

Compliance Today – January 2018 A review of 2017 enforcement actions against physicians

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The Department of Justice (DOJ) has confirmed its commitment to pursue individual physicians, in addition to corporate healthcare entities, for False Claims Act violations in the 2017 calendar year.

The number of False Claims Act (FCA) settlements that resulted in personal liability for physicians and other healthcare providers increased markedly in 2017 over prior years. The DOJ entered into 26 FCA settlements involving personal liability for healthcare providers in 2017 and is projected to finalize an additional six settlements before year's end. By contrast, the DOJ entered eight settlements involving personal provider liability in 2016, six in 2015, and five each in both 2014 and 2013 (the years preceding the Yates Memorandum). In total, 2017 had three times as many FCA settlements holding physicians, dentists, and podiatrists personally liable than in 2016.^[1]

The Yates Memorandum — issued September 9, 2015 by former Deputy Attorney General Sally Q. Yates — plays a significant contributing role in this marked jump in individual prosecutions.^[2] The DOJ issued the Yates Memo, at least in part, in response to public frustration surrounding the scarcity of prosecutions of corporate executives in relation to the 2008–2009 financial crises and formalized a new DOJ focus on individual prosecutions. The Yates Memo specifically instructed DOJ attorneys to direct their FCA enforcement efforts to individual prosecutions and to seek accountability directly from the individuals who perpetrated the wrongs within corporations.

In the Yates Memo, DOJ prosecutors and civil attorneys alike were directed to follow these six “key steps” in conducting, evaluating, and settling FCA investigations: (1) to be eligible for any cooperation credit, corporations must provide to the DOJ all relevant facts about the individuals involved in corporate misconduct; (2) both criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances, no corporate resolution will provide protection from criminal and 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; and (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.

Healthcare providers in the crosshairs

Under these guidelines, DOJ authorities are required to investigate and pursue individuals responsible for corporate misdeeds in order to pursue the more lucrative claims against corporations. Consequently, physicians and other healthcare providers, like any other executives, can and are beginning to be named at regular intervals

as parties to FCA enforcement actions. This uptick is also attributable to whistleblower interests. Physicians are desirable targets for whistleblowers, who often feel personally victimized by the physicians involved.

Settlements for claims involving personal liability of physicians under the FCA have varied greatly over the last two years. Most physician settlements were in the low 6- or 7-figure range, with the highest settlement being \$20 million paid by a pain management physician, Robert Windsor, who practiced in Georgia and Kentucky.^[3] Many physicians in the crosshairs of FCA investigations are electing to settle FCA claims in which they are individually named to avoid the high financial costs of protracted litigation in addition to the other penalties that can result from FCA liability — including lost professional reputation, exclusion from federal healthcare program participation (i.e., Medicare/Medicaid), penalties under state law, and loss of medical license, medical board membership, and clinical privileges.^[4]

Physicians and other health care providers should take note of these FCA enforcement actions when structuring their future clinical and billing practices, because the possibility of being named in FCA investigations is becoming increasingly realistic for physicians. Moreover, individual physicians and their group practices should not make the mistake of thinking that the government only investigates obviously bad actors, as investigators' resources and scrutiny continue to grow. Most FCA settlements with physicians fall within one of the five categories discussed below.

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