

# Health Care Fraud

## Recent Government Enforcement Initiatives and Investigation Issues

**Presentation for the Mississippi Health Care Working Group**  
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**When the government knocks,  
do what you gotta do...**

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“I use my single windup, my double windup, my triple windup, my hesitation windup, my no windup. I also use my step-n-pitch-it, my submariner, my sidearmer, and my bat dodger. Man’s got to do what he got to do.”

*-Satchel Paige*

# Federal Prosecution of Corporations

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- What governs the possibility of federal prosecution of a corporation?
- What are the different strategies for avoiding corporate indictment?
  - Don't cooperate. – Arthur Andersen
  - Cooperate as much as possible. – KPMG

# Principles of Federal Prosecution of Business Organizations

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1999	Holder
2003	Thompson
2006	McNulty
2008	Filip
2010	Holder
2015	Yates

# Yates Memorandum

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The Yates Memorandum requires the company to disclose the facts discovered in the company's investigation and to identify the wrongdoers within the company.

- Will the corporation be indicted?
- Will the corporation be regarded as deserving of cooperation credit to reduce the corporate fine by up to 80 percent?

# Impact of Yates on federal civil enforcement and parallel proceedings

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- Federal prosecutors and agents will communicate more with civil government attorneys
- More parallel proceedings
- More civil enforcement where criminal prosecutor declines
- Fifth Amendment asserted by employee/manager/officer in civil depositions

# Yates will discourage individual/corporate cooperation in some cases

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- Individuals are less likely to avoid prosecution by cooperating with internal investigation
- Company may be more likely to waive the privilege
- Company counsel may need to sharpen *Upjohn* warning before interviewing employee/manager/officer
- Company may not stop at hard facts and proceed to draw inferences and form conclusions of willful blindness of employee/manager/officer
- Separate legal representation for individuals is more likely and more likely to be early under Yates



# Individual Exposure

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Corporate Resolution under the Yates Memo no longer bars enforcement against individuals – except in “extraordinary circumstances.”

# Rosenstein Era Modifications

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1. Give up just the most culpable individual employees (Nov. 29, 2018)
  - To obtain cooperation credit, a corporation must now identify persons who were “substantially involved” in criminal conduct.



# Rosenstein Era Modifications

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2. No piling on (May 9, 2018)
  - The DOJ will not sequentially prosecute if any other agency/foreign jurisdiction has brought similar charges.
3. No reliance on agency guidance as basis for prosecution (Brand Memo)(Jan. 25, 2018)
  - Prosecution based on agency guidance documents or noncompliance with them will not be used to establish liability in affirmative civil enforcement action.

# Rosenstein Era Modifications

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4. False Claims Act dismissal policy (Granston Memo)(Jan. 10, 2018)
  - The DOJ will move to dismiss qui tam cases that lack merit, even those where the government lacked resources to intervene.
  - *Gilead Sciences, Inc. v. United States*, No. 17-936 (Supreme Court, Nov. 2018)
    - DOJ opposed relator's request for certiorari to appeal dismissal on materiality grounds.
    - Supreme Court declined certiorari (Jan. 7, 2019).

# Rosenstein Era Modifications

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5. DOJ's informal policy on FCPA self-reporting (Rosenstein speech, Nov. 29, 2018)
  - DOJ, after a trial program, seeks to incentivize corporations to self-report via a presumption that the DOJ will then decline prosecution.
  - Should there be aggravating circumstances leading to enforcement actions, the DOJ will recommend a 50 percent reduction off the low end of the Sentencing Guidelines fine range.
  - DOJ will consider the company's compliance program in evaluating efforts at remediation.
  - All FCPA declinations will be publicized.

# Rosenstein Era Modifications

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## 6. HHS OIG Self-Disclosure

- Self-disclosure must include anti-kickback issues, not just Stark violations.
- \$50,000 is the minimum settlement (versus 1.5 times the amount owed).
- New increased CMP levels take effect after HHS-OIG final rule adopted (Dec. 7, 2016).
- Largest CMPs in 2018 were assessed against providers making voluntary self-disclosures.

# Rosenstein Era Modifications

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7. Fraud Risk and CIAs (Demske Initiative, Sept. 27, 2018)
  - OIG-HHS developed criteria for fraud risk indicators
  - Publicize where permissive exclusion candidate refuses corporate integrity agreement.
  - While CIAs are a presumptive outcome, GAO report found decrease in their use (May 10, 2018).
  
8. DOJ Evaluation of Corporate Compliance Programs (Feb. 8, 2017)
  - Fraud Section issues questions to use in determining existence and effectiveness of pre-existing compliance programs.
  - DOJ Compliance Chief left, position has not been filled, and AAG Benczkowski says DOJ will go in a different direction (Oct. 2018).

# Rosenstein Era Modifications

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9. Modification of Corporate Monitorship (Benczkowski Memo, Oct. 11, 2018)
  - Criteria for selection of monitors in Criminal Division cases
    - Only where demonstrated need and clear benefit relative to costs and burdens
    - Likely not necessary where compliance program effective and adequately resourced
  - Broward Health Corporate Integrity Agreement



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**Find the truth, keep the  
confidence of prosecutors and  
investigators...**

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“Mother always told me, if you tell a lie, always rehearse it.  
If it don’t sound good to you, it won’t sound good to no one  
else.”

*-Satchel Paige*

# Conducting Employee Interviews During an Internal Investigation

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Lawyer conducting interviews of employees

1. Who does the lawyer represent when the lawyer has been retained by the company to conduct an internal investigation?

**The organization**

# Conducting Employee Interviews During an Internal Investigation

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Mississippi Rule of Professional Responsibility 1.13(a):

“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

# Conducting Employee Interviews During an Internal Investigation

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2. May the lawyer be unclear with the interviewee as to who the lawyer represents?

**No**

# Conducting Employee Interviews During an Internal Investigation

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Mississippi Rule of Professional Responsibility  
1.13(d):

“In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client ***when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.***”

# Conducting Employee Interviews During an Internal Investigation

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Mississippi Rule of Professional Responsibility 4.3:

“In dealing on behalf of a client with a person who is not represented by counsel, a lawyer *shall not state or imply that the lawyer is disinterested.*

**When the lawyer knows, or reasonably should know, that *the unrepresented person misunderstands the lawyer’s role in the matter,* the lawyer shall make reasonable efforts to correct the misunderstanding.”**

# Ethics Issues

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- *United States v. Stein*, 435 F. Supp. 2d. 330 (S.D.NY 2006)
  - Corporation in Deferred Prosecution Agreement cannot deny legal fees to individuals conditioned on their cooperation with the prosecution



# Ethics Issues

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- *Upjohn Warnings*

“I represent . . . .”

“I do not represent . . . .”

“This is a privileged communication”

“The privilege is held by . . . .”

and could be waived by . . . . , not by you.

“Keep this interview confidential”



*"Fellas, I invited Max here to give us a fresh, millennial take on how to get out of the inning."*

# Sampling and Extrapolating False Claims

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- Overpayment for medically unnecessary procedures can be supported by sampling in audit and extrapolating to universe of claims.
  - *MaxMed Healthcare, Inc. v. Thomas Price, Secretary, U.S. Department of Health and Human Services*, No. 16-50398 (5<sup>th</sup> Cir. June 22, 2017)
  - *United States v. Rodney Hesson, Gertrude Parker*, No. 17-30627 (5<sup>th</sup> Cir. Aug. 15, 2018)

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# Protect your information

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“If you ask me a question I don’t know,  
I’m not going to answer.”

*-Yogi Berra*

# Protect Your Information

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- Attorney-client and work product privilege
  - Morgan Lewis waiver case resolved after counsel ordered to produce materials supporting oral download of information to SEC (*SEC v. Mathias Francisco Sandoval Herrera, et al.*, No. 17-20301-CIV (S.D. FL., Dec. 5, 2017 and Jan. 3, 2018))
  - Siemens Independent Monitor FOIA case required disclosure with exceptions (*100 Reporter, LLC v. United States, et al.*, Civ. No. 1:14-01264 (D.D.C. June 13, 2018))
    - Disclose: monitor reports regarding industry best practices, monitor's final work plans, compliance policies and training, personal information of executives
    - Do not disclose: Siemens business operations and general compliance, DOJ's analysis of monitor's activities, personal information about non-executive employees and third parties.

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# **There's always another angle or consequence to consider.**

Collateral consequences and new legal developments can  
extend for years.

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“It ain’t over till it’s over.”  
-*Yogi Berra*



# Legal Developments

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- *Universal Health Services v. Escobar*, 136 S. Ct. 1989 (June 2016)
- “Implied certification” doctrine as a basis for False Claims Act liability applies if providers falsely certify compliance with all legal, regulatory or contractual requirements when claiming reimbursement.
  - Are the representations specific about the services or product?
  - Does the undisclosed noncompliance result in “misleading half-truths”?

# Legal Developments

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- But also the falsity must be material to the government's decision to pay the claim.
- Circuit Courts vary in interpreting materiality.
  - Does *Escobar* apply in factually false claims – not implied certification – cases?
  - *United States ex rel. Joshua Harman v. Trinity Industries, Inc., et al.*, No. 15-41172, 2017 WL 432527966 (5<sup>th</sup> Cir., Sept. 29, 2017), *cert. denied* (Sup. Ct., Jan 7, 2019)
  - Continued government use of product (secretly changed guardrails), paid reimbursements, confirmed approval of product show lack of materiality.

# Legal Developments

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- FCA statute of limitations case pending in Supreme Court
  - *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F. 3d 1081 (11<sup>th</sup> Cir. 2018), *cert. granted* (Sup. Ct., Nov. 16, 2018)
  - Three different stands of Circuit Court opinions.
  - Question 1: does the tolling provision to the 6-year statute of limitations apply to satisfy a relator where the government declines to intervene?
  - Question 2: if so, does the relator's knowledge or the government's knowledge trigger the limitations period?

# Complexity and Delays in Investigation and Resolution

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- Parallel Proceedings
  - Search warrant
  - Subpoena/CID
  - Civil qui tam by whistleblower
  - Federal and State document productions/interviews
  - Stays of discovery
  - Grand jury investigations
  - Civil trial/settlement/CIA
  - Criminal trial/plea/sentence
  - Licensures
  - Exclusions
  - Payment suspensions/denials/overpayment determinations.