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What's New About the DOJ's Handling of Criminal Health-Care Fraud Matters?



BY MARILYN MAY AND SEAN HENNESSY

Assistant Attorney General (“AAG”) for the Criminal Division Leslie Caldwell’s recent remarks at the Taxpayers against Fraud conference in Washington, D.C., have raised concerns in the business and legal communities about new Department of Justice (“DOJ”) focus on potential criminal cases arising from *qui tam* matters. Many commentators are construing Ms. Caldwell’s remarks as heralding a new era in criminal health-care fraud prosecutions.

In her speech,¹ Ms. Caldwell outlined a variety of tools DOJ’s Criminal Division is using to successfully

combat health-care fraud,² including the highly effective Medicare Fraud Strike Force—a coordinated team of investigators and prosecutors from the Department of Justice, Health and Human Services, and state and local law enforcement—as well as “stepped-up” efforts to prosecute corporate health-care fraud cases.

She also showcased prosecution statistics—since 2007 DOJ has charged over 2,000 individuals (responsible for over \$6 billion in false billings) with health-care fraud and maintained a 95 percent conviction rate.

But it was her remarks about sharing *qui tam* information with the Criminal Division that generated the recent stir:

We in the Criminal Division have recently implemented a procedure so that all new *qui tam* complaints are shared by the Civil Division with the Criminal Division as soon as the cases are filed. Experienced prosecutors in the Fraud Section are immediately reviewing the *qui tam* cases when we receive them to determine whether to open a parallel criminal investigation.

While some have portrayed this statement as announcing a significant new direction, AAG Caldwell’s comments reflect long-standing DOJ parallel proceeding policy which requires DOJ criminal and civil attorneys to work together and share information, to the extent allowable by law.

That policy dates back to at least 1997 when Attorney General Janet Reno issued a memorandum directing

¹ See “Remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell at the Taxpayers Against Fraud Education Fund Conference,” available at <http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-140917.html>.

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² AAG Caldwell also spoke about DOJ’s joint criminal-civil efforts to fight defense procurement and financial fraud. The same DOJ parallel proceedings policy is applicable in those areas.

that criminal, civil and administrative attorneys coordinate their efforts.³ The most recent iteration of DOJ's parallel proceeding policy, set forth in a January 30, 2012 memorandum from Attorney General Eric Holder to all U.S. Attorneys, Litigating Divisions, Trial Attorneys, and the FBI Director (the "Holder Memo"),⁴ requires that "criminal prosecutors and civil trial counsel timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and permissible by law."

It also requires:

Every United States Attorney's Office and Department litigating component should have policies and procedures for early and appropriate coordination of the government's criminal, civil, regulatory and administrative remedies. . . . These policies and procedures should stress early, effective, and regular communication between criminal, civil, and agency attorneys to the fullest extent appropriate to the case and permissible by law. In keeping with this objective, such policies and procedures should specifically address the following issues, at a minimum:

Intake: Early evaluation of all matters for criminal, civil, regulatory, or administrative action. A case referral from any source, including an agency referral, a self-disclosure, or a qui tam action, to any component of the Department or to a United States Attorney's Office, is a referral for all purposes. From the moment of case intake, attorneys should consider and communicate regarding potential civil, administrative, regulatory, and criminal remedies, and explore those remedies with the investigative agents and other government personnel.

The Holder Memo further instructs DOJ attorneys to consider investigative techniques "that maximize the government's ability to share information" between criminal and civil attorneys, including criminal attorneys' use of investigative means other than grand jury subpoenas in cases with potential civil remedies and civil attorneys' use of False Claims Act civil investigative demands to obtain information and share it with their criminal counterparts.

Finally, the Holder Memo instructs criminal and civil attorneys to assess the potential implications of their actions on the parallel case at every stage between case intake and final resolution.

The False Claims Act requires that qui tam complaints and written disclosure of substantially all material evidence and information the relator possesses be served under seal on both the U.S. Attorney's office for the district in which the case is filed and the Attorney General.⁵

In practice, relators' counsel often also send a copy of the complaint (with their disclosure statement) to the Department of Justice Commercial Litigation Branch. To ensure that qui tam information is shared with the Criminal Division, the United States Attorney's Crimi-

nal Resource Manual⁶ requires civil DOJ attorneys to bring qui tam information to the attention of the Criminal Division, as follows:

[I]t is important that United States Attorneys promptly forward a copy of the complaint and statement of evidence to the Commercial Litigation Branch of the Civil Division The Commercial Litigation Branch will contact the agency involved, the Criminal Division, and, frequently, the Inspector General of the agency, to determine if the allegations are known to them and to obtain an assessment of the material evidence furnished by the relator. The Criminal Division will, in turn, check with appropriate United States Attorneys' offices USAOs and investigative agencies to determine if the allegations relate to a pending criminal investigation.

In addition to the requirement that the complaint and statement of evidence is shared with the Criminal and Civil Divisions in Washington, each of the 93 U.S. Attorney's offices around the country has a designated Criminal and Civil Health Care Fraud Coordinator with responsibility for the intake, review and coordination of all criminal and civil health-care fraud investigations and cases in the their office, consistent with DOJ's parallel proceedings policy.⁷

Given Ms. Caldwell's express invitation to qui tam attorneys to call criminal prosecutors directly and her promise to "redouble" efforts to work alongside relators, we can expect to see a continued emphasis on joint criminal-civil investigations.

To see the parallel proceedings policy in practice, one need look no further than many of the government's recent settlement announcements of civil False Claims Act cases initiated by from qui tam actions and, accompanied by criminal resolutions and large criminal fines.⁸

⁶ http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00932.htm.

⁷ See USAM 9.44.160 ("Cooperation and communication among components will enhance health care fraud enforcement. Before the Civil Division or Criminal Division acts on any health care fraud matter within a particular district, or a United States Attorney's Office acts on a health care fraud matter in a district other than its own, it shall advise in advance the health care fraud coordinator in the United States Attorney's Office of that district. Similarly, United States Attorneys' Offices shall advise the Criminal Division's Fraud Section and the Civil Division's Commercial Litigation Branch of matters which appear likely to result in inquiries to the Criminal or Civil Divisions."); see also USAM 9-42.010 (Each United States Attorney's Office also has an Affirmative Civil Enforcement (ACE) coordinator, who should be consulted on issues arising from parallel criminal and civil cases.).

⁸ See, e.g., <http://oig.hhs.gov/publications/docs/hcfac/FY2013-hcfac.pdf>.

³ Attorney General Memorandum to All U.S. Attorneys, All Litigation Divisions, et al., July 28, 1997, available at <http://www.justice.gov/ag/ag-memo-coordinate-parallel-criminal-civil-administrative>.

⁴ http://www.justice.gov/usao/eousa/foia_reading_room/usam/title1/doj00027.htm.

⁵ 31 U.S.C. § 3730(b)(2); Fed. R. Civ. P. 4(i).

In light of DOJ's existing parallel proceeding policy and the manner in which qui tam information is already being shared among DOJ civil and criminal attorneys (both within DOJ in Washington and in U.S. Attorney's offices around the country) what was new in AAG Caldwell's comments about the Criminal Division's handling of health-care cases?

For the first time, Ms. Caldwell invited the lawyers attending the conference (many of whom represent qui tam relators) to reach out directly to DOJ's criminal attorneys to advise them about alleged criminal health care fraud, suggesting: "[W]hen you are thinking of filing a qui tam case that alleges conduct that potentially could be criminal, I encourage you to consider reaching out to criminal authorities, just as you now do with our civil counterparts in the department and the U.S. Attorney's Offices."

Ms. Caldwell further explained the Criminal Division "will redouble [its] efforts to work alongside you" (referring to the qui tam attorneys at the conference) and noted that "[q]ui tam cases are a vital part of the Criminal Division's future efforts."

Given Ms. Caldwell's express invitation to qui tam attorneys to call criminal prosecutors directly and her promise to "redouble" efforts to work alongside relators,⁹ we can expect to see a continued emphasis on joint criminal-civil investigations.

While parallel proceedings provide the DOJ with a powerful tool to investigate and prosecute fraud, they can mean significant challenges to the companies, officers, directors, and employees in the crosshairs.

Here are a few things to keep in mind in dealing with DOJ:

- **An investigation that is initially only "civil" or only "criminal," may evolve into a parallel proceeding as the investigation progresses:** As the government obtains additional information, the nature and focus of the investigation may change. A civil investigation, either begun as a qui tam matter or otherwise, may reveal information of criminal conduct not evident earlier in the investigation. Similarly, a criminal investigation that may initially involve only private victims may evolve into a matter that also includes potential government program victims and thus, may have potential civil implications. The government does not have to disclose a criminal investigation. As a practical matter, however, DOJ attorneys will answer questions about investigations. Except when the criminal matter is covert, the civil DOJ attorney will respond truthfully when asked whether there is an open criminal investigation. Conversely, if asked whether there is an open civil matter, a criminal DOJ attorney will also provide that information.
- **With the exception of information protected by the rule governing grand jury secrecy, information obtained in a criminal investigation will likely be shared in a parallel civil investigation**

⁹ Given the race to the courthouse arising from the False Claims Act's "first to file" requirements 31 U.S.C. § 3730(b)(5), it is unclear whether qui tam attorneys will accept Ms. Caldwell's invitation to call criminal prosecutors before filing their complaint. Once the complaint is filed, the information will be shared as discussed above.

and vice versa: While Federal Rule of Criminal Procedure 6(e) prohibits criminal attorneys from sharing grand jury information with their civil counterparts, there is no corresponding restriction on information obtained through search warrants, interviews independent of grand jury proceedings or HIPAA subpoenas for documents. HIPAA subpoenas (issued under the Health Insurance Portability and Accountability Act of 1996)¹⁰ allow information to be shared among health oversight agencies, including the DOJ, U. S. Attorney's offices, HHS and the FBI. The Holder memo specifically requires criminal attorneys to consider use of investigative methods such as HIPAA subpoenas, rather than grand jury subpoenas, so that information can be shared with civil attorneys, particularly in time-sensitive qui tam matters.¹¹ Because information obtained through a HIPAA subpoena can be shared with civil attorneys, receipt of a HIPAA subpoena usually telegraphs a parallel criminal and civil health care fraud investigation. Civil attorneys can issue Civil Investigative Demands ("CIDs") for documents, interrogatories or oral testimony.¹² Although the authority to issue CIDs was initially reserved to the Attorney General, use of CIDs has increased after the Fraud Enforcement and Recovery Act of 2009 allowed that authority to be delegated to U.S. Attorneys. There is no prohibition against the civil attorneys sharing information with their criminal counterparts, indeed the Holder memo specifically states that "Civil attorneys can obtain information through the use of False Claims Act civil investigative demands and that information may be shared with prosecutors and agency attorneys." Such sharing of CID information with criminal attorneys raises potential Fifth Amendment issues for the person providing sworn testimony and documents. In practice, before commencing oral CID testimony some U.S. Attorney's offices provide the person testifying with a warning that the information may be shared with criminal attorneys. In addition to information obtained through CIDs and qui tam information, the Holder memo further requires civil attorneys to "apprise prosecutors of discovery obtained in civil, regulatory, and administrative actions that could be material to criminal investigations."

- **Consider the implications and timing of resolution of one part of the case on your interests in the parallel case:** Defense counsel must request a global resolution of criminal and civil matters; the government cannot make that suggestion. The language of a plea agreement, including required admissions, the entity charged, the conduct charged

¹⁰ 18 U.S.C. § 3486.

¹¹ Even when the prosecutor has obtained information through grand jury subpoenas, the Holder Memo requires that "prosecutors should consider seeking an order under Federal Rule of Criminal Procedure 6(e) at the earliest appropriate time to permit civil, regulatory, or administrative counterparts access to material, taking into account the needs of the civil, regulatory, administrative, and criminal matters, including relevant statutes of limitations, and the applicable standards governing such an order."

¹² 31 U.S.C. § 3733.

and the time period of the conduct will affect the resolution of the civil matter and may have collateral consequences on subsequent third-party litigation. In a health care fraud resolution, the most important collateral consequence is the effect the plea and/or civil settlement will have on HHS-OIG's rights of exclusion, including both mandatory and permissive exclusion.¹³ The type of resolution, the included entities, the admissions made

¹³ HHS-OIG is required to exclude individuals or entities for conviction of specific crimes, including felonies relating to health care fraud, controlled substances, program-related

will all factor into whether HHS-OIG exercises its exclusion authority.

Although Ms. Caldwell's comments may not suggest criminal health care fraud matters will proceed in a different direction because qui tam information will be shared with criminal attorneys, they do demonstrate this administration's continued emphasis on health care fraud.

crimes and crimes relating to patient abuse. 42 U.S.C. § 1320a-7(a). HHS-OIG can also exercise its permissive exclusion authority in a number of other circumstances. 42 U.S.C. § 1320a-7(b).