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A sharpened focus on remediation in federal investigations

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Today, compliance and ethics programs are an integral part of the operations of many healthcare organizations. These organizations aim to prevent, detect, correct, and in some cases even self-disclose potential fraud and abuse before any misconduct is discovered by government agencies. Sometimes these laudable goals are simply unattainable, and organizations learn about potential misconduct only afterthe government has detected the wrongdoing and initiated an investigation.

In their investigations of corporate misconduct, federal prosecutors, state and local investigators, and private pay auditors all routinely focus on an organization's preexisting compliance program, along with the organization's remediation and compliance actions after it learned of the allegations of misconduct (i.e., after the organization is served with a qui tam action, or receives a Civil Investigative Demand, subpoena, or proffer request related to an investigation). Unfortunately, some organizations neglect to do the same, and they tend to look only to the general risks and historical failures, rather than exercising real-time and forward-looking compliance efforts that are focused on remediating the alleged misconduct at hand.

Failure to engage in remedial actions, including modification of a compliance program that did not detect the allegations that are the subject of a government investigation, can be dangerous. Additionally, an organization that fails to thoroughly, credibly, and promptly investigate and remediate actual misconduct, including misconduct that first comes to the organization's attention as a result of a government investigation, may completely disqualify itself from later seeking any cooperation credit from prosecutors in federal civil or criminal investigations and enforcement actions.

Historical perspective

The concept of remediation is not new. Indeed, remediation is one of the seven elements of an effective compliance program detailed in the U.S. Sentencing Commission's Guidelines Manual.[1] Remediation is also a mitigating factor that impacts the charging decisions, plea offers, and settlements of the U.S. Department of Justice (DOJ). Federal criminal prosecutors are directed to consider ten factors expressly set forth in the U.S. Attorneys' Manual (USAM).[2] These factors, also considered by federal civil prosecutors, are listed in USAM Section 9-28.300, Factors to be Considered, and are commonly referred to among criminal defense lawyers as the "Filip Factors" because they were initially enumerated in a memorandum issued in 2008 by then-Deputy Attorney General Mark Filip.[3]

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Filip Factor Number 7 specifically focuses on "the corporation's remedial actions" after the potential wrongdoing has been detected. It describes remediation to include "any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies." Notwithstanding the well-established concept of remediation, recent DOJ fraud enforcement trends reveal prosecutors' heightened focus on corporate remediation.

Healthcare fraud and abuse enforcement has been heavily influenced in recent years by several interrelated developments in the DOJ. The priorities established by senior leaders in DOJ's Criminal and Civil Divisions have focused on vigorous investigation of individuals, with a parallel emphasis on encouraging organizations to, inter alia (i.e., among other things), operationalize effective compliance programs and take appropriate remedial action.

For more than 15 years, the DOJ has directed prosecutors to pursue cases against criminally culpable individuals responsible for corporate misconduct. In June 1999, former Deputy Attorney General Eric Holder issued a memorandum entitled, "Bringing Criminal Charges Against Corporations" (the Holder Memo), which established the framework that prosecutors use in deciding whether to charge a corporation.[4] The Holder Memo directed prosecutors to "consider the corporation, as well as the responsible individuals, as potential criminal targets" and to consider the corporation's "willingness to cooperate in the investigation." Additionally, the Holder Memo cautioned that "prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees."

In September 2015, former Deputy Attorney General Sally Quillian Yates issued guidance to all federal prosecutors regarding an organization's cooperation in the context of corporate investigations (the Yates Memo).[5] The Yates Memo outlines six key steps that prosecutors should take in all investigations of corporate wrongdoing. The Yates Memo directives have been incorporated in the USAM, and they are being followed by federal prosecutors in U.S. Attorneys offices nationwide. The Yates Memo reiterated existing DOJ policy and established a new "threshold" for organizations to receive cooperation credit pursuant to the Filip Factors, stating that organizations are required to "identify all individuals involved in the wrongdoing" in order to qualify for any cooperation credit in the resolution of a matter. Additionally, the Yates Memo specified that "[t]his condition of cooperation applies equally to corporations seeking to cooperate in civil matters" such as False Claims Act (FCA) cases.

This "threshold" requirement was a change from the DOJ's prior practice of granting partial cooperation credit to organizations for their significant cooperation, without requiring them to identify the responsible individuals or share all relevant facts implicating those individuals. This new approach to evaluating corporate "cooperation" highlights the DOJ's expectation that organizations will conduct a thorough investigation, disclose evidence of wrongdoing, and take appropriate remedial actions to address the issues identified in the investigation.

This expectation was reinforced further when, at the end of 2015, the DOJ announced the hiring of a full-time consultant, Hui Chen, as the DOJ's first Compliance Counsel Expert.[6] Andrew Weissmann, the former Chief of the Fraud Section of the DOJ's Criminal Division (the Fraud Section) stated that the Compliance Counsel Expert was brought in to ensure that the DOJ was "holding companies to a high but realistic standard," and he emphasized the importance of adding compliance expertise to the DOJ, referring to Ms. Chen as "manna from heaven."[7]

Before her June 2017 departure, Ms. Chen guided, trained, and actively assisted federal prosecutors in making judgements concerning the existence and effectiveness of corporate compliance programs, including whether

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organizations facing possible criminal prosecution had taken meaningful remediation measures. Additionally, Ms. Chen authored the Fraud Section's "Evaluation of Corporate Compliance Programs" document, which provides sample topics and questions that prosecutors may raise in making individualized assessments of the effectiveness of corporate compliance programs.[8]

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