

Current Issues on Individual Exposure, Risk Assessments, Internal Investigations, and Self Disclosures

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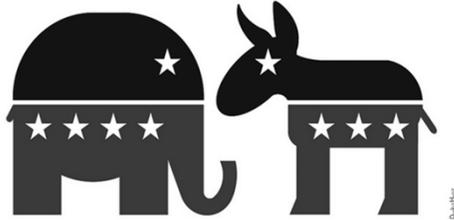


Objectives

- Post Yates Memo: What compliance professionals need to know
- Tips on conducting internal investigations and risk assessments
- How Compliance can best collaborate with Legal on self-disclosures



The US Election's Impact on Compliance



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Government Enforcement Trends

- More rigorous approach to pursue individual actors for liability
- DOJ has recovered over \$16.5 billion in health care fraud since January 2009
- Large increase in FCA penalties amount
 - \$5,500 - \$11,000 to \$10,781.40 - \$21,562.80 per claim



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The Yates Memo

“One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing . . . [accountability] it deters future illegal activity, it incentivizes changes in corporate behavior . . . and it promotes the public’s confidence in our justice system.”

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The Yates Memo (cont.)

DOJ's Key Steps to Implementing Yates Memorandum

- Corporations must provide all relevant facts relating to the individuals responsible for the misconduct in order to qualify for cooperation credit
- Focus on individuals from the inception of criminal or civil corporate investigation
- Close coordination between DOJ criminal and civil attorneys
- DOJ will not release culpable individuals from civil or criminal liability when resolving a matter (absent extraordinary circumstances or DOJ policy)
- Resolution with corporation should not occur without clear plan to resolve related individual cases
- Civil attorneys should focus on individuals and evaluate whether to bring suit against individual based on consideration beyond individual's ability to pay



Yates Memo - Key Implications

- Shifts burden to company to focus its internal investigation on individuals
- Facts may be interpreted more negatively from outset
- Increased bureaucratic oversight
- More stern "Upjohn Warnings" to employees
- May receive less cooperation from employees
- Increased pressure to waive privilege/work product with respect to individuals
- Whistleblowers may increase



Compliance Officer's Authority



Are Compliance Professionals at Risk?

- Compliance professional's obligations
- Training/preparing the Board
- Conducting a risk assessment



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Risk Assessment Resource Guide

- **Compiled semi-annually and the areas covered include:**
 - The status of ongoing Compliance initiatives
 - Key changes and updates to pertinent rules and regulations
 - Risk profile chart
 - Health System financial data and benchmarks



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Risk Assessment Resource Guide (cont.)

- Government audit data trends and Health System government audits
- Internal audits conducted
- Health System voluntary disclosures
- Health System developments
- Compliance Help-Line trend analysis



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Determining Potential Risk Areas

- Interviews of key personnel
- External work plans from OIG and OMIG are reviewed
- Prevalent industry topics also reviewed
- Internal data mining, through third party software
- Financial data is assessed to evaluate reimbursement trends
- Audit items that pertain to the Health System are placed on a "potential audit" list
- Prior year audits/re-audits



Data Mining

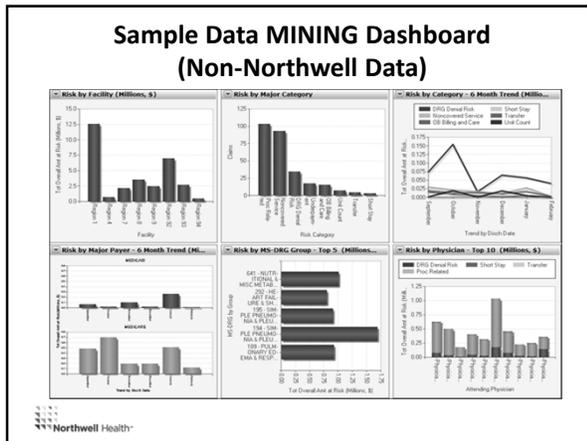
- Federal/state governments investing heavily in data mining tools
- What is "data mining" and how does it relate to risk assessments?
- Types of data mining algorithms/reviews
 - RAC
 - OIG/OMIG work plans
 - External reports (e.g., Medicare Compliance Report)
 - Help Line calls
 - Internal inquires



Data Mining (cont.)

- Identified data mining risk areas often do not equate to errors
- Data mining software can validate data is within a normal range
- Lots of options to perform data mining internally or externally





Investigation Tips

- Inform management early, but not for every complaint
- Don't jump to conclusions or rush to finish Get internal/external counsel involved early on when appropriate
- Hire experience staff or invest in training
- Stay in control of the investigation
- Be mindful of resources and time
- Document the investigation
- Involve Risk Management

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Tips on Self Disclosures

- Which federal or state agencies to disclose to?
- Factors to consider
- <https://oig.hhs.gov/compliance/provider-compliance-training/files/HandoutSD>

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Short Case Study – Debbie’s Dilemma

- Debbie, a contractor in ThisCo’s IT Department called the company’s compliance hotline to report that the General Counsel (GC) has colluded with the CFO, with whom he is also having an affair, by advising the CFO that it is acceptable to submit inaccurate information on the company’s tax forms.
- Debbie did not provide much detail about the allegations, but provided an email from the GC to the CFO which contained credible information supporting her allegations.
- Debbie was inadvertently included on the email since she has the same last name as the GC. Debbie is not related to the GC.
- The Compliance Officer reviews hotline complaints and reports into the Board and the General Counsel.



Audience Question?

Who should the compliance officer report the issue to first:

- (a) GC
- (b) CFO
- (c) Board
- (d) CEO
- (e) Someone else



Audience Question

Who should manage the investigation:

- (a) Board
- (b) Outside Counsel
- (c) Compliance Officer
- (d) a & c
- (e) a, b, & c
- (f) Someone else



Audience Question

If there is potential merit to the allegations, should the company provide separate counsel to the GC and CFO:

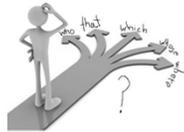
- (a) yes
- (b) no



Audience Question

Should the company place the entire investigation under privilege:

- (a) yes
- (b) no
- (c) only the tax form issue



Audience Question

Should the company agree to waive privilege if there is a government investigation:

- (a) yes
- (b) no



Audience Question

If we assume that the financial damages are minimal and that the main issue is embarrassment to the company, should the company agree to waive privilege in a government investigation:

- (a) yes
- (b) no



Thank You

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