Individual Accountability and Corporate Cooperation — a Year in Review

by Dawn L. Merkle

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Government contractors are subject to the same criminal and civil laws as all other businesses in the United States, including laws governing the environment, workplace safety, labor and employment relationships, antitrust, corruption and bribery, and mail and wire fraud. In addition, government contractors, including subcontractors and others performing on federally funded projects, are subject to laws aimed at curtailing fraud, waste, and abuse in government spending through the imposition of civil and criminal penalties. These laws include the False Statements Act,[1] Major Fraud Act,[2] Small Business Act (misrepresentations of size),[3] and the False Claims Act (FCA).[4] In the past year, the Department of Justice's announced focus on individual accountability for corporate wrongdoing, and its impact on government contractors has been the topic of many client alerts.

Role of the Department of Justice

The Department of Justice (DOJ) is the chief enforcer of these laws, handling both criminal prosecutions and civil claims on behalf of the United States. A top DOJ priority is to protect public interests by "discouraging business practices that would permit or promote unlawful conduct at the expense of the public interest."[5] Recent cases involving government contractors and highlighted by the DOJ include:

- A former officer and owner of a construction company pleading guilty to conspiracy to commit wire fraud in a scheme in which the small businesses would receive government contracts but the large business would illegally perform all of the work.[6]
- An investigative services company forfeiting $30 million in payment to settle an FCA case brought by a whistleblower for "circumvent[ing] contractually required quality reviews of completed background investigations in order to increase the company's revenues and profits."[7]
- Affiliated companies agreeing to pay more than $1 million to settle an FCA case alleging overcharges to the government in a *qui tam* action in which the relator received more than $200,000.[8]

Because the DOJ has found that "[o]ne of the most effective ways to combat corporate misconduct is by holding accountable all individuals who engage in wrongdoing," its *U.S. Attorney's Manual* instructs its attorneys to "focus on wrongdoing by individuals from the very beginning of any investigations of corporate misconduct."[9] In September 2015, Deputy Attorney General Sally Yates issued a memorandum entitled "Individual Accountability for Corporate Wrongdoing." The "Yates Memorandum's" (despite Yates's efforts to dissuade use of that title[10]) stated purpose was "to strengthen [the DOJ's] pursuit of individual corporate wrongdoing,"[11] and it outlined six steps for doing so:

- Corporations must provide the DOJ all relevant facts relating to individuals responsible for corporate misconduct to qualify for any cooperation credit;
- Investigations should focus on individuals from the outset;
- Criminal and civil attorneys should communicate routinely on corporate investigations;
- Individuals will not be released from liability when resolving a matter with a corporation absent extraordinary circumstances or approval;
- Clear plans for resolving individual cases when resolving corporate cases;
- Decision to bring civil suit against individuals should be based "on considerations beyond that individual's ability to pay."[12]

Since the Yates Memorandum's release, there have been a number of alerts and articles from law firms, scholars, and government contracting organizations. Many alerts opined that the memorandum would "significantly impact corporate enforcement actions" while others noted that it did not introduce anything new.[13] Regardless, it does signify a renewed focus on individual accountability.

False Claims Act and the Yates Memorandum

According to Acting Associate Attorney General Bill Baer, more than 630 *qui tam* actions[14] were filed last year.[15] In remarks at the ABA's National Institute on Civil False Claims Act and Qui Tam Enforcement in June 2016, Baer counseled that government contractors "should not assume [the DOJ] will be amenable to releasing individuals from False Claims Act liability when we settle with the organization. The presumption is flipped in the other direction."[16] This "flip" appears to be born out in the increase of clauses requiring companies to cooperate fully with investigations of individuals who may be involved in misconduct in FCA cases. According to Bloomberg BNA, in the first half of 2016, 46 percent of health care related FCA settlements included such clauses, compared to 17 percent to 32 percent in the previous eight years.[17]

Recent settlements highlighted by Baer in his remarks underscored the DOJ's emphasis on individual accountability: payment of $4 million by the estate of a company's deceased CEO; a $1.65 million settlement with the owner of a company; a $10.3 million settlement with a company and its owner; and payment of $40 million by a contractor and its former president to resolve the claim.[18]

The Importance of "Cooperation Credit"

Cooperation is a factor the DOJ considers in determining whether to charge a corporation, offer a non-prosecution or deferred prosecution agreement, settle or dismiss a civil claim, or seek civil and regulatory alternatives to criminal prosecution.[19] For criminal prosecutions, the federal Sentencing Guidelines provide a reduction in penalties for cooper-

ation.[20] The DOJ's Fraud Section offers the most illustrative examples of cases demonstrating how the DOJ has been applying cooperation credit since the Yates Memorandum:

- In February 2016, the DOJ entered into a non-prosecution agreement with Parametric Technology companies for improper gifts and entertainment provided to Chinese government officials. The letter agreement between the companies and the DOJ explained that the companies did not receive voluntary disclosure credit even though they had disclosed misconduct to the DOJ because they "did not disclose relevant facts known to [them through an internal investigation] at the time of the initial disclosure," but received partial credit of 15 percent off the bottom of the Sentencing Guidelines fine range for cooperating in the DOJ's investigation by "collecting, analyzing, and organizing voluminous evidence." Although they had not disclosed all information initially, the companies did provide "all relevant facts known to them, including information about individuals involved ... [and they] engaged in extensive remedial measures," factors that the DOJ considered in determining not to prosecute.[21]
- In another Foreign Corrupt Practices Act case settled in February 2016, the DOJ entered into a deferred prosecution agreement with VimpelCom Limited and Unitel LLC. Under the agreement, the companies agreed to pay more than $230 million in criminal penalties to the US. The DOJ's press release noted that a factor contributing to the resolution was the "significant credit" the companies received for their "prompt acknowledgement of wrongdoing" after being informed of the investigation, and extensive cooperation in the investigation. This credit resulted in a 45 percent reduction off the bottom of the US Sentencing Guideline fine range. The companies did not receive other mitigation credit, however, because they "did not voluntarily self-disclose their misconduct to the department after an internal investigation uncovered wrongdoing."[22]
- In June 2016, the DOJ entered into a non-prosecution agreement with BK Medical ApS in which the DOJ agreed not to prosecute the company criminally. The company received "full credit" for voluntary disclosures, but did not receive full cooperation credit because it did not provide "all relevant facts that it learned during the course of its internal investigation."[23]
- In July 2016, the DOJ entered into a deferred prosecution agreement with Latam Airlines Group S.A. The agreement filed in US District Court for the Southern District of Florida stated that the company did not voluntarily disclose violations of the law until after a newspaper ran a story about the alleged misconduct. The company, however, did fully cooperate subsequently with the DOJ's investigation and "provided all relevant facts known" to the company, including information about individuals involved in the misconduct. The agreement noted further that a "relevant consideration" was the inadequacy of the company's compliance program at the time of the misconduct, the failure of the company to discipline in any way the responsible employees, and the company's subsequent implementation of a compliance program. The "credit" the company received based upon these factors was the deferred prosecution and a criminal penalty "25 percent above the low end" of the Sentencing Guidelines range.[24]

Obtaining Cooperation Credit

Whether a company obtains "full" or "partial" credit and the factors for which it receives credit impacts the DOJ's decision to prosecute or defer prosecution, the amount of the fines that a company will pay, and other conditions the company must meet such as having its compliance independently monitored.[25] The *U.S. Attorneys' Manual*[26] and the recent settlement of fraud cases highlight the steps a company should take to obtain cooperation credit, as summarized below:

- Identify all individuals involved in or responsible for the misconduct leading to the civil or criminal investigation. This is a prerequisite for the company to receive any cooperation credit.[27]
- Have a robust compliance program that can deter and detect misconduct. Such a program should:
    - Inform employees of the company's program and commitment to it;
    - Be designed to detect the types of misconduct typical in the company's industry;
    - Allow corporate directors to exercise independent review over officers' recommendations;

- Have internal audit functions that demonstrate the program's independence and accuracy; and
- Provide officers and directors information so they can reach informed decisions regarding compliance.

- Take appropriate remedial measures, including disciplining employees who engage in misconduct, termination of relationships with officers, directors, subcontractors, affiliates, and others who are involved in misconduct, and making restitution.
- Voluntarily disclose a violation or potential violation of the law and all relevant facts known to the company at that time. Disclosure should occur when the misconduct is discovered during the course of business or an internal investigation. Disclosure of the misconduct is not sufficient for full credit. Other than information legitimately protected under the attorney-client privilege or work-product doctrine, the company must provide all relevant facts , including:
  - how and when the alleged misconduct occurred;
  - who promoted or approved the misconduct; and
  - who was responsible for committing the misconduct.
- Once DOJ begins an investigation, cooperate fully by:
  - compiling and organizing relevant documents;
  - making current and, to the extent possible, former officers, directors, and employees available for interviews and testimony; and
  - safeguarding sensitive information that the DOJ has provided and requests not be transmitted (such as information that could lead to concealment of assets by an individual).

Conclusion

Whether the Yates Memorandum represents a significant policy shift, "business as usual" or, as Yates describes it, "somewhere in the middle,"[28] it certainly has heightened the awareness of lawyers and government contractors to the significance of compliance programs, internal investigations, and cooperation with the DOJ. Cooperation credit can be the difference that allows a company to minimize the penalties it may pay for misconduct and to avoid the high costs of defending a case brought by the DOJ. In addition, taking the steps that can earn the company cooperation credit, such as a strong compliance program and voluntary disclosure, could help the company avoid civil claims, criminal charges, and monetary penalties, and curtail misconduct altogether. According to Yates, "[the DOJ's] new approach is causing positive change within companies. Compliance officers have said that our focus on individuals has helped them steer officers and employees within their organizations toward best practices and higher standards."[29] The DOJ's goal of protecting the public interest, in the end, serves not only taxpayers but government contractors as well by fostering fair competition for public contracts.

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Endnotes:

1 18 U.S.C. § 1001 (2006).
2 18 U.S.C. § 1031 (2006).
3 15 U.S.C. § 645 (2006).
4 31 U.S.C. § 3729 (2000).
5 U.S. Department of Justice, U.S. Attorneys' Manual, *Principles of Federal Prosecution of Business Organizations*, § 9-28.010 (hereinafter "U.S. Attorneys' Manual").
6 www.justice.gov/opa/pr/former-mcc-construction-company-officer-and-owner-pleads-guilty-conspiring-defraud-government (Aug. 23, 2016) (last visited Sept. 11, 2016).

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Compliance *continued from page 37*

55 *See* 2 Bruner & O'Connor, *supra* note 2, § 5:109. ¶ 4.3.5.
56 *Modern Cont'l South*, 70 Va. Cir. at 194-95 (citation omitted).
57 *Appeal of Powers Regulator Co.*, GSBCA No. 4668, 80-2 B.C.A. (CCH) ¶ 14,463, (Apr. 30, 1980), *available at* 1980 WL 2546 (citation omitted). Furthermore, notice requirements in federal changes clauses "are enforced sporadically . . . [or] when fairness demands. This has created the anomalous situation in which the notice requirements currently being imposed on contactors are those found in the decisional law rather than those found in the contract language." Cibinic & Nash, *supra* note 17, at 476.
58 *See Huff Enters., Inc.*, 191 A.D.2d at 317, 595 N.Y.S.2d at 181; *Modern Cont'l South*, 70 Va. Cir. at 192; *see also Halberstam*, 251 Va. at 250, 467 S.E.2d at 784.
59 1 Bruner & O'Connor, *supra* note 2, § 4:35.
60 *Id.*

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7 www.justice.gov/opa/pr/us-investigations-services-agrees-forego-least-30-million-settle-false-claims-act-allegations (Aug. 19, 2015) (last visited Sept. 11, 2016).
8 www.justice.gov/opa/pr/jacintoport-international-llc-and-seaboard-marine-ltd-agree-settle-false-claims-allegations (Aug. 1, 2016) (last visited Sept. 11, 2016).
9 U.S. Attorneys' Manual, *supra* note 7, §9-28-010; *see also id.* §4-3.100 ("Government attorneys handling corporate investigations should maintain a focus on potentially liable individuals and maximize the accountability of individuals responsible for wrongdoing….").
10 Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference (May 10, 2016) ("I have to tell you how disconcerting it is to hear something described as the 'Yates Memo.' I call it the Individual Accountability Policy, but I may have long since lost that battle.").
11 Memorandum from Deputy Attorney General Sally Q. Yates, US Department of Justice, to Assistant Attorney General and US Attorneys (Sept. 9, 2015) (hereinafter the "Yates Memorandum").
12 Yates Memorandum, *supra* note 13.
13 *See, e.g.,* Joseph W. Yockey, *Beyond Yates: From Engagement to Accountability in Corporate Crime*, 12 N.Y.U. J.L. & Bus. 407 (2015-2016).
14 *Qui tam* actions are FCA cases filed by an individual (called "relators") on behalf of the government in which the DOJ may choose to intervene. Relators are often former employees and other "whistleblowers," though it can be any individual with knowledge of a violation of the act. Relators are awarded a portion of any settlement or judgment against the defendant. *See* 31 U.S.C. § 3730 (2000).
15 Acting Associate Attorney General Bill Baer, Remarks on Individual Accountability at American Bar Association's 11th National Institute on Civil False Claims Act and Qui Tam Enforcement (Washington, D.C.) (June 9, 2016). This number does not include matters that agencies referred to the DOJ.
16 *Id.*
17 http://www.bna.com/doj-increasingly-demanding-n57982072932/ (last visited Sept. 9, 2016).
18 Baer, *supra* note 17.
19 U.S. Attorneys' Manual, *supra* note 7, § 9.28-200.
20 *See* Federal Sentencing Guidelines Manual § 8C2.
21 Letter Agreement between USDOJ and Parametric Technology (Shanghai) Software Co. Ltd and Parametric Technology (Hong Kong) Limited (Feb. 16, 2016).
22 https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million (Feb. 18, 2016) (last visited Sept. 11, 2016).
23 Letter Agreement between USDOJ and BK Medical ApS (June 21, 2016).
24 *United States of America v. Latam Airlines Group*, S.A., No. 0:16-cr-60195-DTKH (S.D.Fla. July 25, 2016) (Document No. 2, Deferred Prosecution Agreement).
25 *See, e.g.*, *id.*
26 *See* U.S. Attorneys' Manual, *supra* note 7, §§ 9-28.700 – 9-28.1000.
27 *Id.* § 9-28.700.
28 https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association (May 10, 2016) (last visited Sept. 11, 2016).
29 *Id.*