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FAST BREAK:

**GOVERNMENT ENFORCEMENT
OF INDIVIDUAL
ACCOUNTABILITY**

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Discussion Agenda

- Individual liability creep into the C-Suite and Board Room.
- Government mandates to prosecute individuals civilly and administratively in addition to potential criminal liability.
- Significant impact on navigating government controversies.
- If, how and when to identify individuals for prosecution in government investigations. The stakes are high.



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Legal Baseline

- Companies act through individuals and government prefers to hold individuals accountable for corporate wrong-doing.
- In heavily regulated sectors, individual culpability is difficult to prove under criminal standards of proof. Most common prosecution result is a Deferred or Non Prosecution Agreement against company with large fine and compliance mandates. Sometimes a parallel civil or administrative result.
- Many question why no individuals are held accountable for large health care fraud and financial fraud schemes. Data is mixed. *2016 DOJ Fraud Section Report* shows robust criminal prosecutions of individuals. Same for *FY 2016 DOJ/OIG Health Care Fraud Report*.
- Growing pressure to develop prosecutorial focus on individuals. In September 2015, DOJ issued Individual Accountability for Corporate Wrongdoing Memo (Yates Memo) to expressly establish new corporate cooperation standards that include cooperating to help prosecute individuals.
- Yates memo did not transform criminal investigations which always had an individual emphasis but will have its largest impact on civil and administrative investigations.
- USAM amended to incorporate Yates memo in both criminal (section 9-28.00) and civil (section 4-3.100) prosecution guidance.

Legal Baseline

➤ DOJ 2016 Fraud Section Report:

- 300 individuals charged and 201 convicted. One prominent acquittal: Vascular Solutions and its CEO.
- \$1.51 billion in corporate fines and \$7.8 billion in resolutions to US and foreign governments.
- FCPA, SEC and HCF prosecutions predominate resources and results.

➤ DOJ/OIG 2016 HCFAC Program Report:

- 802 defendants charged in 480 criminal cases, along with 930 new civil health care fraud investigations opened.
- Exclusions by OIG of 3,635 individuals and entities – 1,362 based on criminal convictions related to Medicare/Medicaid.
- Recovery of \$3.3 billion in resolution of health care fraud judgments, settlements, and administrative proceedings.

Individual Liability

- Criminal liability may be direct or indirect.
- Conduct-based liability: FDCA, false statements, obstruction, anti-kickback, or conspiracy allegations.
- Indirect or strict liability based on responsible corporate officer doctrine (RCOD).
- Civil liability: False Claims Act for causing submission of false claim.
- Administrative: mandatory exclusion or debarment based on conviction of specified offenses. Permissive exclusion based on agency exercise of discretion of certain offenses, including RCOD.

Responsible Corporate Officer Doctrine

- First recognized in 1943 in **U.S. v. Dotterweich** – then again in **U.S. v. Parks**, -permits criminal liability for any corporate employee responsible for legal violations that impact public welfare for life and health if:
 - statute intended to improve common good; and
 - no culpable intent requirement (strict liability).
- More recently, used in FDA-focused and quality care prosecutions. Concept has broadly morphed to denote government perspective on individual accountability.
- DOJ issued new compliance guidance in 2017; emphasizes “conduct at the top”
 - assessment of Senior and Middle Management actions and words
 - requirements for both “commitment to compliance” and compliance oversight by BoD
 - M&A due diligence and successor obligations to detect wrong-doing.

False Claims Act -Individual Prosecutions

- False Claims Act broadly reaches those who submit and those who cause the submission of a false claim or false statement to pay a false claim.
- In the past, DOJ rarely pursued individuals for FCA liability and had inconsistent policy on if and when to give individual releases of liability for management and board. FCA is about money and individuals presumptively have no money to pay punitive damages.
- Yates memo has a civil fraud kicker. Now, official DOJ policy to bring FCA actions against individuals even if no reasonable expectation of financial recovery. Case should be pursued based upon seriousness of misconduct and sufficiency of evidence to sustain a judgment. Seismic and dubious change in policy.
- New DOJ FCA Settlement Provision has important ramifications to assess:
- ***"Company agrees to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, Company 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. Company further agrees to furnish to the United States, upon request, complete and unredacted 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."***

False Claims Act-Individual Prosecutions

- **National American Health Corp:** \$28.5 million corporate FCA settlement with individual liability settled against Board Chairman for \$1 million and the Sr. Vice President of Reimbursement for \$500,000.
- **Tuomey Health System:** \$245 million jury verdict resolved for \$72.5 million. CEO forced to settle individually for \$1 million and 4-year federal health care program exclusion.
- **OURLabs:** physician-owned laboratory resolved FCA kickback allegations with individual liability settled against CEO physician.

False Claims Act-Individual Prosecutions

- **Bank of Mellon:** \$714 million settlement related to advertising representations on foreign exchange transactions. Settlement required termination of a managing director.
- **Home Care Hospice:** \$8 million false billing settlement for hospice services; supervising admission nurse sentenced to over 1 year in prison and \$230,000 restitution for admission of ineligible patients
- Ongoing investigations are raising individual liability issues.

Administrative Sanctions Against Individuals

- Broad administrative sanctions in all regulated industry sectors.
- Enhanced resources to certain agencies to pursue administrative remedies.
- Oct. 2015 - HHS OIG Litigation Team -10 designated attorneys- to pursue civil monetary penalties against individuals for Stark Law, Anti-Kickback and False Claims violations. *IG v. Dinkel.*
- HHS OIG 2015: *Fraud Alert On Physician Compensation Arrangements targeting medical director relationships.*
- HHS OIG 2016: *Guidance on Permissive Exclusion. Rebuttable presumption of exclusion if decline a CIA-assessment of corporate detection of individual wrong-doing.*
- **HHS OIG Section 1128 (b)(15) Exclusion - Individual** owners who knew or should have known of the conduct that led to the sanction -
 - Officers and managing employees
 - of a “sanctioned entity.”

Ramifications Of Asserted Individual Liability

- Very early case assessment related to indemnity, D&O coverage and insurance notice, separate counsel, employment separation, and protecting privileges.
- Is Yates cooperation map the only road to choose? How best to implement cooperation and achieve best result?
- How are executives and Board members advised on potential liability beyond criminal-for civil and administrative liability. Corporate Miranda for the C-suite and Board.
- Gotcha warnings: subpoena compliance, preservation holds, letters to government, incomplete investigations, unprepared witnesses.



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Selected References

- **Yates Memo** - <https://www.justice.gov/dag/file/769036/download>
- **FAQ on the Yates memo and requirements for corporations** - <https://www.justice.gov/dag/individual-accountability/faq>
- **2017 DOJ Compliance Guidance** - <https://www.justice.gov/criminal-fraud/page/file/937501/download>
- **Guidance for Implementing Permissive Exclusion Authority (b)(7)-false claims-** <https://oig.hhs.gov/exclusions/files/1128b7exclusion-criteria.pdf>
- **Guidance for Implementing Permissive Exclusion Authority (b)(15)-individual -** https://oig.hhs.gov/fraud/exclusions/files/permissive_excl_under_1128b15_10192010.pdf
- **DOJ 2016 Fraud Section Report-** <https://www.justice.gov/criminal-fraud/page/file/929741/download>
- **DOJ-OIG FY 2015 Health Care Fraud Report-** <https://oig.hhs.gov/publications/docs/hcfac/FY2016-hcfac.pdf>

Thanks!



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Join us next month!

Please join us for next month's webinar:

"What a Federal Prosecutor really thinks about your Compliance Program" with Zane Memeger

➤ Thursday March 23, 2017 3:00 PM (EST)