

Environmental Enforcement and Crimes Webinar

EPA and DOJ Announce New Initiatives and How They Affect You

March 22, 2016

WA 7965283

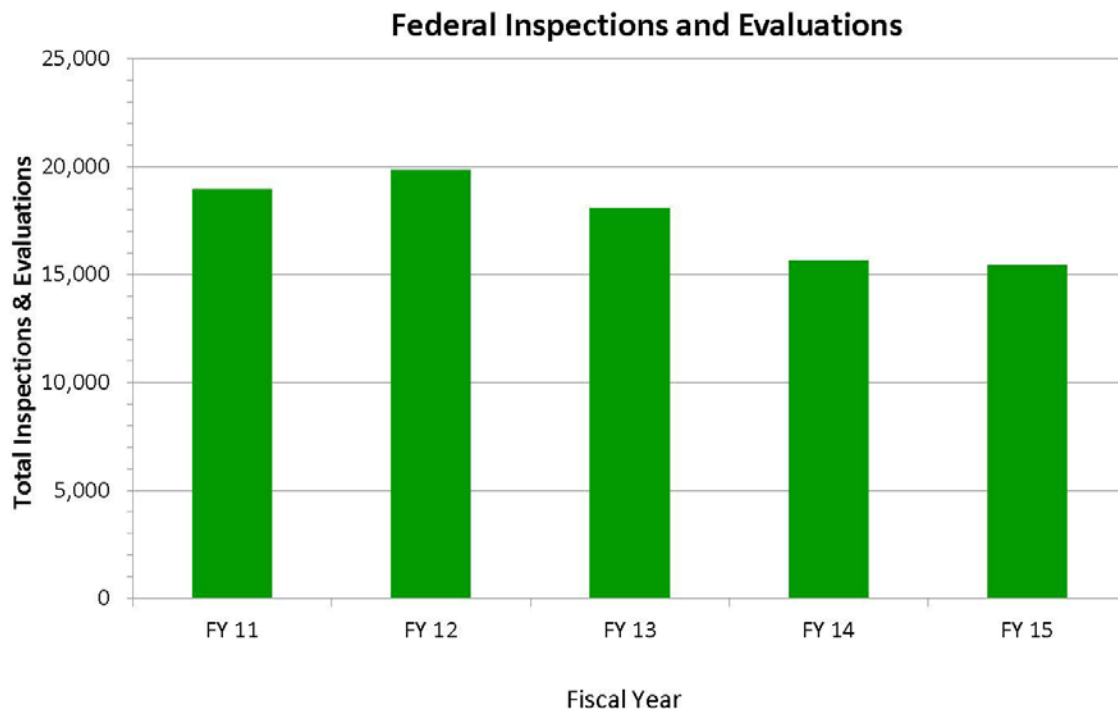
Webinar Overview

- **Changing enforcement landscape**
 - Environmental Enforcement Trends - EPA
 - Worker Endangerment Initiative - DOJ
 - Individual Accountability – Yates Memo
- **Staying ahead of the curve**
 - EHS Audits
 - Internal Investigations



FY 2015 Enforcement and Compliance Annual Results

Federal Inspections and Evaluations (Conducted by EPA) FY 2011 – FY 2015



➤ In FY 2015, EPA conducted more than **15,400** inspections/evaluations.

➤ As EPA's budget has declined, the total number of inspections has declined as well. EPA continues to pursue additional means of gathering information about facility compliance, to supplement our on the ground inspections.

Data Source: Integrated Compliance Information System (ICIS), ICIS-NPDES, ICIS-AIR, RCRAInfo, and manual reporting.

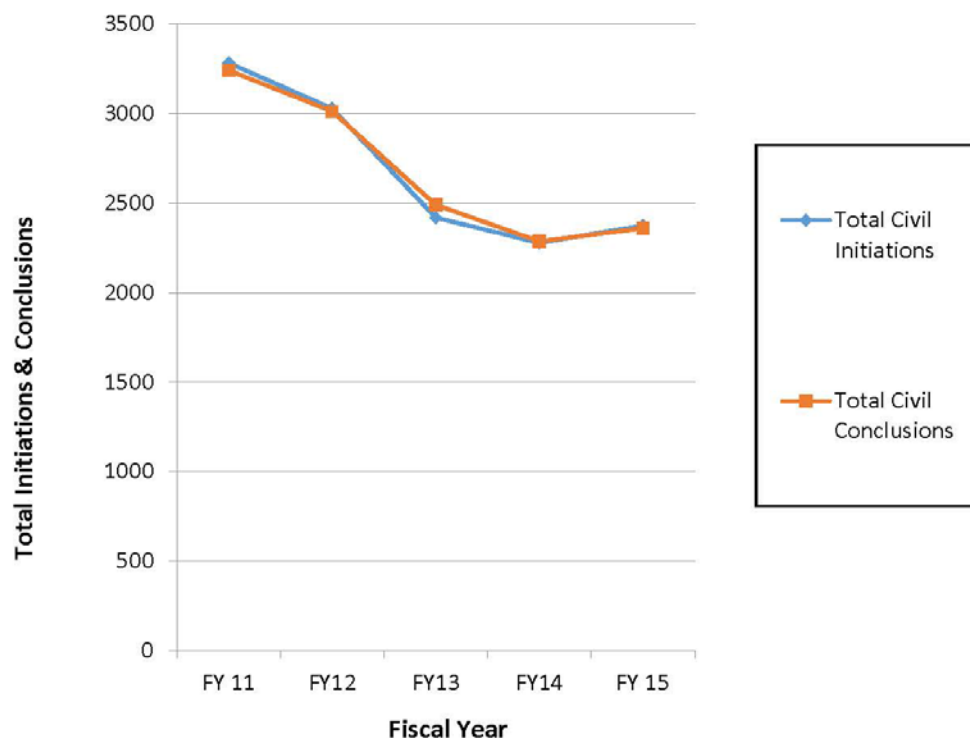
Prepared by: OC/ETDD/DSIMB
October 29, 2015



FY2014 Enforcement and Compliance Annual Results

Civil Enforcement Case Initiations and Conclusions

FY 2011 – FY 2015



➤ In FY 2015, EPA initiated approximately **2,380** civil judicial and administrative cases.

➤ In FY 2015, EPA concluded approximately **2,360** civil judicial and administrative cases

➤ In FY 2015 EPA continued to pursue larger more complex, risk-based enforcement cases. This strategy leads to significant environmental and health gains, but general lower numbers of cases overall.

Data Source: Integrated Compliance Information System.
Prepared by: OC/ETDD/DSIMB
November 7, 2015

12/16/2015

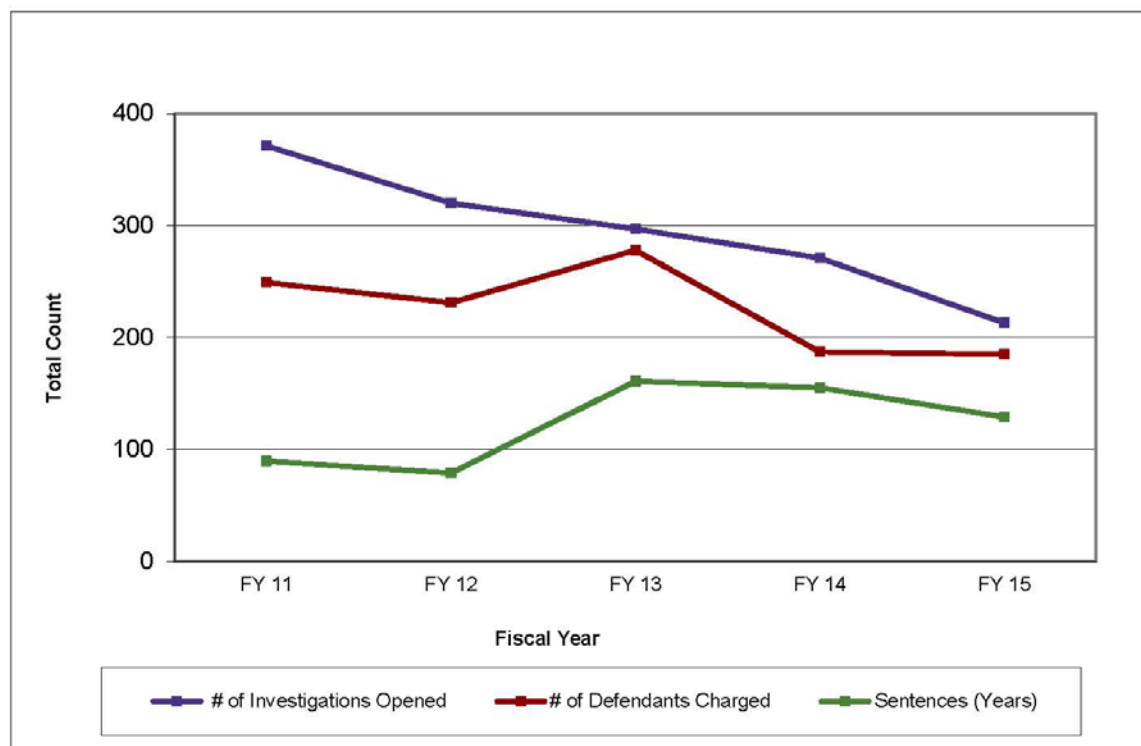
U.S. Environmental Protection Agency

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FY 2015 Enforcement and Compliance Annual Results



Criminal Enforcement Environmental Crime Cases Opened, Defendants Charged, and Sentencing Results – Years of Incarceration FY 2011 – FY 2015

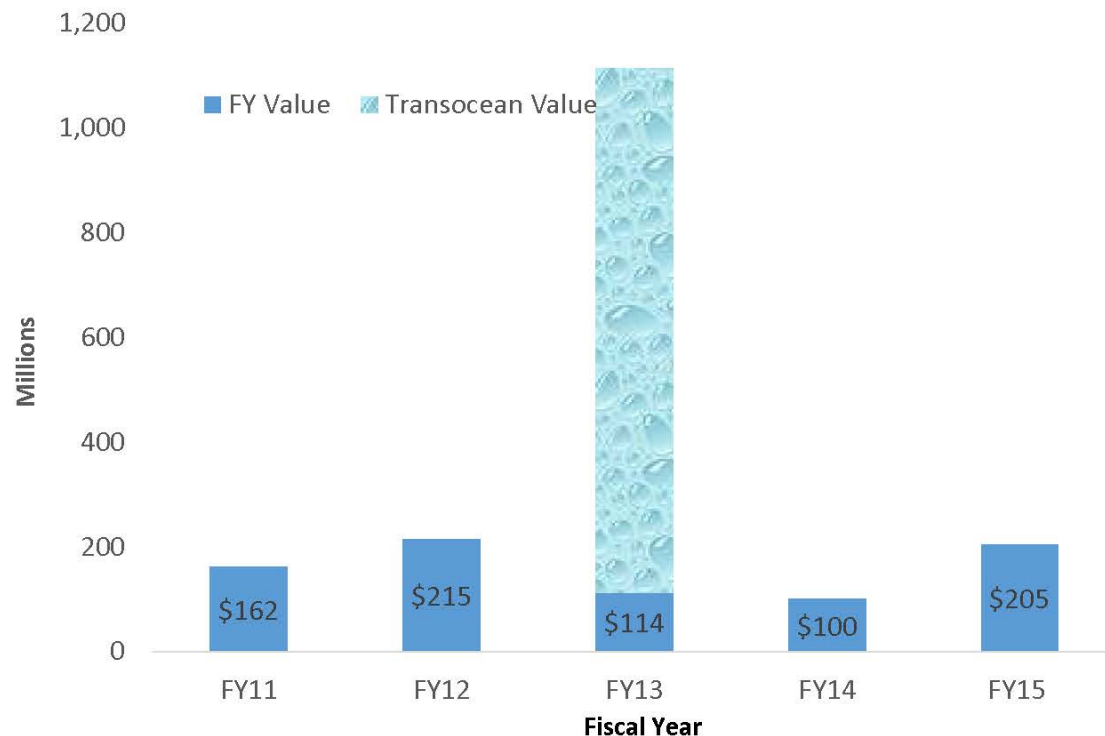


Data Source: Criminal Case Reporting System
Prepared by: OC/ETDD/DSIMB

- The criminal program continued in FY15 to focus on complex cases that involve a serious threat to human health and the environment or that undermine program integrity.
- The focus on high impact more complex cases results in fewer investigations overall.

FY 2015 Enforcement and Compliance Annual Results

Administrative and Civil Judicial Penalties Assessed FY 2011 – FY 2015



- In FY 2015, EPA obtained nearly **\$205 million** in federal administrative and civil judicial penalties.
- The FY 2013 results were dominated by the record setting **\$1 billion** penalty from Transocean in the Deepwater Horizon case.
- Penalties assessed vary from year to year depending on the timing of resolution of the largest cases.

All prior FY dollar figures in this report are adjusted to reflect the current value in FY 2015 dollars based on the monthly rate of inflation/deflation as determined by the U.S. Department of Labor Consumer Price Index for All Urban Consumers.

Data Source: Integrated Compliance Information System (ICIS)
Prepared by: OC/ETDD/DSIMB

12/16/2015

U.S. Environmental Protection Agency

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EPA's Mission and Impact from Flint and Gold King Mine

U.S. House of Representatives – Committee on Oversight and Government Reform
<https://oversight.house.gov/hearing/examining-federal-administration-of-the-safe-drinking-water-act-in-flint-michigan-part-3/>

- Chairman Chaffetz (R-UT), questioning EPA Administrator McCarthy during March 17, 2016, Hearing regarding Federal Administration of the Safe Drinking Water Act in Flint, Michigan



EPA's Mission and Impact from Flint and Gold King Mine

- Precautionary principle
- Data sharing
- Transparency
- More oversight of delegated programs



Next Generation Compliance

- Technology and the new reality with EPA

Real time data + transparency =
changed behavior

Next Generation Compliance

- Electronic Reporting of Data
- Advanced Monitoring Technologies
- Independent Third-Party Verification

Potomac River – Washington, DC

Red Light – Illuminated during Combined Sewer Overflow (CSO) event

Yellow Light –
Illuminated for 24 hours after CSO event



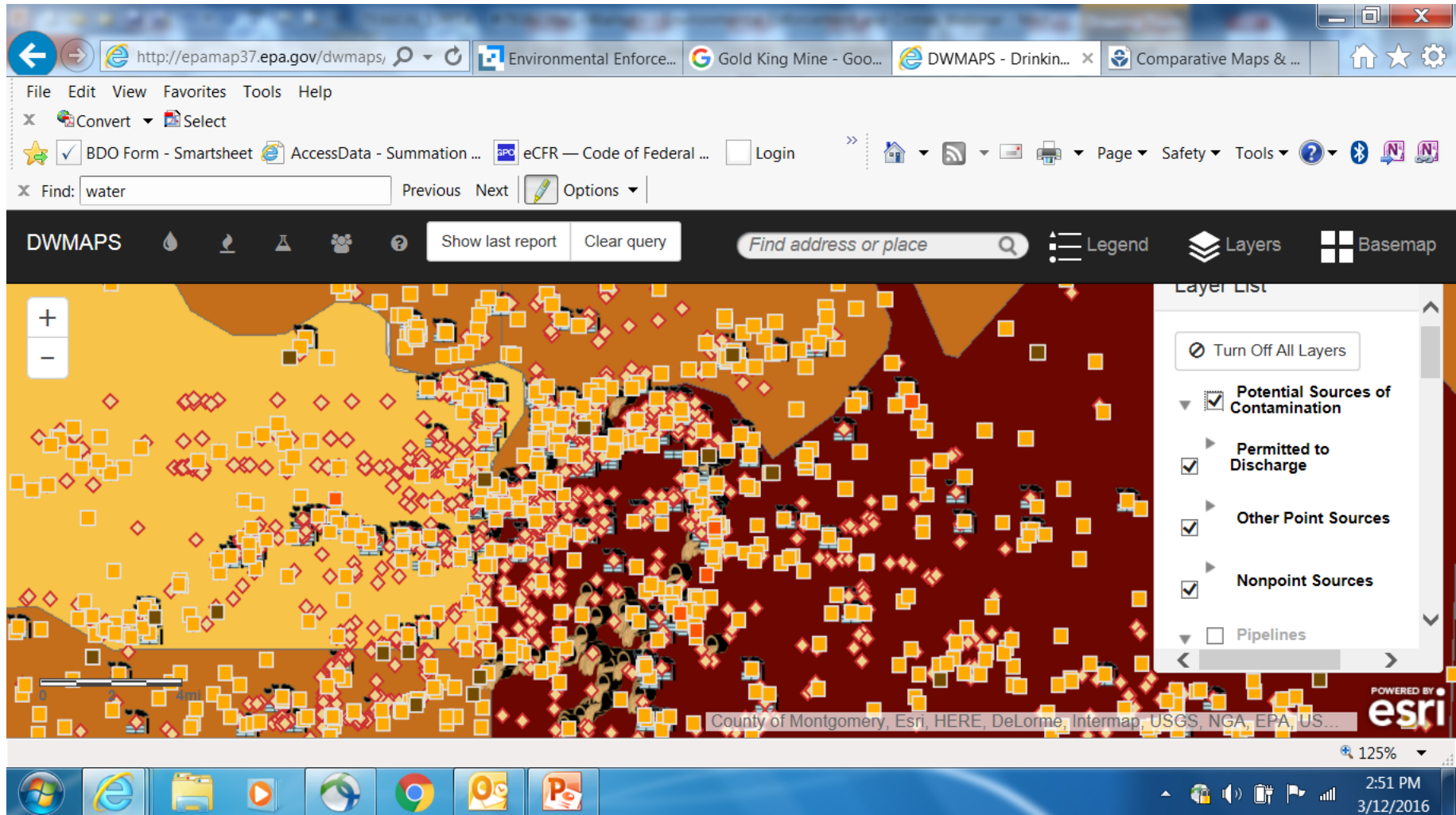
St. Louis MSD

- Signage
- Other examples
 - Text alerts
 - Email alerts



Next Generation Compliance

- Online Mapping Tools
 - Drinking Water Mapping Application to Protect Source Waters (Feb. 19, 2016)
 - Upgrades and Maps and Dashboards
 - Enforcement and Compliance History Online (ECHO Database)
- Citizen Enforcement

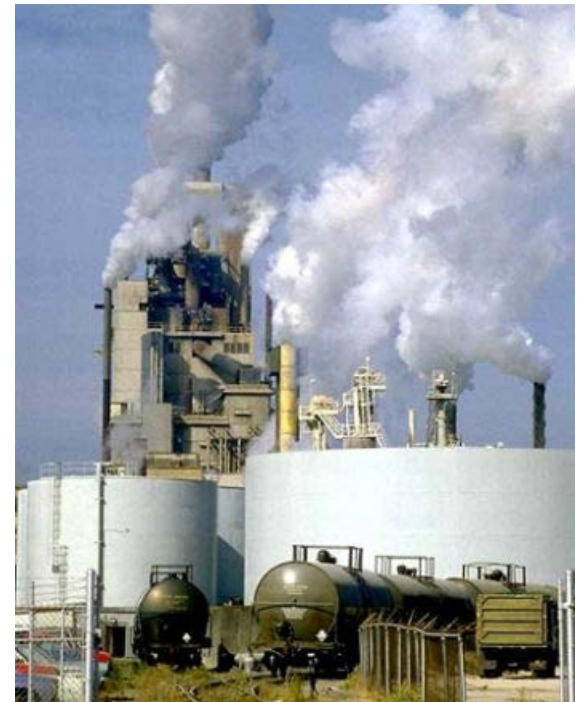


EPA National Enforcement Initiatives FY 2017-2019

- WATER
 - Keeping Industrial Pollutants Out of the Nation's Waters (new)
 - Stormwater - CSOs / SSOs
 - CAFOs

EPA National Enforcement Initiatives FY 2017-2019

- AIR
 - Cutting HAPs (expanded)
 - Reducing Air Pollution from the Largest Sources



EPA National Enforcement Initiatives FY 2017-2019

- AIR / HAZARDOUS
CHEMICALS
 - Reducing Risks of
Accidental Releases
at Industrial and
Chemical Facilities
(new)



EPA National Enforcement Initiatives FY 2017-2019

- LAND
 - Ensuring Energy Extraction Activities Comply with Environmental Laws



Worker Endangerment Initiative

- OSH Act Criminal Provisions – Section 17
 - **Willful** violation of OSHA standard and said violation causes death of employee
 - Providing advance notice of an inspection
 - Knowing false statements, representations, or certifications
- Misdemeanor – a fine no more than \$10,000 and/or incarceration for no more than 6 mos.

Worker Endangerment Initiative

- DOJ – December 17, 2015 Memo
 - Prosecutors should charge other felony Title 18 offenses (false statements, obstruction of justice, witness tampering, conspiracy, mail/wire fraud)
 - USAO to work with Environmental Crimes Section
- MOU between DOJ and DOL

Worker Endangerment Initiative

- Endangerment crimes under CAA, CWA, and RCRA
- Knowingly commit underlying pollution crime
- Knew that such act(s) put another person in imminent danger of death or serious bodily injury
- CAA also has negligent endangerment

Worker Endangerment Initiative

- Civil Enforcement by DOJ Environmental Enforcement Section
 - Coordination with OSHA on injunctive relief and settlement framework
 - Cross-training EPA and OSHA inspectors
 - Information sharing
 - Worker safety concerns being investigated

The Yates Memorandum



U.S. Department of Justice

Office of the Deputy Attorney General


The Deputy Attorney General

Washington, D.C. 20530

September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND
NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL
SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES
TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM:

Sally Quillian Yates 
Deputy Attorney General

SUBJECT:

Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

The Yates Memorandum

- DOJ's aggressive and lucrative pursuit of corporate crime expands to individual corporate actors
- Response to criticism that “no bankers went to jail” for the financial crisis
 - “the buck needs to stop *somewhere* where corporate misconduct is concerned” (A.G. Holder September 17, 2014)

The Yates Memorandum – cont.

- Essential Policy Statements
 - Cooperation credit for corporations only upon disclosure of “all relevant facts” regarding individual misconduct
 - Can affect decision to prosecute, sentencing guidelines calculation and civil penalty amounts
 - Disclose all facts about misconduct of all individuals involved or responsible, regardless of rank
 - Best efforts obligation
 - Government will focus on individual liability from outset
 - Persons with minimal culpability may be sued in civil enforcement action

The Yates Memorandum – cont.

- Coordinated efforts between prosecutors and civil enforcement lawyers
 - Corporation's voluntary disclosures to prosecutors will be shared with civil enforcement lawyers
- Corporation pleas or settlements may not include releases of individuals except in extraordinary circumstances
 - release of criminal or civil liability must be approved by Asst. A.G. or U.S. Attorney

The Yates Memorandum – cont.

- Possible Effect
 - Environmental – Prosecution of corporations and executives is common in cases of criminal intent.
 - Potential for increase in negligence prosecutions and civil penalty cases.
 - OSHA – Statute allows civil or criminal actions against “employer” only. Exception is criminal liability for false statements.

EPA Audit Policy – Voluntary Disclosure

1. Systematic discovery
2. Voluntary disclosure
3. Prompt disclosure
4. Independent discovery and disclosure
5. Correction and remediation
6. Prevent recurrence
7. Repeat violations ineligible
8. Certain types of violations ineligible
9. Cooperation

EPA Audit Policy – Dec. 2015 Changes

- eDisclosure Portal
- Category 1 Disclosures
 - EPCRA violations (excluding release reporting) that meet all Audit Policy conditions, including systematic discovery
- Category 2 Disclosures

Internal Investigations

Best Practices

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Internal Investigations

- Considerations
 - Selection of Counsel
 - Oversight by company executives
 - Controlling the message
 - Information collection and retention
 - Interview by witnesses
 - Establishing the privilege in interviews
 - Separate counsel for implicated employees
 - Cooperation with prosecutor

Selected Topics

Environmental/OSHA Investigations

- Information collection and retention
- Witness interviews
- Separate counsel for witnesses

- Internal investigations are conducted on possible significant claims against an organization where the underlying conduct is not fully known to management.
 - Did the conduct actually occur
 - Scope of the conduct
 - Persons responsible
 - Effects on the corporation

Document/Information Collection and Retention

- Collect information from all media
- Litigation-hold rules apply to internal investigations
- Counsel should engage an electronic discovery consultant

Employee Interviews and Privilege

- Communications/Interviews between Counsel and the Employee are Privileged
 - Upjohn Co. v. United States
 - state cases
- Interviewing the implicated employee.
 - Interests of the corporation and the implicated employee may diverge
 - Counsel's obligation to warn the implicated employee

Employee Interviews and Privilege – cont.

- Upjohn Warnings
 - counsel represents the organization only
 - interview is for the purpose of privileged legal advice to the corporation
 - the organization owns the privilege
 - the organization may waive the privilege and disclose the interview information
 - the witness may want his own lawyer

Separate Counsel for the Implicated Employee

- Benefit of shared information (with clients' consent)
 - Common interest rule
- Generally permitted if arguable good faith conduct
- Due to Yates memo, employees with minimal culpability (even negligence) may refuse an interview and demand separate counsel

Questions?



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