

# Managing Your Organization's Response to a Federal Government Investigation

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1

## Common Fraud and Abuse Investigations

- ▶ Civil False Claims Act
- ▶ Various fraud (e.g., health care fraud, honest services fraud, mail fraud, etc.)
- ▶ Paying and/or receiving kickbacks
- ▶ Unlawful distribution of prescription opioids
- ▶ Related criminal offenses (e.g., money laundering, tax evasion, etc.)

2

## Parallel Government Investigation and Enforcement Actions

- ▶ Well-established case law permitting information sharing with parallel proceedings
- ▶ *United States v. Kordel*, 397 U.S. 1, 10 (1970) and its progeny
- ▶ Public-private partnership to prevent health care fraud
- ▶ Justice Manual, Chapter 1-12.000 - Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings

3

## Indicators of a Government Investigation

- ▶ Actual notice (e.g., subpoena, CID)
- ▶ Potential violation of law is detected or reported
- ▶ Whistleblower activity detected / *qui tam* case unsealed
- ▶ Criminal activity is detected or reported
- ▶ Consumer complaints
- ▶ Competitor complaints
- ▶ Insurance company complaints
- ▶ Media reports

4

# Due Diligence to Detect Fraud

- ▶ Monitoring
- ▶ Auditing
- ▶ Reasonable steps to have and publicize a company system whereby employees and agents may report potential or actual criminal conduct without fear of retaliation
- ▶ Internal investigation

5

# Who Investigates?

- ▶ Nature of report/activity that has been detected
- ▶ Civil liability exposure
- ▶ Criminal exposure
- ▶ Attorney–client privilege considerations

6

# Company Internal Investigation

- ▶ Properly scoped
- ▶ Independent
- ▶ Objective
- ▶ Appropriately conducted by qualified personnel
- ▶ Properly documented
- ▶ Findings
- ▶ How does the company use the findings?

7

# Investigating Potential Civil False Claims/Fraud

## Operational challenges

- Document preservation, collection, and production
- Identifying witnesses
- Planning and managing interviews
- *Upjohn* warnings

8

## Other Company Considerations

### Non-retaliation and Ethical Considerations

- ▶ What if company suspects that a current employee is considering filing a *qui tam* case?
- ▶ What steps can company take after learning employee has filed a *qui tam* case?
- ▶ Can company require employee to participate in company interview?
- ▶ Can company review employee's emails?

9

## What is the Appropriate Company Response After Fraud is Detected?

- ▶ U.S. Sentencing Commission's Guidelines Manual, Sections 8B2.1(a) (1) and 8B2.1(b) (7)  
<https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8#NaN>
- ▶ DOJ, The Justice Manual (previously known as U.S. Attorneys' Manual)
- ▶ DOJ, Criminal Division, Fraud Section's *Evaluation of Corporate Compliance Programs*  
[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=2ahUKewjHjfLjr\\_3dAhUKSK0KHQkrBGYQFjACegQIBhAC&url=https%3A%2F%2Fwww.justice.gov%2Fcriminal-fraud%2Fpage%2Ffile%2F937501%2Fdownload&usg=AOvVaw040vqrlYryxmQxZeeqUVPI](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=2ahUKewjHjfLjr_3dAhUKSK0KHQkrBGYQFjACegQIBhAC&url=https%3A%2F%2Fwww.justice.gov%2Fcriminal-fraud%2Fpage%2Ffile%2F937501%2Fdownload&usg=AOvVaw040vqrlYryxmQxZeeqUVPI)

10

## What is the Appropriate Company Response After Fraud is Detected? (Cont.)

- ▶ HCCA-OIG guidance

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiRhFzr\\_3dAhVDXqwKHTfqAzwQFjAAegQICRAC&url=https%3A%2F%2Ffoig.hhs.gov%2Fcompliance%2Fcompliance-resource-portal%2Ffiles%2FHCCA-OIG-Resource-Guide.pdf&usg=AOvVaw1lwEcWTXy8m8D7omoy1C-a](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiRhFzr_3dAhVDXqwKHTfqAzwQFjAAegQICRAC&url=https%3A%2F%2Ffoig.hhs.gov%2Fcompliance%2Fcompliance-resource-portal%2Ffiles%2FHCCA-OIG-Resource-Guide.pdf&usg=AOvVaw1lwEcWTXy8m8D7omoy1C-a)

- ▶ Federal Cases

11

## What is the Appropriate Company Response After Fraud is Detected? (Cont.)

- ▶ Reasonable steps to respond appropriately to fraud that has been detected
- ▶ Reasonable steps to prevent further similar fraud
- ▶ Reasonable response to the internal investigation findings

12

## Reasonable Steps

- ▶ Prompt action to stop the fraud
- ▶ Disciplinary actions and manager accountability (Human Resources)
- ▶ Root cause analysis and updated risk assessments
- ▶ Remediation – specific changes to reduce the risk that similar fraud will occur in the future
- ▶ Testing relevant controls, including review of the compliance program in the area relating to the fraud

13

## Representation of Company and Individuals

- ▶ Potential conflicts of interest for company's outside lawyers
- ▶ Common Interest Agreements
- ▶ Former Employees

14

# Final Resolution

- ▶ Voluntary disclosure
- ▶ 60-Day Overpayment Rule
- ▶ Civil False Claims Act litigation (dismissal?)
- ▶ Settlement of alleged False Claims Act violations
- ▶ Criminal defense
- ▶ Plea agreement
- ▶ Civil or criminal trial