is appropriate
- How the new allegations come to light matters

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How do we think the government should define a "recidivist?"

- Life Sciences companies have big targets on their backs
- Large companies are diverse entities with different operating units and lines of business both domestically and internationally
- Even if a company diligently investigates allegations of misconduct, it is difficult to beat a False Claims Act relator in the health care context

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How is recidivism viewed in the District of Massachusetts?

- The District of Massachusetts is a leading district that saw many of the same companies being targeted over and over again
- They have a unique perspective on the repeat targeting of companies
- When is the repeat appearance of a company in False Claims Act suits filed in Massachusetts a sign of bad corporate culture or a sign of relator opportunism?

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How do compliance programs affect the perception of companies?

- Compliance efforts are being more closely scrutinized by prosecutors:
 - There is a belief that criminal enforcement efforts should be forward-looking as well as backward-looking, *i.e.*, focused both on addressing the misconduct and prevention
 - Some senior prosecutors believe that companies should perhaps have a chance to avoid criminal culpability if they consistently “do the right thing” and, conversely, punished more severely if they do not
 - Focus on self-disclosure, compliance, remediation and clarity/metrics in evaluating all aspects of a criminal case

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DOJ Guidance on Compliance Programs

- On February 8, 2017, Department of Justice Criminal Division, Fraud Section issued an “Evaluation of Corporate Compliance Programs”
- DOJ/Criminal Division guidance focused on 11 areas:
 - Analysis and Remediation of Underlying Conduct
 - Senior and Middle Management Connection to Misconduct
 - Autonomy and Resources of Compliance Program/Officers
 - Compliance Policies and Procedures
 - Risk Assessment Measures
 - Training and Communications
 - Confidential Reporting and Efficacy of Investigations
 - Incentives and Disciplinary Measures
 - Continuous Improvement, Periodic Testing and Review
 - Third Party Management
 - Mergers and Acquisitions

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Key questions from the DOJ guidance

- Did the conduct occur because of or in spite of the compliance measures in place?
- Was the compliance department adequately resourced to spot, investigate and address the issue?
- Is the chief compliance officer sufficiently independent?
- Does senior management support the compliance?
- Is the existing compliance program adequately designed to prevent and detect wrongdoing? Or is this just superficial/ "paper" program?
- Is there pressure/encouragement on employees to engage in misconduct to achieve business objectives?
- Does the compliance program actually work (identify, isolate, prevent misconduct)?
- How pervasive was the misconduct: employees involved (number and level); seriousness of the misconduct; duration and frequency of the illegal activity
- Recidivist?

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How might a strong compliance program help mitigate a routinely-targeted company?

- Four types of corporate criminal dispositions.
 - Criminal Charge/Plea
 - Deferred-Prosecution Agreement
 - Non-Prosecution Agreement
 - Declination

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The effect compliance can have

- October 2016 Hospital Chain Resolution – NPA with monitor
 - Company had been the subject of multiple civil resolutions
 - Why an NPA?
 - The company engaged in remedial measures including
 - restricting services purchased from potential referral sources
 - adding new policies to make sure there was no re-occurrence of the conduct
 - enhanced corporate auditing
 - better training
 - Also, other factors (continued cooperation; payment of civil settlement and forfeiture)

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Would a corporation approach compliance differently if it had previously been prosecuted by the DOJ?

- How?
- Does a pre-existing CIA affect the analysis?
- Does it matter if the company had merely been investigated, as opposed to being prosecuted?

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How can a company and its compliance professionals help their company best position itself in this type of environment ?

- Make sure compliance is adequately funded, empowered, independent and routinely testing and auditing
- If an issue is identified during routine audits, remediate quickly and thoroughly
- Conduct regular, updated trainings
- Regularly assess risk assessment management policies and practices based on the evolving nature of your business
- Conduct a properly scoped investigation based on any reported events
- Hold employees and executives appropriately accountable for any violation of policies
- Follow your own compliance policies

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QUESTIONS?

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