BRACEWELL

BLOG POST

Major Cases Only, Please

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At the American Health Lawyers Association meeting last week, Department of Justice officials signaled that the Department may shift to a model of bringing slightly fewer health care fraud cases overall but bringing them against large corporations, their executives, and other high profile targets. According to *Law360*, Daniel R. Anderson, the deputy director of the commercial litigation branch in the Civil Division, said that "[c]riminal enforcement is slightly down if you look at the statistics, but I wouldn't take too much from that. We're finding that our criminal [prosecutor] colleagues are turning more toward institutional fraud. ... The investigations that they're opening are larger."

To this I say . . . what?

Perhaps I'm skewed by my recent departure from the U.S. Attorney's office, but it's not all that easy to one day decide to focus on large cases instead of small cases. A federal agency supervisor once told me that he wanted his squad to work only the large mortgage fraud cases. Really? How, exactly? In the world of white collar prosecution, it's often the small cases that turn into the large cases. For example, you usually start looking at one investor complaint, find another investor, and then you discover an extensive scheme. You ordinarily don't get out of the shower on a Monday morning and run smack into Charles Ponzi (unless you are dreadfully unlucky). Billion-dollar schemes do not just lie in wait for you unless you really *do* believe that a wealthy heiress in Nigeria has willed you all of her money.

So reading between the lines, what it looks like is that the Department is increasing its *scrutiny* of large corporations to identify suspicious activity while declining smaller value cases because of resource issues. And in increasing its scrutiny, it is more willing to work its way up the chain to high value targets, or at least more willing than in the past.

And the question then becomes, with an increased eye towards high value targets, how aggressive will the Department be in resolving their investigations? And how exacting will that pound of flesh be when carved from a corporate entity?

You can see this idea taking hold from the Department's actions against large financial institutions. From non-prosecution agreements, to deferred prosecution agreements, to criminal convictions, to civil fines, the Department has an open palette of enforcement options at its disposal. The key for a large company is to make sure that the playing field ranges from a declination to a civil resolution, as opposed to from a civil issue to a criminal one.

What does that mean in practice? Well, it means that means that compliance programs are especially important now. Bringing counsel in when the government has contacted you is too late because the playing field is tilted away from you. Competent counsel can evaluate practices

and procedures, set up a strong compliance program, and use that as Exhibit A to obtain a declination in a government investigation. It also means that smaller cases may very well be sent to the state and local authorities to prosecute. And it means that corporate executives need to be aware of what the regulatory and law enforcement agencies are doing so that they can ensure that their own practices are aligned.

Prosecution of high value targets is a terrific goal for the Department because it carries with it both protection of the community *and* deterrence to future bad actors. But swept into that net at times are large companies who are held accountable by the actions of a few bad actors. Far better to address the compliance issue before the Department gets involved than to serve as the deterrent after the government is through with you.