

HCCA ATLANTA REGIONAL CONFERENCE

January 20, 2017


The Yates Memo and Recent OIG Guidance on Permissive Exclusion: The New Reality for Providers

Phyllis Sumner
Partner
King & Spalding

Amy Berne
Chief, Civil Division
USAO Northern District of GA


KING & SPALDING

Yates Memorandum (September 9, 2015)

 U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General Washington, DC 20530
September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND
NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL
SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES
TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates 
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

KING & SPALDING

Yates Memorandum

- Deputy Attorney General Sally Quillian Yates issued a memorandum regarding individual accountability for corporate wrongdoing
- Provides guidance for both civil and criminal investigations
- Emphasizes the need to hold individuals who perpetrated corporate wrongdoing accountable, “particularly in the aftermath of the financial crisis”

Six Principles of the Yates Memo

- 1) **To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in the misconduct under investigation.**
- 2) **The Department’s criminal and civil corporate investigations should focus on individuals from their inception.**

Six Principles of the Yates Memo

- 3) Criminal and civil attorneys handling corporate investigations should routinely communicate with one another.**
- 4) Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.**

Six Principles of the Yates Memo

- 5) Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases should be memorialized in writing.**
- 6) Civil attorneys should consistently focus on individual liability as well as entity-level liability and should look beyond the question of an individual's ability to pay in evaluating whether to bring suit against that individual.**

Discussion – “The Big Picture”

- What is the intended impact?
 - More cooperation for the government?

- Potential unintended consequences?
 - Less cooperation for companies?
 - Less effective internal investigations?

Potential Consequences

- Will outside counsel need to enhance their *Upjohn* warnings to employees during interviews?
- What if employees refuse to be interviewed?
- Does the Memo encourage employees to seek individual counsel earlier and more often?
- Will individuals attempt to place restrictions on being interviewed?

Potential Consequences

- How will the Memo impact settlement discussions?
- Will companies be willing to settle matters with DOJ while cases are still pending against their (indemnified) individual employees?

Updated OIG Permissive Exclusion Authority

(April 18, 2016)

Criteria for implementing section 1128(b)(7) exclusion authority
April 18, 2016

Preamble

Under section 1128(b)(7) of the Social Security Act (the Act), the Office of Inspector General (OIG) of the U.S. Department of Health and Human Services may exclude any individual or entity (collectively, "person") from participation in the Federal health care programs for engaging in conduct prohibited by sections 1128A or 1128B of the Act. In 1997, OIG published a policy statement with non-binding criteria to be used by OIG in assessing whether to impose exclusion under section 1128(b)(7). See 62 Fed. Reg. 67,392 (December 24, 1997). Since the original publication of the policy statement, OIG has used these criteria to evaluate whether to impose exclusion under section 1128(b)(7); release this authority in exchange for integrity obligations with OIG, within this document we refer to both "integrity obligations" or corporate integrity agreements (CIA) interchangeably; or take some other approach. OIG solicited information and recommendations for revising these criteria on June 27, 2014. OIG received five comments from the public. Based on its experience in evaluating persons for exclusion and on the comments received in response to the solicitation, OIG has revised the non-binding criteria for use in evaluating exclusion under section 1128(b)(7).

Updated OIG Permissive Exclusion Authority

OIG revised policy statement containing the new criteria that OIG intends to use in implementing permissive exclusion authority under 42 U.S.C.A. § 1320a-7(b)(7) (Revised Policy).



Updated OIG Permissive Exclusion Authority

• Examples of Key Aspects of the Revised Policy

- Individual Accountability
 - In the case of an individual, if the individual organized, led, or planned the unlawful conduct, this indicates higher risk
 - In the case of an entity, if individuals with managerial or operational control at or on behalf of the entity organized, led, or planned the unlawful activity, this indicates higher risk
 - If the person's cooperation resulted in criminal, civil, or administrative action or resolution with or against other individuals or entities, this further indicates lower risk

Updated OIG Permissive Exclusion Authority

- **Examples of Key Aspects of the Revised Policy**

- Internal Investigations

- If the person initiated an internal investigation *before becoming aware of the Government's investigation to determine who was responsible for the conduct*, and shared the results of the internal investigation with the government, this indicates lower risk
- *If the person self-disclosed the conduct cooperatively and in good faith as a result of the internal investigation, prior to becoming aware of the Government's investigation*, this indicates lower risk

Questions