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## Engaging Board and Corporate Leaders About New Avenues for Officer and Director Exposure Under the Stark Law and False Claims Act



BY MICHAEL W. PEREGRINE, REBECCA C. MARTIN  
AND TONY MAIDA

**R**ecent developments regarding the 2015 Yates Memorandum on individual accountability may merit a measured briefing to corporate leadership on the potential exposure of health-care industry officers and directors to financial penalties and other sanctions arising from corporate regulatory violations.

### The Basic Message

The basic message that could be shared with leadership is that the application of Yates-based principles of individual accountability are clearly seen in the latest Stark Law and False Claims Act based complaints and settlements involving the Department of Justice and the Office of Inspector General. The particular elements of accountability applied involve (in certain instances) financial penalties, Medicare program exclusion and/or waiver of indemnification rights. They affected senior corporate officers, including a former CEO, and a board chair.

This message should not be presented in a “sky is falling” perspective, but rather in a rational, contextual discussion of the possible risks. It should be accompanied by a series of compliance-grounded recommenda-

tions that provide leadership with pro-active options that will allow them to mitigate their Yates-based risks.

### The Developments

It is not necessarily unusual for corporate Stark and FCA settlements to include financial penalties asserted against individual employees. What is unusual—at least up until now—is for these cases to involve senior corporate officers and directors (e.g. Director of Operations, Director of Reimbursement, Chief Executive Officer and Board Chair).

The focus is on a September 7 FCA-based complaint filed by the Department of Justice, as well as on FCA settlements announced by DOJ on September 19 and 27, respectively. Also relevant is an important September 27 speech by a senior Department of Justice official.

The September 7 complaint alleged FCA claims against a nursing home system—and its director of operations—“the trifecta” of (i) the provision of services “that were either non-existent or grossly substandard”; (ii) caused by chronic inadequate staffing and other cost-cutting measures; and (iii) that management chose not to invest in the facilities to resolve the problems and improve care. In a Yates connection, the company’s Director of Operations was included in the complaint on the grounds that he was aware of these alleged quality of care failures, yet failed to take any corrective action.

The September 19 settlement involved allegations that the nursing home-related business North American Health Care, Inc. (“NAHC”) and two of its corporate officials violated the FCA by submitting false claims for medically unnecessary rehabilitation therapy services provided to its skilled nursing home facility residents.

*Michael W. Peregrine (mperegrine@mwe.com) is a partner in the Chicago office of McDermott Will & Emery LLP. Rebecca C. Martin (rcmartin@mwe.com) and Tony Maida (tmaida@mwe.com) are partners in the firm's New York office.*

Specifically, the government contended that NAHC had service agreements with 35 skilled nursing facilities located in western states, 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 contended 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.

The September 27 settlement involved the payment of \$1 million by the former CEO 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.

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, not only requires the former CEO to pay \$1 million dollars but also to 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.

Coinciding with the Tuomey CEO settlement announcement was a speech by Bill Baer, Principal Deputy Associate Attorney General of the US Department of Justice (DOJ), given to the Society of Corporate Compliance and Ethics Conference. Mr. Baer addressed company cooperation and “individual accountability” in the context of federal civil enforcement. He spoke at length about the application of the Yates memo to civil matters—an important consideration—and the need for companies proactively to provide to the government information about all relevant facts, including those relat-

ing to individuals “no matter where those individuals fall in the corporate hierarchy.”

## The Importance of “the Pipeline”

The particular significance of these developments is pipeline-based. FCA and similar complaints and settlements typically involve a long “incubation” period. While the Yates memorandum was released in September, 2015, its effects would not be immediate given the need of the government to obtain individualized evidence to build a case vis-a-vis a corporate officer. Thus, it is reasonable to think that these September developments represent the beginning of what may become a consistent pattern of complaints and settlements involving senior corporate leaders.

## What to Tell Leadership

Directors and executives have a right to be informed of credible enforcement trends involving individual accountability. At the same time, any such message or briefing should be contextual, “even keeled” and not be interpreted as an overreaction. Thus, an effective briefing plan might focus on offering leadership some immediate and clear areas through which they can constructively exercise an increased interest in legal compliance. These areas might include:

**Resources:** Are the resources committed to legal compliance activities commensurate with the size and operational complexity of the health system, and the regulatory challenges it faces? Are the right people in the right places; i.e., are individual legal/regulatory positions filled by individuals with the proper qualifications and with the proper organizational prominence?

**Process:** This is more than just a “Do we have an effective compliance program?” question. Rather, it is a top-down evaluation of whether board, committee and management structures are operating and coordinating in the best interests of the health system. Is the full board and the audit/compliance committee organized to exercise compliance oversight? Are they spending sufficient time on legal compliance? Is constructive skepticism being applied to legal opinions and risk analyses? Are committees and business managers that deal with regulated transactions and with legal compliance communicating and coordinating with each other?

**Culture:** In many ways, this is the most critical analysis. Does the health system truly maintain a culture of compliance with the law? Is that culture reflected in the conduct of its senior leaders? Is it acknowledged and respected by management and employees? Or, do management and employees feel compelled to place business and employment pressures ahead of compliance?

## Conclusion

There is material evidence that Yates-based individual penalties are now being applied in complaints and settlements. This evidence should be communicated in a balanced manner to health system leaders, as it is reasonable to assume that it may affect their oversight and decision-making. The evidence should be combined with a series of recommendations on how those leaders can mitigate their risks, and those of the organization, to FCA, Stark and related compliance risks. The general counsel (perhaps teaming with the Chief Compliance Officer) is well situated to deliver this briefing.