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This Update Addresses: The Position taken by the Department of Justice on the Large Increase in FCA Penalties Immediately Following the U.S. Supreme Court’s Decision on FCA and Implied Certification as well as the Potential Interplay with the Yates Memorandum

In not so surprising news, the Department of Justice (DOJ) confirmed yesterday that it will adopt the largest ever proposed increase in fines and penalties for False Claim Act (“FCA”) cases. The first whiff of this development came with the interim rule published in May, as updated by Outlook Law with the highpoints of the adjustment.

<http://outlooklaw.com/legal-list/civil-penalties-for-false-claim-act-violations-set-to-significantly-increase-in-august/>. The increase is set for August with it hitting violations occurring after November 2, 2016. The DOJ has the authority **to not** go as high as is allowed, but declined to exercise that authority; thereby clearing the way for the imposition of the maximum penalties allowed.

This decision by DOJ follows on the heels of the U.S. Supreme Court’s decision allowing the FCA to apply to implied certification of claims and settling a federal circuit court split on the matter. Recall, that when the U.S. Supreme Court did that, it also defined material and knowingly better than it has in the past and some would say more narrowly than some courts have applied it. For a refresher on the high points of that case visit here:

<http://outlooklaw.com/legal-list/fca-liability-implied-certification/>.

This could all tie into a number of other provisions and the Yates Memorandum where DOJ is naming **individuals** as culpable in the alleged failings of a company. Here are the six high points of the Yates Memorandum and a link follows:

- (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct;

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- (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
- (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another;
- (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;
- (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and
- (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

Yates Memorandum Link:

<http://outlooklaw.com/legal-list/updates-cyber-security-and-the-yates-memorandum/>

If one were to speculate about the enforcement tools that the Government is adding to its tool belt, it seems that tool belt is expanding. Companies are facing increased scrutiny and more powerful tools when events may occur that may bring Governmental inquiry. Compliance plans, following and testing those plans, are receiving increased attention as are the mitigation factors in the sentencing guidelines. With the recent developments in mind, it may be time to do a quick review of your compliance plan, how your company adheres to it, and what tests you have done to ensure it is being followed.