

# Kiefer: Health care fraud enforcement still top priority under Trump

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Kiefer

**By J. Richard Kiefer**

Despite election rhetoric that led many to believe that Donald Trump, if elected, would reduce enforcement of criminal laws against U.S. corporations and business executives, President Trump has instead ratcheted up the enforcement of laws involving health care fraud. Yes, immigration, drugs and guns are unquestionably high priorities in the Trump administration, but so is health care fraud.

The proof is best illustrated in President Trump's March 16 budget proposal to Congress that included an additional \$70 million for the Health Care Fraud and Abuse Control program in the Department of Health and Human Services. The budget proposal of \$751 million in discretionary funding to HHS for health care fraud enforcement comes despite an overall \$15 billion cut in funding for HHS. The Trump administration has requested \$5.25 billion over the next 10 years for health care anti-fraud programs.

Acting Assistant Attorney General Kenneth Blanco told the American Bar Association's National Institute on Health Care Fraud May 18 that health care fraud is a very high enforcement priority for the Department of Justice. He told the audience that he was passing on Attorney General Jeff Sessions' personal commitment to stamp out health care fraud. Trevor McFadden, deputy assistant attorney general, presented that message at the 7th Circuit Bar Association annual meeting in Indianapolis on May 1: Health care fraud remains a top priority of the Department of Justice.

## **Return on investment**

Perhaps more so than any other area of white collar criminal enforcement, health care fraud criminal prosecutions and civil False Claims Act lawsuits produce enormous revenues. In its Semi-Annual Report to Congress for Oct. 1, 2016, through March 31, 2017, the HHS-Office of Inspector General reported recoveries of \$2.04 billion from health care fraud enforcement. The report also noted that OIG criminal and civil actions increased during this period. Its report suggests there is no plan to reduce enforcement actions in the future.

One reason for continued emphasis on health care fraud civil and criminal actions is that the federal government receives a significant return on its investment in these cases. Gregory Demske, chief counsel for the Office of Inspector General of HHS, told the American Health Lawyers Association's conference in Baltimore on March 29 that the Health Care Fraud and Abuse Control account produces a return of \$5 for every \$1 invested. State Medicaid Fraud Control Units report similar ROIs. The OIG reports that in fiscal year 2016, state MFCUs recovered nearly \$1.9 billion in civil and criminal health care fraud cases, an ROI of \$7 for every \$1 spent. The MFCUs also achieved 1,564 criminal convictions in FY 2016 alone.

Locally, the U.S. Attorney's Office for the Southern District of Indiana reported collecting almost \$8 million in fiscal year 2016 in criminal and civil actions. "Collecting money owed to the victims of crimes and taxpaying citizens of this district is a commitment I take very seriously," U.S. Attorney Josh Minkler said. In a presentation to the 7th Circuit Bar Association meeting in Indianapolis on May 1, Minkler said he does not anticipate any reduction in white collar criminal prosecutions.

### **New DOJ mandates**

Two recent directives from the Department of Justice have significantly changed the playing field in all white collar criminal cases, including health care fraud. The first is the memorandum issued by then-Deputy Attorney General Sally Quillian Yates on Sept. 9, 2015, now known as "the Yates Memo," which emphasized that fighting corporate fraud "is a top priority of the Department of Justice" and directed federal prosecutors to hold corporate executives accountable for corporate crimes. One of the best illustrations of the impact of the Yates Memo is the DOJ's civil health care fraud case against Forrest Preston, the owner of Life Care Centers of America, who was held jointly and severally liable for a payment of \$155 million to settle the DOJ's False Claims Act case. Similarly, when the DOJ settled with Warner Chilcott for \$125 million, it also indicted the company's former president of its pharmaceutical division, Carl Reichel, for conspiring to violate the Anti-Kickback Statute. Although Reichel was acquitted by a jury, the prosecution of him demonstrates the DOJ's commitment to seek to hold individual corporate executives liable for corporate wrongdoing.

The second directive is the "Sessions Memo," issued May 10 by Attorney General Jeff Sessions. It mandates that federal prosecutors charge and pursue "the most serious, readily provable offense." It also directs federal prosecutors to recommend a sentence within the Sentencing Guidelines range. Although the memo sets out limited exceptions to the general directives, the new DOJ policy will make settlements far more difficult in the years ahead. If prosecutors must now insist on a guilty plea to the most serious readily provable offense, and a Guidelines sentence, defendants and their attorneys may decide they have nothing to lose from going to trial. Alternatively, more defendants and their attorneys may negotiate "open" plea agreements whereby sentencing is left to the federal district judge who may not be inclined to follow the Sessions Memo directives.

### **Enforcement is here to stay**

Notwithstanding the president's pro-business agenda, the administration's prosecution of health care fraud cases, both civilly and criminally, remains a top government enforcement priority. If President Trump's budget proposal passes Congress, the government will have even more resources to pursue health care fraud cases in the future. •

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