

# Ethical Considerations in Internal Investigations: Title IX and Beyond

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# Presentation Overview

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- Enforcement and Compliance Trends
- Ethical Considerations in Internal Investigations
- The Yates Memo
- Title IX Investigations
- Implications for In-House and Outside Counsel
- Questions?

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# **ENFORCEMENT AND COMPLIANCE TRENDS**

# Dramatic Legal and Regulatory Compliance Burden

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- Institutions of higher education are among the most highly regulated entities in the country:
  - DOE, HHS, EPA, DOD, FDA, DOJ, FTC (and the alphabet soup goes on)
  - State attorneys general
  - Consumer protection agencies
- Violations of relevant statutes and regulations (even if technical and/or well-intentioned) can lead to significant fines, penalties and operational burdens
- Aggressive enforcement environment driven by federal and state whistleblower statutes, well-funded whistleblower attorneys and 24/7 news cycle

# Dramatic Increase in Title IX Enforcement

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- OCR vigorously enforces Title IX to ensure institutions that receive federal financial assistance from Dept. of Education comply with the law.
  - OCR evaluates, investigates and resolves complaints alleging sex discrimination.
  - OCR has authority to conduct compliance reviews to examine potential systemic violations based on sources of information other than complaints.
  - Ability to conduct compliance reviews limited by staffing concerns

# Dramatic Increase in Title IX Enforcement

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- Almost 270 institutions are or have been the subject of an OCR investigation for potential Title IX violations.
  - Investigations last one year, three months on average
  - Almost 20 percent of investigations have been resolved
- Clery Act amended by VAWA in 2013 to add more provisions requiring colleges and universities to prevent and respond to gender-based violence in a variety of ways.

# False Claims Act Enforcement

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- DOJ secured more than \$3.5 billion in False Claims Act settlements and judgments (FY2015)
  - Over 700 new FCA matters docketed (more than 600 of those matters filed by whistleblowers)
  - Almost \$2 billion in FCA settlements and judgments from health care industry
- Teaching hospitals and AMCs have been the subject of many high profile FCA enforcement actions
  - PATH audits
  - Financial relationships with “faculty” physicians
  - Clinical trial billing

# False Claims Act Enforcement

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- Research misconduct and misuse of federal grant funding continues to be a significant source of new FCA matters
  - \$20 million settlement for improperly charged salaries and admin costs
  - \$9 million settlement for charging AIDS research grants for work that was never performed
  - \$3 million settlement for using grant funds to cover personal expenses
  - \$500,000 settlement for false certifications on grant documents
  - \$500,000 settlement for false statements on grant applications
- Jail time for particularly egregious behavior

# FTC/DOJ Focus on For-Profit Institutions

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- For-profit colleges and universities targeted due to employment data, high-pressure recruitment tactics and other allegations:
  - \$96 million settlement with Education Management Corp. for illegal recruiting, consumer fraud and other allegations
  - \$68 million settlement with University of Phoenix (and more recent DOD recruiting ban)
  - FTC lawsuit against DeVry University for inflated employment statistics
  - FTC settlement with Ashworth College over career training allegations
- Query: What does trend mean for professional schools at not-for-profit colleges and universities?

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# **ETHICAL CONSIDERATIONS IN INTERNAL INVESTIGATIONS**

# What Events Should Trigger Investigation?

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- Always consider the nature and severity of the allegations
  - Did allegations come from a credible source?
  - Do allegations have a reasonable basis in facts?
  - How broad are the allegations?
  - Do allegations demonstrate a credible violation of an important company policy?
  - Do allegations include overtones of criminal misconduct?

# Overview of Investigative Process

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- Identify your client
- Determine nature of allegation
- Develop investigative plan
- Form investigative team
- Document hold and notice of rights
- Communication protocols to maintain privilege
- Identify relevant directors, officers, employees and others
- Consider joint defense and common interest agreements
- Find out what happened!

# Who is the Client?

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- Rules of professional conduct will generally specify that a lawyer employed or retained by an organization represents the organization
- In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer must explain who he or she represents when lawyer knows that the organization's interests are adverse
- A lawyer who represents an organization does not necessarily represent any constituent or affiliated organization, such as a parent or subsidiary

# Who Should Lead the Investigation?

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- Costs/benefits of in-house v. outside counsel
- Should outside counsel report to:
  - General counsel and/or management
  - Board of directors
  - Audit committee
  - Special committee of independent directors
- Factors to consider
  - Nature and scope of the alleged misconduct
  - Seniority of the individuals involved in conduct at issue
  - Need for specialized skills, expertise, resources

# Who Should be on the Investigative Team?

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- Makeup of team depends on nature of allegations
- Compliance officer and in-house counsel roles
- Engagement and participation by outside legal counsel
- Use of internal resources from billing, reimbursement and information technology departments
- Attorney-client privilege issues with outside consultants

# How to Address Ongoing Conduct?

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- A lawyer cannot assist a client in conduct that the lawyer knows is criminal or fraudulent
  - How can you discuss the legal consequences of any proposed course of conduct without violating this ethical obligation?
  - Critical distinction between presenting legal analysis and recommending how to conceal wrongdoing
- “When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate.”

# Witness Interviews

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- Common questions
  - Should I be talking to you?
  - Do I need my own lawyer?
  - Can I tell you something “off the record”?
  - Does this look bad for me?
  - What happens to me if I refuse to talk to you?
  - Can I talk to the government?
- Responses
  - Avoid any appearance of potential dual representation
  - Avoid comments that could be construed as “legal advice”
  - Avoid statements assessing interviewee’s position

# ***Upjohn Co. v. United States*, 449 U.S. 383 (1981)**

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- Upjohn warnings given verbally and/or in writing
  - Counsel represents corporation, not the individual
  - Counsel's obligations are to corporation, not individual
  - Conversation is privileged, but privilege belongs to the corporation and only the corporation
  - Corporation may waive its privilege and disclose what the individual tells the lawyer to anyone it chooses
- Consequences of failure to cooperate
  - Typically, permissible to terminate at-will employee
  - Tread lightly
- Memorialize warning in writing and confirm understanding

# Common Sticking Points

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- Can an employee assert the privilege independently?
- Will the company's interests diverge from an employee's interests? If so, when?
- Chilling effect from potential disclosure to third parties?
- Can company counsel represent both the company and a "constituent" of the company?
- Should the company provide indemnified legal services for employees?
- Does the privilege extend to interviews of former employees?

# How to Protect Privileged Material?

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- Contact lawyer at start of internal investigation to direct the investigations
- Affirmative steps to document and establish A/C privilege
- Give constituents clear Upjohn notices
- Legal counsel to engage consultants
- Document when non-lawyers acting under instruction of lawyer
- Limit discussions outside response team
- Mark emails and other documents “Attorney-Client Communication - Privileged and Confidential”
- Include lawyer in all communications **BUT REMEMBER** that just adding lawyer to an email will not automatically apply privilege

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# THE YATES MEMO

# Six Key Priorities

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- In order to qualify for any cooperation credit, organizations must provide all relevant facts relating to individuals responsible for the misconduct
- Focus on individuals from the inception of criminal and civil investigations
- Criminal and civil attorneys handling investigations should be in routine communication

## Six Key Priorities (continued)

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- Absent extraordinary circumstances, no releases from civil or criminal liability for culpable individuals when resolving a matter with an organization
- No resolutions without clear plan to resolve related individual cases
  - DOJ attorneys should memorialize reasons for declining to intervene against individuals in such cases
- Civil attorneys should consistently focus on individuals as well as on organizations and evaluate whether to bring suit against an individual based on considerations beyond ability to pay

# What's New?

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- Before a prosecutor can resolve a case against a corporation, he or she must set out a full discussion of what was done to establish a case against individuals
  - If prosecutor does not recommend bringing any charges against individuals, must explain why
- In order to get “any” credit for cooperation, organization must provide “all” information about individual wrongdoers
- Prosecutors are now instructed to bring civil actions against individuals in appropriate cases, regardless of ability to pay

# What Will Be Different?

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- Cases against organizations will take longer to resolve
  - Significant time and effort to determine whether a case can be made against an organization
  - Takes even longer to do that for an individual
- Decision to self-report and/or cooperate with the government will be much more complicated
  - Will always be important reasons to cooperate, but can corporations meet threshold required to earn credit?
  - Will there be a certification requirement?
- Cooperation may not speed up resolution due to collateral effects of related litigation and media issues

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# **TITLE IX INVESTIGATIONS**

# Title IX

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20 U.S.C. § 1681(a), states: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

- Title IX prohibits sex discrimination in educational institutions that receive federal funding. Under Title IX, *schools are legally required to respond and remedy hostile educational environments and failure to do so is a violation that means a school could risk losing federal funding.*

## Title IX (continued)

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- To maintain compliance, schools need:
  - To disseminate a notice of nondiscrimination;
  - To appoint a Title IX Coordinator and make that person's contact information available;
  - Adopt and publish a grievance procedure that addresses making a complaint, and the investigation and disciplinary process.

# Implementation of Title IX Policy and Procedures

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- Are your school employees properly trained?
- Does the school respond in a prompt manner?
  - What is “prompt” under the guidance? 60 days
- Under the Clery Act is your school notifying claimants of their reporting options?
- Is your school using the appropriate standard of evidence in disciplinary hearings?

# Is your Title IX Process Fair and Equitable?

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- Do both the claimant and respondent (accuser and accused) have equal rights?
  - Advisors
  - Witnesses and evidence
  - Timely access to information
  - Right to be present at pre-hearing meetings
  - Right to appeal

# Ethical Considerations for the Investigation

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- Maintain impartiality
- In its 2014 guidance, OCR indicated that all persons involved in implementing grievance procedures should have training or experience in effects of trauma, including neurobiological change.
  - This is important to understanding and using trauma-informed investigations and questioning.
- Identify your role in the process
- Address confidentiality issues
  - FERPA considerations
- Notify students of voluntary informal mechanisms for resolving claims, if available and appropriate, but also notify students of the right to end the informal process and be formal process

# Ethical Considerations for the Investigation

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- Focus on promoting safety and support
  - Advisors and supporters
  - Resources – counseling, medical, police/security
  - Interim measures
- Notify students of prohibition against retaliation and how to report retaliation concerns
- Making a finding. What is the investigator's role? What is the Title IX Coordinator's role?
- Recommendations for sanctions. What is the investigator's role?
  - Take action sufficient to abate the behavior
  - Take consistent action based on similar conduct

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# **IMPLICATIONS FOR IN-HOUSE AND OUTSIDE COUNSEL**

# Continued Focus on Compliance for Colleges and Universities

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- Re-emphasizes the importance of robust ethics and compliance programs
- Credible allegations of wrongdoing must be taken seriously
- Need experienced compliance leadership with direct access and reporting to board of directors
- Executives, officers and employees must “buy-in” to demonstrate commitment to these processes or risk “deliberate ignorance” label
- Educate, educate, educate. Then educate some more.

# Title IX Enforcement Takeaways

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- Must be prepared to respond to allegations in a timely fashion
- Investigative and adjudicative processes must be neutral, unbiased
- Processes must also address confidentiality concerns
- Be prompt (60 days)
- Be thorough (use follow-ups if necessary)
- Be consistent

# The New Bottom Line for DOJ/FCA Investigations

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- Internal investigations are likely to be more extensive and costly
- Reaching resolution with the government will take longer
- Renewed focus on individual liability means that fines and penalties should not be viewed as a “cost of doing business”
- No more releases for culpable individuals, so counsel must explain implications of Yates Memo
- Employees and executives may be more reluctant to talk and/or request individual representation before cooperating
  - How can institutions obtain “all” relevant facts?

# QUESTIONS?

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