

Board Member Risk and Yates Memo

The Yates Memo Makes Boards Nervous¹

Hospital and health system boards are becoming nervous about exposure to personal liability from their board work. The Department of Justice (“DOJ”) recently announced two False Claim Act (“FCA”) settlements requiring a Board member and executive leadership to make considerable monetary payments to resolve their liability for their involvement in the illegal scheme. In the first case involving North American Health Care Inc. (“NAHC”), the chairman of the board and the senior vice president of reimbursement analysis agreed to pay \$1 million and \$500,000, respectively, to resolve allegations that they violated FCA by submitting medically unnecessary rehabilitation therapy services.

In the second FCA settlement, the former chief executive officer of Tuomey Healthcare System agreed to pay \$1 million for his involvement in the hospital’s illegal physician arrangement. The former CEO is also excluded from participating in the federal health care program for four years, including providing management or administrative services paid by federal health care programs.

Based on just these two FCA settlements, it is clear that DOJ will prosecute individuals (e.g., C-suite executives and board members) involved in corporate misconduct investigations and seek monetary penalties and/or exclusion from the federal healthcare programs (consistent with the 2015 Yates Memo). Moreover, given the Memo’s focus on collecting information on individual wrongdoings, the prevalent trend may be substantial monetary penalties against individuals.²

What is the Yates Memo?

In September of 2015, Deputy Attorney General Sally Quillian Yates issued a memorandum entitled Individual Accountability for Corporate Wrongdoing (“Yates Memo,” “Memo”).

There are client guidelines in the Memo, its implications for healthcare providers and the most recent settlements putting the guidelines into action. The Memo instructs all DOJ attorneys, including U.S. attorneys, to target individuals (e.g., C-suite, Board members, etc.) involved in corporate crimes for criminal prosecution and civil sanctions. In digesting the Yates Memo, it is clear that the guidance outlined is to ensure that **individuals are held accountable for corporate wrongdoing in an effort to deter illegal activities, spur change in corporate behavior, and hold responsible parties accountable.** This is clearly stated in the Memo, “One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.”

¹ See Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep’t of Justice, “Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing,” (Sept. 10, 2015), *available at* <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-newyork-university-school>.

² See: <http://blogs.wsj.com/riskandcompliance/2016/05/10/yates-assesses-effects-of-yates-memo/>

The Yates Memo outlines six (6) key steps for DOJ attorneys “to most effectively pursue the individuals responsible for corporate wrongs.” Healthcare providers, particularly in-house counsel and compliance officers, should lead conversations in the C-Suite and Boardroom about how these six factors can strengthen your board work and corporate compliance programming and investigations/audit processes.³

1. To be eligible for any cooperation credit, corporations (healthcare providers) must provide to the DOJ “all relevant facts” about the individuals involved in corporate misconduct, regardless of the level of seniority.
2. Both criminal and civil DOJ investigations should focus on investigating individuals “from the inception of the investigation.”
3. Criminal and civil DOJ attorneys handling corporate investigations should be in “routine communication” with one another. Criminal and civil attorneys should notify each other “as early as permissible” when conduct gives rise to potential civil or criminal liability is discovered.
4. “Absent extraordinary circumstances,” no corporate resolution will provide protection from criminal or civil liability for any individuals.
5. Corporate cases should not be resolved without a “clear plan” to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.
6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.

What it means for healthcare providers?

- Your Compliance officer and legal counsel must train Board members and executive leaders on the Yates Memo.
 - Present to the Board and executive leadership on the Yates Memo and their responsibilities regarding non-compliance detected within the organization. The presentation should include the six (6) key steps discussed above and examples of recent actions/settlements by DOJ in FCA cases.
- Board members and executive leaders must exercise proper supervision.
 - The Board and leadership cannot take a passive role when non-compliance is identified or when the healthcare organization is audited or investigated by third party vendors, like RACs and MACs.
- The compliance department should review its current compliance plan, particularly policies and procedures on how to conduct investigations, in light of the Yates Memo.
 - The process for conducting an investigation must include identifying responsible individual(s), in order to seek cooperation credit should the organization be investigated under the FCA.
 - The policy should include how non-privilege evidence will be documented and preserved should DOJ investigate the organization.
 - These steps are critical because if the organization fails to do so and is investigated, any assistance or cooperation provided will not be considered a mitigating factor. Also included in the Memo is that, at minimum, all relevant facts about the responsible party must be revealed during a FCA investigation to trigger the reduced damages provision.

³ See: <http://www.providentedge.com/yates-memo-healthcare-need-know/>

- The review should also include evaluating and updating forms and templates.
- Train your auditors on the Yates Memo, and the updated compliance plan and policy / procedure for conducting an investigation, if applicable.
- Healthcare providers should consider hiring an outside firm to conduct an investigation when an audit or pattern has been discovered or suspected that may require disclosure.

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