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Strategizing for

GOVERNMENT CONTRACTORS' GAME PLAN

**Under the
New Administration**



Investigations: Protecting the Company in a New Environment

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Recent Developments and Impact

- Focus on Individuals: Impact of the Yates Memo
- Criminal Referrals: Enhanced process and resources
- Impact on investigation dynamics and considerations

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The Yates Memo

- Requirements for corporate cooperation credit based on individual accountability
- Focus on individuals from inception of investigation
- Disclosure of all relevant facts regarding individuals involved in misconduct
- Corporate resolution will not protect individuals
- Applies equally to criminal *and* civil matters
 - *e.g.*, “Yates lists” in civil FCA cases

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Criminal Referrals

- Automatic review of all *qui tam* complaints by DOJ Criminal Division
 - More centralized and coordinated process in procurement fraud cases
- Enhanced resources
 - New prosecutors focused on criminal procurement fraud cases
- More criminal procurement fraud investigations stemming from civil FCA cases?

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Impact on Investigations

- Injecting criminal considerations into civil and administrative investigations:
 - Separate counsel for individuals
 - Fifth Amendment invocations and adverse inferences
 - Common-interest agreements
 - Forced disclosure of fruits of internal investigations
 - Self-disclosure of criminal conduct

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Protecting the Privilege

- Continued importance of *Upjohn*
 - *U.S. v. Blumberg* (D.N.J. 2017)
 - *U.S. v. Merida* (10th Cir. 2016)
- Former employees
 - *Newman v. Highland Sch. Dist.* (Wash. 2016)
- **KBR --- AGAIN!!!**

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Preservation of Documents/ESI

- Triggering the Duty to Preserve
- Scope of the Duty
- Sanctions for Failure to Preserve
 - *Ala. Aircraft Indus., Inc. v. Boeing Co.*
(N.D. Ala. 2017)
- Preservation Practices

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