

Developments in Individual Criminal and Civil Culpability Post-Yates Memorandum

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Agenda

- 1 Format: A Conversation Between Three Current and Former Prosecutors
- 2 Goal: Insights on the How the "Yates Memo" Has Been Implemented
- 3 Questions Welcomed

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Yates Memorandum

- There were six mandates in the Yates Memo, but two in particular had the broadest potential impact.
  - First, DOJ adjusted its views on cooperation by a corporation.
    - Specifically, DOJ announced that companies had to provide *all* information they possess to assist in prosecuting any culpable individuals.
  - Second, the Yates Memo directed both criminal *and* civil prosecutors to fully consider individual culpability when resolving matters with corporations.

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Yates Memorandum

- In February 2018, Deputy AG reaffirmed that the policy of pursuing individuals where appropriate, and not just corporations, will be kept in place.
- The Deputy AG further explained that DOJ will review the policy and seek ways “streamline it, clarify it” where necessary in order to reduce any ambiguity and ensure consistent application throughout the Department

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Recent DOJ Cases

**Joint/Several Liability**

- eClinical Works (\$155M)
- Life Care Centers of America (\$145M)
- Prime Healthcare Services (\$65 million)
- Medstar Ambulance (\$13M)

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Recent DOJ Cases

**“Pure” Individual Liability**

- Health Diagnostics Lab Execs Kickbacks Violations
- Ohio Hospice FCA Settlement
- Curo Health Services Hospice Intervention
- Medicare Advantage COO settlement

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DOJ Focus On Individuals -- Criminal

- General perception: the Yates Memo sought to increase the odds of success in criminal prosecutions and broaden how senior executives could be held potentially accountable.
- An appreciable increase in the number of senior executives prosecuted criminally as a result of it?
  - High-profile acquittals: Root, Reichel
  - Convictions: Fabian, Facticeau
    - Park Doctrine Misdemeanors
  - Challenges criminally prosecuting senior executives: proving knowledge and agreement

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DOJ Focus On Individuals -- Criminal

- Defense counsel must consider at early stage of investigation.
- Meaning and importance of "cooperation"
- Complications during settlement
- Parallel investigation considerations
  - Issues re: "cross-designation"
- Importance of open and frank discussions with DOJ at early stage

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DOJ Focus On Individuals

- However, the second policy thrust – pushing civil individual resolutions – might be its most significant and lasting one.
- Acting Associate Attorney General Bill Baer discussed the impact of the Yates Memo on civil FCA investigations in a June 9, 2016 speech.
  - DOJ's commitment to individual accountability "applies with equal force and logic to the department's civil enforcement."
  - The threat of civil enforcement actions and the possibility that an executive or board member could be named personally and be subject to an injunction or be required to pay a sizable civil judgment provides a strong deterrent.
- In several significant resolutions over the past year, corporate executives have been named in settlements and/or made to reach their own settlements, with variety in what they were required to admit.

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DOJ Focus On Individuals -- Civil

- Suing individuals being evaluated more regularly
- Limited releases – not extending to individuals
- Settlements with individuals – either separate (stand-alone) agreement or joint-and-several liability – are typically in the same agreement as corporate entity
  - Driven largely by the covered conduct, i.e., whether the individual and corporate entity are resolving same or different claims
- Collectability and increased likelihood of ability-to-pay settlements with individuals
- Cooperation and other value provided by individuals and valuation of settlement with financially-limited individual
- eClinicalWorks example
- More lower-level/judgment-proof defendants

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DOJ Focus On Individuals -- Civil

- **MD2U**
  - A July 2016 settlement with MD2U, a home health provider, included the providers' three co-owners and top executives as parties to the settlement and required concessions from them as well as the company.
  - This \$21 million civil settlement included admissions of liability; both the company and the owners.
  - Under the terms of the settlement, the company agreed to pay approximately \$3 million within 10 days of the settlement, an additional \$3 million in installments over five years, and to make additional payments equal to a percentage of the company's net income over the next five years.
  - As for the individual defendants, until the company's obligations were paid, 50 percent of proceeds from a sale of those individuals' equity interest would be paid to the government. Similarly, 50 percent of any transfer from MD2U to the individual defendants outside of their normal salaries and business expense reimbursements would be paid to the government.

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DOJ Focus On Individuals -- Civil

- **NAHC**
  - On September 19, 2016, North American Health Care Inc. (NAHC) and two executives—its chairman of the board and a senior vice president of reimbursement—settled alleged FCA liability for a total of \$30 million.
  - Through the settlement agreement, NAHC agreed to pay \$28.5 million. Its chairman of the board and the senior vice president agreed to pay \$1 million and \$500,000, respectively.
  - However, nothing in the settlement agreement will prevent NAHC from indemnifying the two executives, and the agreement did not require that they be terminated.

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## DOJ Focus On Individuals -- Civil

- **Tuomey**

- A year after Tuomey Healthcare resolved a lengthy FCA litigation with DOJ for alleged Stark Law violations stemming from Tuomey's financial relationships with physicians, Tuomey's former CEO, Ralph "Jay" Cox III, entered a civil settlement through which he agreed to personally pay \$1 million.
- During the Tuomey trial, the government alleged that Cox ignored and suppressed warnings from a hospital attorney that the physician contracts were risky and raised red flags.
- The terms of the settlement require that Mr. Cox pay \$1 million and also that he be excluded for four years from participating in any federal healthcare programs.
- Cox did not admit any individual liability. However, unlike in the NAHC case, as part of the settlement, Cox was required to release Tuomey from any indemnification claims he may have had. The settlement also noted that the resolution was reached in reliance on financial disclosures made by the CEO to DOJ and thus it presumably reflected his "ability to pay."

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**QUESTIONS?**

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