

HCCA ATLANTA REGIONAL CONFERENCE

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

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**Yates Memorandum
(September 9, 2015)**

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

Memorandum
September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTI-CORRUPTION DIVISION;
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION;
THE ASSISTANT ATTORNEY GENERAL, FEDERAL SENTENCES;
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND
NATURAL RESOURCES DIVISION;
THE ASSISTANT ATTORNEY GENERAL, NATIONAL
RECOVERY DIVISION;
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION;
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION;
THE DIRECTOR, SECURITIES AND EXCHANGE COMMISSION;
THE INSPECTOR GENERAL, OFFICE OF INSURANCE REGULATION;
THE INSPECTOR GENERAL, OFFICE OF OVERSIGHT AND
RECOVERY;
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates, Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

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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”

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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)

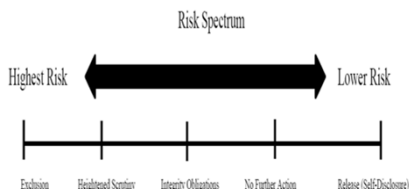
Criteria for implementing section 11280(b)(7) exclusion authority
April 18, 2016

Executive Summary

Under section 11280(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 11280(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 11280(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 11280(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

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Questions
