Holding Individuals Accountable: The Yates Memo and Recent OIG and DOJ Compliance Guidance

Diane M. Signoracci
614.227.2333
dsignoracci@bricker.com

Chris Bennington
513.870.6572
cbennington@bricker.com

AGENDA

- Yates Memo
  - Background
  - 6 Key Steps and FAQ
  - Examples of Civil and Criminal Enforcement
  - Recommendations
- DOJ: Evaluation of Corporate Compliance Programs
- OIG: Measuring Compliance Program Effectiveness

BACKGROUND

On September 9, 2015, Sally Yates, former Deputy Attorney General, authored a Memo on "Individual Accountability for Corporate Wrongdoing."

> "One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing."

DOJ PURSUIT OF INDIVIDUALS FOR CORPORATE WRONGDOING: 6 KEY STEPS

Bricker & Eckler ATTORNEYS AT LAW

"The Yates Memo" sets forth **six "key steps"** that DOJ attorneys should follow for the prosecution of individuals when reviewing corporate fraud and abuse in both criminal and civil context:

(1) To receive any cooperation credit, a corporation must provide **all relevant facts relating to the individuals responsible** for the misconduct;

(2) Both criminal and civil investigations should **focus on holding individuals accountable from the inception** of the investigation in cases;

(3) **DOJ criminal prosecutors and civil attorneys** handling corporate investigations should **engage in early and regular communication** with one another;

(4) **Settlement with a corporation will not release culpable individuals** from civil or criminal liability absent "extraordinary circumstances or approved departmental policy";

(5) **Corporate cases should not be resolved without addressing the liability of culpable individuals** before the statute of limitation expires, and any decisions not to prosecute individuals must be memorialized; and

(6) Civil attorneys should focus on individuals as well as the company and **evaluate whether to bring suit against individuals based on considerations beyond the individual's ability to pay**.

Yates Memo Goals:

(1) to increase financial recovery against individuals, and

(2) to deter future misconduct by individuals.

Shift in Enforcement as described by former United States DAG Yates:

First, we made clear that providing information about individual wrongdoers is a **threshold requirement** for any corporate cooperation – without it, no cooperation credit is available.

Second, we changed the way that we approach civil enforcement against individuals, especially by encouraging our attorneys to pursue civil charges where warranted even if a defendant may not have full ability to pay a judgment.

And **third**, we increased the difference between the credit a corporation receives for voluntary self-disclosure and the credit it gets if the company was aware of wrongdoing but failed to cooperate until after the government came knocking.

YATES MEMO: IMPACT ON FCA SETTLEMENTS

Bricker & Eckler ATTORNEYS AT LAW

Hospitals and other health care organizations will now be required to **identify all individuals involved in the misconduct**, and provide all facts relating to the misconduct, **including facts revealed in an internal investigation**, to obtain credit for cooperating.

Global settlements in which the United States agrees to a corporate resolution and waives its right to pursue individuals will be rare.

FAQ: CORPORATE COOPERATION AND THE INDIVIDUAL ACCOUNTABILITY POLICY

Bricker & Eckler ATTORNEYS AT LAW

Q1: How did the Individual Accountability Policy change the requirements of corporate cooperation?

A1: Before the Individual Accountability Policy (the "Policy") took effect, the United States Attorneys' Manual ("USAM") identified a company's "willingness to provide relevant information and evidence and identify relevant actors" as one of several factors that a prosecutor "may consider" in determining the nature and extent of the company's cooperation. Thus, a company could be eligible for **some degree of cooperation credit** even if it hadn't disclosed basic facts about who did what.

Under the Policy, a company must turn over all non-privileged relevant information about the individuals involved in the misconduct in order to receive **any consideration for cooperation**. This is a threshold requirement, and unless it is satisfied, the company will be ineligible for cooperation credit.

FAQ: Corporate Cooperation and the Individual Accountability Policy, cont'd

Q2: What else is a cooperating company required to do?

A2: If a company seeks mitigation credit for cooperation, it must turn over all non-privileged relevant information about the individuals involved in the misconduct in order to satisfy the **threshold requirement for that credit**.

The actual cooperation credit that a company ultimately receives, however, will depend on a number of additional factors. These include the **timeliness** of the cooperation, the **diligence**, **thoroughness and speed** of the internal investigation, and the **proactive** nature of the **cooperation**. See USAM 9-28.700; see also USAM 9-28.710 fn. 1 ("There are other dimensions of cooperation beyond the mere disclosure of facts, such as providing non-privileged documents and other evidence, **making witnesses available** for interviews, and **assisting in the interpretation** of complex business records.").

FAQ: Corporate Cooperation and the Individual Accountability Policy, cont'd

Bricker & Eckler ATTORNEYS AT LAW

Q3: What is a cooperating company not required to do?

A3: Receiving cooperation credit is in **no way contingent on a waiver of either the attorney-client or the work product privilege**.

- Cooperation does not mean that a company should conduct an overly broad investigation or embark on a lengthy, costly investigation every time it learns of misconduct. DOJ expects companies to carry out investigations that are thorough but tailored to the scope of the wrongdoing.
- A company also is not required to deliver a prosecutable case in order to obtain credit for cooperation.
- A company's counsel is not required to present its conclusions about the culpability of any individual or its legal theories to the government.
- A company is not required to take specific actions against employees as part of its efforts to obtain cooperation credit. However, "prosecutors should consider … whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct."

FAQ: Corporate Cooperation and the Individual Accountability Policy, cont'd

Q4: When should a company report misconduct?

A4: DOJ "encourages early voluntary disclosure of criminal wrongdoing … even before all facts are known to the company, and does not expect that such early disclosures would be complete." USAM 9-28.700. Once a company has made a preliminary assessment that criminal conduct has likely occurred, it should promptly report the matter to the government if it desires mitigation credit for voluntary self-disclosure. . . . It is expected that, in circumstances where the company self-discloses before all facts are known, the company will continue to turn over additional information to the government as it becomes available. *Id*.

FAQ: Corporate Cooperation and the Individual Accountability Policy, cont'd

Bricker & Eckler ATTORNEYS AT LAW

Q5: What happens if a company cannot determine who did what within the organization or is prohibited from providing that information to the government?

A5: In such circumstances, the Principles state that "the company seeking cooperation will bear the **burden of explaining the restrictions** it is facing to the prosecutor." The prosecutor will make a determination, based on all the circumstances, about the validity of the claim, and discuss an appropriate resolution with company counsel. A company should identify any such concerns and convey them to the prosecutor as early as possible in the investigation.

In instances where there is a **claim of privilege** over one or more relevant facts, counsel for the company must let the prosecutor know about the existence of and basis for such a claim, so that the prosecutor is aware that there are relevant facts that are not being provided and has an opportunity to understand the basis for the claim of privilege.

FAQ: Corporate Cooperation and the Individual Accountability Policy, cont'd

Bricker & Eckler ATTORNEYS AT LAW

Q6: Can a cooperating company enter into a joint defense agreement with individuals' counsel?

A6: "The mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements." USAM 9-28.730. Of course, entering into such an agreement has the potential to complicate a corporation's ability to cooperate, and, therefore, the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit. Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired.

FAQ: Corporate Cooperation and the Individual Accountability Policy, cont'd

A6, cont'd:

Ultimately, "[c]orporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate."

Additional information may be found at the DOJ website, which is posted at https://www.justice.gov/dag/individual-accountability

INDIVIDUAL ACCOUNTABILITY- DOJ ENFORCEMENT GOING FORWARD

Bricker & Eckler ATTORNEYS AT LAW

Former Deputy AG Yates, speaking at the International Conference on the Foreign Corrupt Practices Act in Washington, on 11/30/16 said the increase in civil and criminal prosecution of individuals for corporate fraud would accompany “high-dollar resolutions” with the Department of Justice.

Attorney General Jeff Sessions on April 24, 2017: “The DOJ will continue to emphasize the importance of holding individuals accountable for corporate wrongdoing.”

Examples of Civil Enforcement under the Yates Directive

MD2U:

- July, 2016 FCA settlement
- MD2U, a home health provider, agreed to pay $21,511,756 over 10 years for submitting claims for patients who were not homebound and for services that were either not medically necessary or upcoded.
- The settlement named three co-owners and top executives as individual defendants and required them to pay the government 50% of any sales proceeds or revenue distributions from MD2U until MD2U's obligations to the government were satisfied.

Examples of Civil Enforcement under the Yates Directive, cont'd

Bricker & Eckler ATTORNEYS AT LAW

NAHC:

- September 19, 2016 FCA settlement
- North American Health Care Inc. (NAHC) and two executives – the chairman of the board and a senior VP of reimbursement – agreed to pay $30 Million for rehabilitation services alleged to be medically unnecessary.
- The chairman of the board and the senior VP's individual responsibility for payment was $1 million and $500,000 respectively.

Examples of Civil Enforcement under the Yates Directive, cont'd

Bricker & Eckler ATTORNEYS AT LAW

Tuomey Healthcare System:

- September 2016, a year after Tuomey Healthcare entered into a $72.4 Million settlement for alleged Stark violations stemming from Tuomey's financial relationships with employed physicians.
- Tuomey's former CEO entered a civil settlement to personally pay $1 million and to be excluded for four years from federal health care programs.
- The government alleged that the CEO ignored and suppressed warning from a hospital attorney that physician contracts raised red flags under Stark.
- The CEO also was required to release the hospital system from any indemnification obligations toward him.

Examples of Civil Enforcement under the Yates Directive, cont'd

Bricker & Eckler ATTORNEYS AT LAW

East Texas Medical Center Regional Healthcare System:

- January 23, 2017, the U.S. Attorney's Office for the Eastern District of Texas filed a complaint in intervention in a qui tam action against a health system operated ambulance service.
- Alleged wrongful conduct: the payment of kickbacks to Oklahoma's Emergency Medical Services Authority (which controlled ambulance service contracts for Oklahoma City and Tulsa, Oklahoma).
- The original whistleblower complaint did not identify any individual defendants. The government added the president of the Emergency Medical Services Authority as a co-defendant.

Bricker & Eckler ATTORNEYS AT LAW

Norman Regional Health System:

- April 11, 2017
- Hospital, COO and six radiologists will pay $1.6 million to settle qui tam allegations that the radiologists had submitted claims for services that had been performed by radiological practitioner assistants without the appropriate level of supervision.
- COO "abdicated his responsibility and authority to prevent or correct the false billings".

Examples of Civil Enforcement under the Yates Directive, cont'd

Bricker & Eckler ATTORNEYS AT LAW

Freedom Health Inc.:

- May 30, 2017
- Florida-based provider of managed care services, and related companies will pay $31,695,593 to settle claims under the False Claims Act.
- Qui tam action alleges they took part in illegal schemes to maximize their government payments.
- Former Freedom Health Chief Operating Officer will pay $750,000 to resolve claims regarding his alleged role in one of the schemes. (*United States ex rel. Sewell v. Freedom Health, Inc*., M.D. Fla., No. 8:09-cv-1625, dismissed 5/26/17).

Examples of Civil Enforcement under the Yates Directive, cont'd

Complementary Support Services:

- May 30, 2017
- A Minnesota mental health-care firm and two of its principals agree to pay $6.3 million to resolve a government forfeiture mandate and settle qui tam claims they violated the False Claims Act by filing fraudulent Medicaid claims (*United States ex rel. Schwandt v. Complementary Support Services*, D. Minn., No. 13-cv-01018, announced 5/30/2017).
- The complaint alleged that the company and its principals violated clinical supervision requirements in part by (i) hiring unlicensed health care providers and (ii) batch-signing thousands of fraudulent Medicaid claims for payment.
- The Company's principals agreed to pay $4.52 million to revolve the allegations, and the government retained an additional $1.75 million in a separate negotiated civil forfeiture resolution regarding one of the principals' alleged transfer of about $2 million in Medicaid funds from Minnesota to Wisconsin for personal use.
- The settlement also bars both principals from participating in state health-care programs for at least five years.
- The company ceased operations in July, 2016.

Examples of Civil Enforcement under the Yates Directive, cont'd

eClinicalWorks

- May 31, 2017
- $155 million settlement to resolve a False Claims Act lawsuit.
- Original whistleblower complaint alleged "ECW falsely represented to its certifying bodies and the United States that its software complied with the requirements for certification and for the payment of incentives under the meaningful use program."
- Complaint also charged that "ECW paid kickbacks to certain customers in exchange for promoting its product," in violation of the anti-kickback statute.
- Settlement amount split among 3 founders of company individually, and company.
- Developer and 2 technicians also to pay additional individual settlements.

Bricker & Eckler ATTORNEYS AT LAW

Integrated Medical Solutions Inc. (IMS):

- June 5, 2017
- IMS and its former President agree to pay United States $2.475 Million.
- Resolves False Claims Act and Anti-kickback Act allegations in connection with federal contracts obtained from the U.S. Bureau of Prisons.

Criminal Enforcement under the Yates Directive

Forest Park Medical Center:

- As part of a 2013 FCA settlement, Forest Park agreed to cooperate with an ongoing federal investigation into certain individuals who may have been tied to the scheme.
- December, 2016, three years after this bankrupt, physician-owned hospital system in Texas entered into a $258,000 settlement for alleged kickback violations.
- DOJ filed a criminal indictment against 21 individuals including hospital owners, managers, physicians, advertising executives and a workers compensation lawyer, alleging that payments were made to induce out-of-network referrals and other patient referrals.
- Referred patients were primarily ones with high reimbursing out-of-network private insurance benefits or benefits under certain federally-funded programs, including the Federal Employees Compensation Act.

Criminal Enforcement under the Yates Directive, cont'd

Bricker & Eckler ATTORNEYS AT LAW

Tenet Healthcare:

- January, 2017: Four months after Tenet entered into a $513 Million settlement with the government in October, 2016, which included an admission of guilt by two subsidiaries and non-prosecution agreement conditioned on Tenet cooperating in continuing investigations of individuals.
- The government indicted a senior vice president of Tenet on four fraud counts in relation to a Medicaid patient referral scheme from 2000 to 2013.
- Charges based in part on alleged false certifications under CIA.
- Charges carry a maximum prison sentence of 50 years and significant monetary penalties.
- The government also filed notices of forfeiture against two homes owned by the executive.
- The Tenet investigation began as a whistleblower lawsuit.

Criminal Enforcement under the Yates Directive, cont'd

Insys Therapeutics, Inc.:

- December, 2016
- The indictments of six former executives of Insys, including the CEO, alleged to have engaged in a RICO, mail fraud and AKS conspiracy to bribe physicians to prescribe the company's fentanyl-based drug.
- No charges were brought against the company, which released a statement saying that it was cooperating with all relevant authorities in ongoing investigations.
- Two former Insys sales representatives, including the wife of its ex-CEO, have since pleaded guilty to engaging in schemes to pay kickbacks to medical practitioners to prescribe a drug containing the opioid fentanyl.
- Two physicians, convicted of receiving $115,000 in kickbacks from Insys in the form of speaking fees, were each subject to a $5 Million criminal forfeiture. The government declined to intervene in the whistleblower FCA lawsuit brougth by a former employee of the physicians, but instead initiated the criminal prosecution against the physicians and the Insys executives.
- The USDC for S. D. Ala declined to permit the whistle-blower to share in the criminal fines.

City Medical Associates:

- March 1, 2017
- Government intervened in FCA case against cardiology and neurology practice alleging kickback scheme and illegal searches of hospital EMR to identify patients to recruit. *U.S. ex rel Kelly v. City Medical Associates* (S.D.N.Y., No. 1:15-cv-7261)
- Same day DOJ filed criminal charges against 6 defendants including 2 physicians

DOJ-FCA Settlement Agreement Language

"**Hospital agrees to cooperate fully and truthfully with the United States' investigation of individuals and entities not released** in this Agreement. Upon reasonable notice, Hospital shall encourage, and agrees not to impair, the cooperation of its directors, officers, and employees, and shall use its best efforts to make available, and encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. Hospital further agrees to furnish to the United States, upon request, complete and un-redacted copies of all non-privileged documents, reports, memoranda of interviews, and records in its possession, custody, or control concerning any investigation of the Covered Conduct that it has undertaken, or that has been performed by another on its behalf, subject to the requirements of applicable federal and state laws and regulations."

Recommendations Going Forward

- Internal investigations should be conducted under attorney-client privilege.
- Internal investigations need to specifically focus on individual culpability and include a risk analysis related to individual misconduct.
- Hospital counsel should consider the impact on individual employees at the start of any self-disclosure investigation, and the need for separate counsel for employees, when individual misconduct is identified.
- Employees should be provided an *Upjohn* warning -
  - the attorney-client privilege over communications between the attorney and the employee belongs solely to, and is controlled by, the company.
  - the company may choose to waive the privilege and disclose what the employee informs the attorney to a government agency or any other third party.

Recommendations Going Forward, cont'd

- Hospital counsel and individuals' counsel must be clear when entering into joint defense agreements and when conducting interviews about whether the interview is taking place pursuant to a joint defense agreement or for purposes of potential cooperation with the government.
- D&O coverage should be reviewed to determine the scope of coverage for executives in the context of FCA investigations and notice of claim requirements.
- Hospital executives and Board members should be counseled on the DOJ's focus on individual accountability.

DOJ: Evaluation of Corporate Compliance Programs

- Issued February 2017
- Outlines DOJ expectations for effective compliance programs
- Will be utilized by DOJ when conducting criminal investigations
- Contains 11 compliance program evaluation topics with corresponding “common questions”
- Key topic for leadership: “Senior and Middle Management”

Bricker & Eckler ATTORNEYS AT LAW

Conduct at the Top

- Have senior leaders (through words and actions) encouraged or discouraged misconduct?
- What concrete actions have they taken to demonstrate leadership in compliance and remediation efforts?
- How is senior leadership's behavior monitored?
- How has senior leadership modeled proper behavior to subordinates?

Bricker & Eckler ATTORNEYS AT LAW

Shared Commitment

- What specific actions have other stakeholders (e.g., business and operational managers, Finance, Procurement, Legal, HR) taken to demonstrate their commitment to compliance, including remediation efforts?
- How is information shared among different components of the company?

DOJ: Evaluation of Corporate Compliance Programs

Bricker & Eckler ATTORNEYS AT LAW

Oversight

- What compliance expertise has been available on the board of directors?
- Have the board and/or external auditors held executive or private sessions with the compliance and control functions?
- What types of information have the board and senior management examined in their exercise of oversight in the area in which misconduct occurred?

Bricker & Eckler ATTORNEYS AT LAW

Other Topics

- Communications: What have senior leaders done to communicate the company's position on misconduct to employees?
- Investigation Findings: Have results been used to identify accountability lapses among senior leaders? How high up in the company do findings go?
- Accountability: Are leaders held accountable for misconduct that occurs under their supervision?

Bricker & Eckler ATTORNEYS AT LAW

Other Topics

- Internal Audit: Are audit findings and remediation progress reported to senior leaders on a regular basis? Do the leaders follow up on these reports?
- Third Party Risk: Are managers responsible for third party relationships trained on how to identify and manage compliance risks?
- Autonomy: Do senior leaders permit the Compliance Officer to maintain a direct reporting relationship to the Board?

OIG: Measuring Compliance Program Effectiveness

- Issued March 27, 2017
- Developed during a roundtable meeting attended by OIG and a group of compliance professionals (HCCA)
- Goal: provide a large number of ideas for measuring the elements of a compliance program
- Published list includes more than 400 metrics
- Not meant to be used as a “checklist”; using all or most of the metrics in a given year is “impractical and not recommended”

OIG: Measuring Compliance Program Effectiveness

Element 1: Standards, Policies and Procedures

- Do leaders participate in policy formulation/review when appropriate?
- Do leaders understand the requirements set forth in the Compliance policies and Code of Conduct?
- Do leaders take responsibility for implementing and following policies?

OIG: Measuring Compliance Program Effectiveness

Element 2: Compliance Program Administration

- Do all members of senior leadership receive information directly from Compliance Officer?
- Do leaders promote compliance in town halls, presentations, newsletters, etc?
- Do leaders complete audit/review items within established timeframes?
- Do senior leaders support the Compliance team?
- Do leaders have concrete compliance deliverables other than training and following Code of Conduct?

OIG: Measuring Compliance Program Effectiveness

Element 3: Screening and Evaluation of Employees and Vendors

- Do leaders clearly articulate employees' compliance obligations and measure performance against those requirements?
- Do leaders understand conflicts of interest and fully disclose any conflicts?

OIG: Measuring Compliance Program Effectiveness

Element 4: Communication, Education, and Training

- Is there a formal program to orient senior leaders to the compliance program and their obligations and responsibilities?
- Do senior leaders adjust strategy and operations in response to compliance training and other compliance guidance?
- Do leaders/managers discuss Code of Conduct and related compliance responsibilities with employees?
- Does the organization reward/recognize leaders for compliance activities?
- Do leaders include a Compliance representative in all senior- and governance- level meetings?

OIG: Measuring Compliance Program Effectiveness

Element 5: Monitoring, Auditing, and Internal Reporting

- Does leadership participate in risk resolution?
- Is management (not compliance) responsible for corrective action plans?

Element 6: Discipline for Non-Compliance

- Is there a leadership scorecard that includes compliance metrics?
- Does Compliance Officer participate in senior leader performance reviews?

OIG: Measuring Compliance Program Effectiveness

Element 7: Investigations and Remedial Measures

- Are compliance investigations and results reported to senior leaders?
- Are leaders accountable for follow-up to investigations?
- Do leaders/managers follow up on reports of compliance concerns and take appropriate action when necessary?

Bricker & Eckler
ATTORNEYS AT LAW

Questions?