

WHAT'S NEW IN THE NEW YEAR – GOVERNMENT ENFORCEMENT INITIATIVES AND INVESTIGATION ISSUES

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Association of Certified Fraud Examiners

Robert E. Hauberg, Jr.

Michael T. Dawkins

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

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I. WHEN THE GOVERNMENT KNOCKS, DO WHAT YOU GOTTA DO

“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*

**A. WHAT GOVERNS THE
POSSIBILITY OF FEDERAL
PROSECUTION OF A
CORPORATION?**

Different strategies for avoiding corporate indictment

- (1) Don't cooperate – Arthur Andersen
- (2) Cooperate as much as possible - KPMG

Principles of Federal Prosecution of Business Organizations

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

**B. THE YATES MEMORANDUM
REQUIRES THE COMPANY
TO DISCLOSE THE FACTS
DISCOVERED IN THE
COMPANY'S INVESTIGATION
AND TO IDENTIFY THE
WRONGDOERS WITHIN THE
COMPANY**

1. Will the corporation be indicted?

2. Will the Corporation be regarded as deserving of cooperation credit to reduce the corporate fine by up to 80% ?

3. Examples of internal investigations involving accounting, auditing, tax

C. CORPORATE RESOLUTION NO
LONGER BARS ENFORCEMENT
AGAINST INDIVIDUALS –EXCEPT
IN “EXTRAORDINARY
CIRCUMSTANCES”

Corporate plea protecting against individual prosecution

(Adapted from a plea agreement in a Mississippi case)

“If Tax Preparer, Inc. complies with all terms of this Plea Agreement, the Government will not file any additional criminal charges against any of the company’s current and former employees, officers, or directors for any conduct known by the United States as of the date of the Plea Agreement arising out of the IRS-CID investigation that resulted in the Indictment....”

D. ROSENSTEIN ERA MODIFICATIONS

1. Give up Just the Most Culpable Individual Employees (Nov. 29, 2018)
 - Now corporation, to obtain cooperation credit, must identify persons who were “substantially involved” in criminal conduct



2. No Piling On (May 9, 2018)
 - 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

4. False Claims Act Case Dismissal Policy
(Granston Memo) (Jan. 10, 2018)



- a. DOJ will move to dismiss *qui tam* cases that lack merit, even those where the government lacked resources to intervene
- b. *Gilead Sciences, Inc. v. United States*, No. 17-936 (Supreme Court, Nov. 2018)
 - DOJ opposed defendant's request for certiorari to appeal dismissal on materiality grounds

5. DOJ's Informal Policy on FCPA Self Reporting (Nov. 29, 2018)
 - a. DOJ, after a trial program, seeks to incentivize corporation to self-report via:
 - 1) a presumption that DOJ will then decline prosecution
 - 2) should there be aggravating circumstances leading to enforcement actions, DOJ will recommend 50% reduction off low end of Sentencing Guidelines fine range

- 3) DOJ will consider the company's compliance program in evaluating efforts at remediation
- 4) all FCPA declinations will be publicized



6. IRS's Offshore Voluntary Disclosure Program

- a. The voluntary disclosure program ended Sept. 28, 2018

- b. Criminal liability could have been avoided for willful failure to report if 5 years of returns filed and taxes paid with one-time penalty



7. DOJ Evaluation of Corporate Compliance Programs (Feb. 8, 2017)
 - a. Fraud Section issues questions to use in determining existence and effectiveness of pre-existing compliance programs
 - b. Compliance Chief at DOJ left and position has not been filled

II. FIND THE TRUTH, KEEP THE CONFIDENCE OF PROSECUTORS AND INVESTIGATORS

“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*

A. CONDUCTING INTERVIEWS OF EMPLOYEES DURING AN INTERNAL INVESTIGATION

Lawyer and accountant 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

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.”

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

No.

Mississippi Rule or 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.*”

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.”



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

B. SAMPLING AND EXTRAPOLATING FALSE CLAIMS

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

C. WITNESS MAY OBTAIN EXPERT ASSISTANCE

1. PCAOB must allow witness the assistance of an accounting expert at an investigative interview (Laccetti v. SEC, 885 F.3d 724 (D.C. Cir., March 23, 2018)(J. Kavanaugh))

The accounting expert may be essential to the effective assistance of counsel.

III. PROTECT YOUR INFORMATION

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

- *Yogi Berra*

A. ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGE

1. 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))
2. Seimens 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))
 - a. Disclose: monitor reports re industry best practices, monitor's final work plans, compliance policies and training, personal information of executives

- b. 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.

3. Communications between taxpayer's lawyer and *Kovel* accountant and the underlying documents are privileged (United States v. Adams, 2018 WL 5311410 (D. Minn. Oct. 27, 2018)
 - a. Does the filing of amended returns waive the privilege?
 - b. Should the *Kovel* accountant prepare the amended returns?

B. ETHICS

1. BioRad – privileged materials disclosed by fired General Counsel as whistleblower (*Wadler v. Bio-Rad Laboratories, Inc.*, No. 17-16193 (9th Cir., argument, Nov. 14, 2018))
2. PCAOB leak results in criminal guilty plea by ex-employee to stealing confidential information about which KPMG audits PCAOB would be reviewing so as to make KPMG (as her new employer) look better on inspections (*United States v. Cynthia Holder*, No. 1:18-CR-00036(S.D.N.Y., Oct. 16, 2018))

IV. THERE'S ALWAYS ANOTHER ANGLE OR CONSEQUENCE TO CONSIDER



Collateral Consequences and New Legal Developments Can
Extend for Years

“It ain’t over til it’s over.”

- *Yogi Berra*

- A. Merrill Lynch civil litigation continues after 2001 Enron criminal case began (*Silvercreek Management Inc. v. Citigroup, Inc.*, 02-CV-881 (S.D.N.Y., Sept. 28, 2018))

- B. Taxpayer litigation continues after criminal resolution of KPMG tax shelter Deferred Prosecution Agreement in 2005
 - 1. Tax strategies employed in 2000
 - 2. KPMG Deferred Prosecution Agreement 2005
 - 3. Criminal prosecution of KPMG partners 2005-6
 - 4. Civil litigation through 2018

- C. MyMedx civil suits and criminal investigation of channel stuffing (e.g., Macphee, et al. v. Mimedx Group, Inc., et al., No. 18-CV-00830 (N.D. GA, Feb. 23, 2018))

- D. SEC Whistleblower, Insider Trading, and 10-b(5) Law Evolves
 - 1. Supreme Court in Digital Realty Trust, Inc. v. Somer, No. 16-1276, (Feb. 21, 2018) decides SEC whistleblower retaliation protection under Dodd-Frank applies only if conduct reported to SEC

2. Supreme Court and Second Circuit go back and forth on who is a tipper/tippee
 - a. United States v. Newman, 773 F. 3d 438 (2d Cir. 2014) – required proof of personal benefit to tipper of “meaningfully close personal relation” to tippee
 - b. United States v. Salman, 1375 S. Ct. 420 (2016) – insider who gifts inside information to relative or friend gets the required personal benefit

c. United States v. Martoma, No. 14-3599
(2nd Cir. August 23, 2017), amended
(June 25, 2018)

- What is tipper's required personal benefit: does any gift suffice regardless of whether close personal relation to tippee exists?

3. Supreme Court after oral argument on December 3, 2018, considers whether misleading emails sent to investors by Lorenzo at direction of his boss constitutes 10-b(5) violation because sender did not “make” the false statement but rather the boss retained “ultimate authority” over the statement, as the Court below held (Lorenzo v. SEC, 872 F. 3d 578, D.C. Cir. Sept. 29, 2017)

- D. Don't ignore a court order at your peril
- Dewey law firm CFO jailed for failure to make first payment on \$1 million fine (Dec. 2018)