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Emerging Director/Officer Liability Risk

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There are notable indications that the government's long-promised focus on individual accountability for corporate misconduct is now being applied at the executive level in the healthcare sector. Prominent, recent examples include settlement agreements that required a board chair and a CEO, respectively, to pay significant financial penalties. These are developments of which healthcare officers and directors should fairly be made aware, but in a manner that avoids "sky is falling" suggestions, and is framed with proactive legal compliance recommendations.

A little over a year ago, Deputy U.S. 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." And, as recent developments strongly suggest, the "Yates" pipeline is filling and producing prosecutorial results with a flow of complaints naming, and settlements penalizing, individual officers and directors.

For healthcare systems, there are two particularly prominent, recent examples. On September 19 and 27, 2016, the DOJ announced separate False Claims Act settlements that required senior corporate leaders of healthcare companies to pay significant financial penalties to resolve allegations that they violated federal law. The September 19 settlement involved allegations that the nursing home operator North American Health Care, Inc. (NAHC) violated the FCA by submitting false claims for medically unnecessary rehabilitation therapy services provided to its skilled nursing home facility residents. NAHC agreed to pay a penalty of $28.5 million, and its ***board chairman*** [emphasis added] and its Senior Vice President of Reimbursement Analysis agreed to pay penalties of $1 million and $500,000, respectively. The September 27 settlement involved the payment of $1 million by the former ***CEO*** [emphasis added] of Tuomey Healthcare system, to resolve allegations relating to his involvement in what a jury concluded was the health system's FCA and Stark violations. The settlement ***also included*** [emphasis added] a four year Medicare participation exclusion. ***In addition*** [emphasis added], the former CEO waived any rights to indemnification he may have had against the health system.

As is typical with out of court settlements involving the DOJ and the False Claims Act, there is no complaint setting forth the government's detailed allegations against the board chairman (i.e., how he allegedly contributed to the allegedly illegal billing practices). There is, however, a substantial trial record from the original Tuomey litigation that provides some suggestion about the government's allegations against the CEO.

It is important not to overreact to the impact of these two settlements. However, it is worthwhile to note that they are consistent with the Yates memorandum theme on individual accountability and the application of Yates to civil, as well as criminal, matters. The DOJ's announcements of these settlements leave little doubt that efforts to assert individual accountability will extend to officers and executives who "lead or participate" in what are perceived to be illegal conduct. This perspective was echoed in a September 26 speech by a senior DOJ official. Certainly these are not the only FCA-related settlements involving corporate employees. However, they are noteworthy to the extent that they involve very senior leaders and apply significant penalties. Given the continued emphasis on Yates and individual accountability, it is possible that these represent a new wave of FCA settlements that will incorporate material penalties against senior corporate leadership.

Such a new wave would be consistent with the fact that FCA and similar complaints and settlements typically involve a long "incubation" period. While the Yates memorandum was released in September 2015, its effects wouldn't happen "right out of the box" given the need of the government to obtain individualized evidence to build a case with respect to corporate officers or directors. Thus, it makes sense to interpret these September developments as the beginning of what may become a consistent pattern of complaints and settlements involving senior corporate leaders.

These are messages that boards and senior executives should hear, in a presentation that balances the likelihood of risk, the significance of the potential penalties, and the importance of continued leadership over legal compliance. It would be incorrect to suggest, or create an inference, that the federal government is actively seeking to hold non-profit hospital/health system officers and directors liable for the alleged wrongdoing of their corporations.

That would greatly exaggerate the risk and create needless and perhaps counterproductive concern. Indeed, we do not have a fully clear picture of the kind of conduct that suggests that an officer or director could be at risk of being held accountable for corporate wrongdoing (although the Tuomey trial record offers some possible examples). Yet, it is information that officers and directors need to be made aware of, so they can govern their own conduct (and that of the corporation) accordingly.

A recommended means of briefing leadership on these developments is to combine the "harsh message" with suggestions on how leadership can be proactive in reducing any related risk. These suggestions can include the following:

Compliance Program: Is the program consistent with government "effectiveness" guidelines? Does the corporate budget provide sufficient resources for legal compliance activities? Are the general counsel and compliance offices sufficiently staffed and supported? Are the positions of general counsel and chief compliance officer at appropriate (high) levels in the corporate hierarchy?

Process: Are the board, committee, and management structures operating and coordinating in the best interests of the health system with respect to activities (e.g., billing, physician contracting) that attract regulatory risk? Are the agendas of both the board and the audit/compliance committee organized to assure continuous, effective compliance oversight? Are they asking the tough questions (i.e., spending sufficient time on legal compliance)? Is there constructive skepticism regarding proposed transactions, and associated legal and valuation opinions and risk analyses? Are committees and business managers who deal with regulated transactions and with legal compliance communicating and coordinating with each other? This is the all-important "right hand, left hand" question.

Culture. This can often be the most critical element of compliance program analysis. Does the health system leadership reflect a "tone at the top" culture of compliance with law? Is that culture acknowledged and respected by management and employees? Are there in place certain compensation and other arrangements that incentivize management and employees to place business and employment pressures ahead of corporate culture?

Conclusion

There's no escaping the fact that individual healthcare executives are now starting to be held accountable (by financial and related penalties) in False Claims Act complaints and settlements. But there's not enough activity to suggest that this a "batten down the hatches" scenario, or to suggest in the slightest that board or executive service in a healthcare system has now become a hazardous occupation. It simply just isn't that bad—nowhere near that, in fact. But it's also pretty clear that the government is becoming true to its word in looking at individual conduct when investigating corporate misconduct in the healthcare sector. Healthcare leadership can best respond to these developments by working with their general counsel and compliance officer to assure that the most effective legal compliance program is in place, and to continue to take actions in their respective roles to support that program. And, even with the most compliance-sensitive organizations, there is usually a lot more that can be done.

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