Department of Justice

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THURSDAY, JUNE 9, 2016
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ACTING ASSOCIATE ATTORNEY GENERAL BILL BAER DELIVERS REMARKS ON INDIVIDUAL ACCOUNTABILITY AT AMERICAN BAR ASSOCIATION'S 11TH NATIONAL INSTITUTE ON CIVIL FALSE CLAIMS ACT AND *QUI TAM* ENFORCEMENT

WASHINGTON, D.C.

Thank you, Dan [Anderson], for that kind introduction. And thank you to Dan and the other co-chairs of this conference, Jack Boese and Jeb White, for having me here today. I know you have heard this before, but this is likely the first time you will have heard it from me. The False Claims Act (FCA) and its *qui tam* provisions remain the government's most effective civil tool in protecting vital government programs from fraud schemes, wherever they occur. I am honored to join you and my colleagues from the department (DOJ) here today to discuss the FCA and some important related topics.

As Dan mentioned, I am a newly minted Acting Associate Attorney General. My priors are mostly in the antitrust field, in the public sector as the Assistant Attorney General for Antitrust these last three plus years, and in the Clinton Administration as head of antitrust enforcement at the Federal Trade Commission. In those capacities, we tackled corporate misbehavior that damaged financial markets, denied or threatened to deny consumers competitive pricing for products and services ranging from ebooks to beer, airlines, wireless phone services, high speed internet access and even canned tuna. While preparing for today, I was reminded that the antitrust statutes and the False Claims Act have much in common: both statutory frameworks outlaw behavior that unfairly enriches companies and individuals at the public expense; and both rely on a combination of government and private enforcement to expose those schemes and seek appropriate monetary and other relief.

This audience is understandably attentive to developments in the False Claims Act area. As you probably know, FCA filings are trending to all-time highs. Last year, more than 630 new *qui tam* matters were filed with the department, bringing the total filings just since 2009

to more than 4,700. These *qui tams* are in addition to referrals that we received from investigative agencies throughout the federal government. The dollars involved are staggering. Since 2009, we have recovered more than $29.5 billion in all FCA matters. Relators have been awarded more than $3 billion for identifying fraud. We continue to dedicate significant resources to False Claims Act enforcement, and to collaborate with our law enforcement and agency partners and with *qui tam* relators and their counsel, all to the benefit of taxpayers and the public fisc. And I congratulate the hard working women and men in the Civil Division and United States Attorneys' Offices across the country whose dedication to effective enforcement continues to produce these impressive results.

It is important to recognize those successes. And I am sure there will be more discussion of those throughout the course of this institute. But my focus in speaking with you is forward-looking. I want to discuss the department's ongoing efforts to ensure that we both recoup government money lost to fraudulent schemes and hold accountable those individuals responsible for the misconduct.

Last September, Deputy Attorney General Sally Yates announced policies designed to strengthen our commitment to holding individuals accountable for corporate misdeeds. The individual accountability approach she laid out sought to give new emphasis to the department's longstanding view that, when it comes to enforcing both criminal and civil statutes, it should not matter whether the offender commits white collar fraud or, as one judge termed it, "no collar" fraud.

The "Yates Memo" certainly has generated its fair share of client alerts. I have read a lot of them. The assessments vary from seeing it as a ho-hum reaffirmation of what we always do, to a bold and risky undertaking. And, as the Deputy Attorney General has said, the truth lies somewhat in the middle. The policy was certainly designed to change certain practices. And even though many of the concepts underlying the policy have long been part of the department's approach to white-collar law enforcement, we thought they needed a renewed emphasis. And, because transparency helps you better advise your clients, we also thought it important to update you periodically on how we are implementing our commitment to individual accountability.

Much of the focus to date has been on application of individual accountability principles to our criminal investigations and prosecutions. My emphasis today is on those aspects of our approach to individual accountability that have a direct impact on civil matters, particularly those brought under the False Claims Act.

First, it is important to appreciate our commitment to the notion that individual accountability applies with equal force and logic to the department's civil enforcement. Some may ask why. To me the answer is obvious. Civil wrongs can have damaging consequences, from the significant waste of taxpayer funds, to the loss of jobs, homes and financial security, to consumer overcharges, to fundamental market dislocations and economic crises. We have a good track record of pursuing the companies involved in these kinds of misconduct. But we all know that companies act through their executives. Why should those who acted on the company's behalf, whether officers, directors or others, and who often profited from the bad behavior, be given a pass? Holding accountable the people who committed the wrongdoing is

fundamental to ensuring that the public has continued confidence in our justice system. It makes no sense to have a different system of justice for individuals who engage in white-collar fraud than we do for everyone else.

We also know that holding individuals accountable for corporate wrongdoing – even through civil enforcement actions – provides a powerful deterrent against future misconduct. Here I speak from my private sector experience. I know from many years counselling corporations, their senior leadership and their boards that the threat of being named personally, the prospect that a corporate executive will have to pay a sizable civil judgment or even simply be subject to a civil injunction, focuses the mind. It sensitizes individuals to the cost of engaging in, or turning a blind eye to, corporate misconduct.

In applying the Yates Memorandum, we have looked across the board at our efforts to hold individuals accountable in all aspects of our civil enforcement. We start by asking department attorneys to make sure they are examining the potential liability of individual actors at the outset of an investigation into corporate wrongdoing. You have already seen the effects of this renewed emphasis. Just two weeks ago, we intervened in a *qui tam* action alleging FCA violations by a major California hospital chain and its CEO. Our recent settlements have included individuals in appropriate cases. These include:

· a $4 million settlement with the estate of an individual who was the CEO of a bank-holding company that defrauded the Troubled Asset Relief Program;
· a $1.65 million settlement with a home health agency owner;
· a $10.3 million settlement with a splint company and its owner for billing for patients in skilled nursing facilities in violation of Medicare rules; and
· a $20 million resolution with a government contractor and its former president for misrepresenting the contractor's status as a woman-owned small business.

These matters are but a subset of matters in which executives and others are a focus of our civil investigations. Whether the conduct implicates the False Claims Act, or our tax, antitrust, environmental or other laws, we have made clear that it is department policy to pursue civilly those individuals who are responsible and hold them accountable, in addition to pursuing our civil case against the organization.

Let me turn next to how this commitment to individual accountability is playing out in the context of our FCA enforcement efforts. At the very outset of any FCA investigation into a corporate scheme, our attorneys are instructed to focus on both the company and the individuals who may be responsible for the bad conduct. It does not matter whether the investigation is precipitated by a *qui tam* complaint or a referral from a law enforcement partner, or whether a relator actually names individuals as defendants in the *qui tam* action. Our inquiry into individual misconduct now proceeds in tandem with the underlying corporate investigation.

That does not mean any claims or any negotiated outcomes involving the company and its officials will always occur at the same time. Often, circumstances will result in a resolution with the corporation before resolution with, or claims filed against, responsible individuals. But the key point here is that reaching a resolution with the company does not end our inquiry into

whether and which individuals should also be pursued. And you should not assume we 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. Admittedly, this is a departure from past practice, where a settlement would release not only the corporation, but also its individual directors, officers and agents. But it is a change we view as necessary to pursue company officials involved in the wrongdoing.

Also, if we do not resolve the issue as to individuals' FCA liability at the time of the corporate resolution, we expect our lawyers to have a plan for how to proceed in the investigation with respect to those responsible. We recognize that, for a variety of reasons, claims against individuals may not always be appropriate. In those cases, if our attorneys conclude at the end of an investigation that they will not recommend pursuing individuals, they are required to memorialize any such recommendation. In short, we are disciplining ourselves to assess individual responsibility at the beginning of and throughout our FCA investigations.

In negotiating FCA dispositions with corporate counsel, companies often seek credit for the assistance they provided the department in getting to a consensual outcome. We, of course, encourage cooperation. So let me turn to the implications that civil accountability for corporate executives hold for companies seeking cooperation credit.

First, companies that are facing FCA allegations and want a settlement to credit their cooperation are expected to disclose all facts relating to the individuals involved in the wrongdoing, no matter where those individuals fall in the corporate hierarchy. This is core to the individual accountability principles articulated by the Deputy Attorney General. We will not credit cooperation unless this threshold requirement has been met.

There are a few different reasons for this. First, understanding who did what is a necessary component of our determining the nature and extent of the violation. How can a company claim to "cooperate" while withholding information that is basic to understanding what happened within the organization? Second, it is critical to identifying those who should be held responsible. Third, disclosing the facts, including telling us what you know about who did what, signifies that the corporation is truly committed to the transparency that is fundamental to the cooperation process. These factors hold true in an investigation into civil liability just as they do where criminal conduct is at issue.

Let me harken back to my antitrust roots, where the argument is so often made that a settlement should reward the company for merely having produced the information demanded by the government pursuant to compulsory process. I never understood, much less credited, the argument. Cooperation is not demonstrated by doing what the law requires, compliance with subpoenas or other lawful demands. Nor is cooperation shown by one-sided presentations and white papers. A corporation should not earn cooperation credit where it just stops contesting what the government has already discovered and, in many cases, disclosed to the defendant; rather, genuine cooperation involves prompt, no slow-walking, and fulsome, no hiding the ball, responses to government requests for information. Moreover, your client's cooperation needs to help us get to the bottom line. It necessitates a focused presentation of relevant information demonstrating the actual conduct that is the subject of the investigation, even where such a

presentation stretches beyond the precise information that may have been requested by the government.

Lots of companies and their counsel understand this. They recognize their responsibility to own up to problems – both because they want to be seen as good corporate citizens and because they appreciate that prolonging a government investigation often only postpones the inevitable at a considerable cost.

Full cooperation may also entail acknowledgement of responsibility by the company, including, in some cases, detailed and complete admissions, as well as remediation efforts. In assessing the nature and extent of a company's cooperation, the department will also take into account the fact that a company reports information that might otherwise not have been discovered in the ordinary course of an investigation, or that saves the government time and resources otherwise dedicated to further investigation. Examples of this cooperation could include making available current or former officers and employees for meetings, interviews, examinations or depositions; disclosing facts gathered during an internal investigation; or identifying opportunities to obtain evidence not in the possession of the organization.

Let me remind you what cooperation does not require. It does not demand wide-ranging and costly internal investigations that are unrelated to our FCA inquiry. As the Deputy Attorney General and others at the department have stated, we expect investigations to be tailored to the scope of the wrongdoing. However, we also expect cooperating companies to make their best effort to determine the facts with the goal of identifying the individuals involved. As we have said previously, if there is any question about the scope of what's required, you should do what many defense attorneys do now – pick up the phone and discuss it with the DOJ lawyer.

Second, and to emphasize a point the department has repeatedly made, there is nothing – I repeat, there is nothing – in the individual accountability policy that requires companies to waive attorney-client privilege.

Third, we are not asking companies to do our work for us by delivering litigatable cases as a condition of cooperation. Cooperation does not require a company to characterize anyone as "culpable" – that is our job. But it does require that a company provide us with all facts about all individuals involved. We need to understand the conduct that occurred and who was involved or sanctioned it. That is the obligation of a company seeking cooperation credit.

A couple of final points on the subject of cooperation in civil matters. Timing, as always, is of the essence. A company should come in as early as it possibly can, even if it doesn't quite have all the facts yet. A company will not be disqualified from receiving cooperation credit simply because it didn't have all the facts lined up on the first day it began talking with us; rather, under those circumstances, we expect that cooperating companies will simply continue to turn over the information to our lawyers as they receive it.

Next, in recognition of the significant value early reporting holds for us in civil cases, prompt voluntary disclosure by a company – that is, soon after the company is aware of the

violation and before the government discovers it – will be weighed in the company's favor. Maximum credit will be reserved for situations where the company not only fully cooperates but also voluntarily discloses; however, the converse is also true: the conduct of those companies that fail to act promptly, fail to promptly disclose or fail to help us understand who participated in the violation also will be factored into our overall view of the appropriate resolution of the matter.

What benefit does a company derive from cooperating in a civil investigation? Why should you convince your client to surrender its right to contest and instead agree to help the department resolve a False Claims Act investigation?

Where a company satisfies the threshold requirement of disclosure as to individuals and otherwise cooperates with the government's investigation, the department will use its significant enforcement discretion in FCA matters to recognize that cooperation. Our lawyers do this all the time in negotiating settlements. But it is important to understand that there is no magic formula here. We cannot write an equation that allows you to plug in values and determine the monetary and other benefits of cooperation. But the concept of the "downward departure" in the federal sentencing guidelines may provide a fitting analogy. There, the penalty is adjusted to reflect the nature and extent of a defendant's cooperation. The analogy is not perfect, of course. False Claims Act cases present unique challenges when we think about how to credit cooperation. This is especially true in light of the different damages issues and measures that arise in these cases, the range of multiples and penalties and the need to ensure that we are fulfilling both the remedial and deterrent purposes of the statute. Nevertheless, we are committed to taking into account the disclosures and other cooperation provided by defendants and to resolve matters for less than the matters would otherwise have settled for based on the applicable law and facts. The most recent examples include various self-disclosures by entities or physicians that violated the Stark Law, and a hospital system that conducted and provided us with the results of a comprehensive audit of its false billings to government health care programs.

As we proceed and consider what type of credit to provide to companies that cooperate in False Claims Act matters, we will place great emphasis on the timing, nature and extent of the cooperation, including the quality and completeness of the disclosures we receive and the degree to which it advances the search for truth.

But more generally, let me make the pitch that there are benefits of working collaboratively with the government in its civil fraud investigations and avoiding what otherwise would entail costly and protracted discovery, trial and the mandatory treble damages and penalties that will be assessed if the government prevails. The more thorough and effective job defense counsel do investigating the case and presenting the results of that investigation, the more likely it is that we will find this type of presentation useful, and the more benefit your clients will realize in negotiated resolutions.

Think, too, about collateral benefits of promptly owning a False Claims Act problem. As you know, there are legal requirements, policies and practices in place that encourage businesses to combat fraud on their own, and these include the FAR – the Federal

Acquisition Regulation – that governs those who do business with the government. Moreover, because disclosure and cooperation show a sincere interest in cleaning house – and ensuring a culture of doing the right thing – cooperation in an FCA matter can help companies demonstrate the necessary responsibility to continue participating in government programs and contracts. So a decision to come in promptly and work with the government to resolve any liability that may arise from past wrongdoing can be more than the right litigation decision. It is often a good business decision as well.

As I hope my remarks here this afternoon have made clear, the department takes seriously its commitment to protect vital government programs from fraud. I doubt there is a person in this room who would disagree with that goal since we are, after all, all taxpayers. That is why we must face this goal collectively. Each of us – plaintiffs and defendants, private counsel and the government – plays a role in these cases. That is why I am so pleased to be here and so convinced that conferences such as this are of value. These gatherings – occurring outside the vigorous advocacy associated with a specific investigation or litigation – give us a chance to talk about policy and to further our understanding of our respective positions on FCA enforcement.

And so I thank our co-chairs of the conference, Jack, Jeb and Dan, for bringing together such a terrific faculty and I look forward to working with all of you in the future.

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