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One Year Later: The Yates Memo, False Claims Act and Director & Executive Liability

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Summary

On September 19 and 27, 2016, the US Department of Justice announced two ***False Claims Act*** settlements that required corporate executives to make substantial monetary payments to resolve their liability. How will director and executive liability be impacted by the Yates Memo and False Claims Act in an evolving health care climate?

In Depth

On September 19 and 27, 2016, the US Department of Justice announced two False Claims Act settlements that required corporate executives to make substantial monetary payments to resolve their liability. In the first, announced on September 19, North American Health Care Inc. (NAHC) and two individuals—its chairman of the board and a senior vice president of reimbursement—agreed to settle potential False Claims Act liability for a total of $30 million. The second settlement involves the former CEO of Tuomey Healthcare, who, a year after the $72.4 million corporate FCA resolution and two years after his departure from Tuomey as CEO, is now settling his own liability for $1 million, has been required to release any indemnification claims he may have had against the company, and has agreed to a four-year period of exclusion from participating in federal health care programs. Coinciding with the Tuomey CEO settlement announcement, Bill Baer, Principal Deputy Associate Attorney General of the US Department of Justice (DOJ), gave a speech in Chicago discussing company cooperation and “individual accountability” in the context of federal civil enforcement. This new guidance, as well as the two settlements, come a little over a year after DOJ Deputy Attorney General, Sally Yates, issued what is now known as the “Yates Memo,” which sets forth guidance to be used by DOJ civil and criminal attorneys “in any investigation of corporate misconduct” in order to “hold to account the individuals responsible for illegal corporate conduct.” Since then, corporate resolutions like these have been watched for telltale signs of whether the Yates Memo is really changing the way federal enforcement does business. Given the timing of the speech and the settlements, and the high level of the officers involved, that change may be here.

NAHC Settlement

In the NAHC matter, the United States alleged that NAHC and the two individuals had violated the

FCA by causing the submission of false claims to government health care programs for medically unnecessary rehabilitation therapy services. Specifically, the government contended that NAHC had service agreements with 35 skilled nursing facilities (or SNFs) in California, Washington, Arizona and Utah, and that the company billed Medicare (Part A) and Tricare for medically unnecessary rehabilitation therapy services by (1) unnecessarily extending the length of stay and (2) providing "Ultra High and Very High Resource Utilization Group (RUG) levels of therapy to patients who did not require those levels of rehabilitation therapy." With respect to the settling individuals, the United States contends that the senior vice president "contributed to this conduct by creating the RUG scheme" and that the board's chairman "contributed to this conduct by reinforcing the RUG scheme described herein at the NAHC facilities." As is standard for out-of-court DOJ FCA settlements, there is no complaint setting forth the government's detailed allegations. Under the settlement agreement, NAHC agreed to pay $28.5 million. Its chairman of the board agreed to pay $1 million and the senior vice president agreed to pay $500,000. There is no provision concerning—or prohibiting—NAHC from indemnifying either of the two individuals. Nor is there a provision regarding termination of employment. *Cf. United States v. Bank of New York Mellon et al.*, No. 11 Civ. 6969 (LAK) (SDNY) (stipulation of settlement requiring separation of certain employees).

Consistent with the Yates memo, the settlement released only the company and the two individuals who were parties to the agreement. The settlement expressly excluded any other individuals from the release of liability. As is also becoming common in post-Yates settlements, the settlement imposed ongoing cooperation requirements and, notably, required the two individuals, as well as NAHC, to "cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement, subject to the NAHC parties' rights and privileges." In this context, "cooperation" includes encouraging and not impairing the cooperation of other present and former directors, officers and employees and furnishing, upon the request of the government, all non-privileged documents concerning any investigation of the conduct underlying the settlement.

Simultaneous with the resolution, NAHC entered into a CIA (corporate integrity agreement) with OIG-HHS; in exchange, OIG-HHS released its permissive exclusion authority against NAHC. However, neither individual entered into an integrity agreement or obtained a release of OIG-HHS's permissive exclusion authority. It is unknown whether this is the result of the agencies determining that the individuals' conduct didn't warrant further action, that the CIA effectively functions as a *de facto* monitoring agreement with the individuals given their positions in the company or a desire to keep their options open down the road. (It is worth noting that (1) the chairman of the board is a named defendant in a related—but not overlapping—*qui tam* action pending in the Northern District of California and (2) the senior vice president is one of a number of other individuals referenced in the complaint. The United States declined to intervene in that *qui tam* case, which has survived motions to dismiss and in which an answer was filed on September 19, 2016—the same date that the DOJ settlement was announced.)

Tuomey CEO Settlement and Exclusion

This settlement comes two years after the CEO's departure from Tuomey Healthcare and one year after Tuomey finally resolved its own long-running matter with DOJ for alleged Stark Law violations resulting from Tuomey's financial relationships with physicians. In the context of that matter, the government alleged that the now-former CEO caused Tuomey to enter into contracts with various physicians to obtain certain referrals to the hospital system. Nonetheless, and despite the pointed allegations against the CEO during the 2013 trial, the government did not reach an individual resolution until nearly a year after the 2015 corporate resolution, which while not unique, is unusual. The settlement is substantial and, as noted above, requires the former CEO to pay $1 million dollars and agree to a four-year period of exclusion from participating in federal health care programs, including providing management or administrative services paid for by federal health care programs. According to the settlement agreement, the resolution was reached in reliance on certain financial disclosures made by the CEO to DOJ (*i.e.,* an "ability to pay" settlement). As in the NAHC settlement, the former CEO is required to fully cooperate with the United States' investigation of other individual and entities. However, in a highly notable departure from the NAHC agreement, the Tuomey CEO is required to release the company from any indemnification claims he may have had.

Since the Yates Memo was announced one year ago, it has sometimes been a guessing game to determine whether one particular case against individuals is the result of a more vigorous post-Yates environment. However, for each of these closely timed settlements, the government's announcement highlights the inclusion of individuals in the resolution and draws a clear connection to the Yates Memo's premise. Further, these settlements coincide with the September 27, 2016, speech of DOJ official Bill Baer, where he spoke at length about the application of the Yates memo to civil matters, emphasizing the need for companies proactively to provide to the government information about all relevant facts, including those relating to individuals "no matter where those individuals fall in the corporate hierarchy." The timing of these settlements and DOJ's additional guidance suggests that we are seeing the impact of Yates on civil resolutions. The extent of an individual's "accountability" will no doubt be fleshed out over time (*e.g.,* in addition to having monetary liability, under what circumstances will individuals have to release claims to indemnification? What level of cooperation will be required? Will agency releases for individuals be dependent on Yates-like factors or will agencies maintain their historical posture of not providing releases? How long will the government wait after a corporate resolution before resolving matters with individuals?). However, it seems evident that as of now DOJ is focusing higher up the executive chain. These settlements are by no means the first FCA corporate resolutions to include individuals (many have included corporate owners and physicians), but they clearly stand out as cases where non-owner, high-level individuals, are singled out and subject to substantial monetary and administrative penalties.

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