

## SKILLED NURSING FACILITY CHAIN SETTLES FALSE CLAIMS ACT CASE FOR \$145 MILLION

On October 24, the Department of Justice ("DOJ") announced a \$145 million False Claims Act settlement with a national skilled nursing facility provider that operates more than 200 skilled nursing facilities (the "Company") and its individual owner. The settlement has been touted as the largest in the DOJ's history with a skilled nursing facility ("SNF") chain. According to the DOJ's announcement, the lawsuit alleged that the chain had knowingly caused its SNFs to submit false claims for rehabilitation therapy services that were "not reasonable, necessary or skilled."

The settlement also involved the entry into a corporate integrity agreement ("CIA") with the Department of Health and Human Services Office of Inspector General. The CIA requires an independent review of the medical necessity of the services billed to Medicare for five years.

### REGULATORY BACKGROUND

For the treatment of their residents, SNFs are paid a per diem rate under Medicare's prospective payment system ("PPS"). The PPS sets the per diem rate based on the level of care required to treat a patient with similar needs. To do this, each patient is assigned a resource utilization group ("RUG"). A patient's RUG is determined based on the number of skilled therapy minutes the resident receives each week, the number of disciplines (occupational therapy, physical therapy and speech language pathology) of therapy the patient receives and other facility considerations. The highest RUG level, and the greatest reimbursement, is for the "Ultra High" group. To be classified as Ultra High, a patient must receive a minimum of 720 minutes of skilled therapy per week from at least two therapy disciplines. The medical necessity of such treatment, and the level of care needed, must also be certified and re-certified by the SNF at regular intervals of each patient's stay.

### FACTUAL ALLEGATIONS

The U.S. Government alleged that the Company engaged in a "systematic effort" to increase government billings by providing patients with an excessive amount of therapy each week and treating the patients for as long as possible, "irrespective of the clinical needs of the patients." In doing so, the government beneficiaries were alleged to have been placed in an Ultra High RUG, which resulted in significantly higher reimbursement than would have been obtained if each resident had been appropriately evaluated.

To drive up the number of therapy minutes provided, the Company allegedly had its therapists provide generic and non-individualized services and allegedly instructed therapists to bill for services that should have been provided by aides, nurses and other non-therapists. These allegations further contended that this improper behavior was motivated by unrealistic and uninformed therapy goals set by those at the corporate level. The complaint alleged that individuals and SNFs who achieved therapy goals were rewarded, and those who failed to meet goals were punished. As a result of this corporate policy, it was alleged that all patients began their treatment with 2.5 hours of therapy a day, regardless of medical necessity, and that any objections to the amount of therapy provided were rejected and compliance hotline complaints were ignored. Finally, the allegations contend that physicians certified the medical necessity of the ongoing treatment without ever seeing the patient and that some physicians pre-signed blank certifications to be filled out later by the Company's staff.

### SETTLEMENT

Both the Company and the Company's owner entered into settlements with the government, for a total settlement amount of \$145 million. This is consistent with the Yates Memo of September 2015 in which Sally Quillian Yates, Deputy Attorney General, announced the government's intent to focus on holding corporate leadership, as well as corporate entities, liable for misconduct. The settlement did not include an admission of wrongdoing by the Company or the Company's owner.

### PRACTICAL TAKEAWAYS

The scrutiny of SNFs has been a consistent and ongoing emphasis for the government over the past several years. The [2016 OIG Work Plan](#), which describes the OIG's enforcement and audit priorities for the upcoming year, indicates that SNFs have increasingly billed for the highest level of therapy. Based on the enforcement attention in this area, SNFs should carefully scrutinize how therapy is provided to its patients and ensure that the amount of therapy provided is medically necessary and set by qualified individuals. More so than ever before, there is a critical need for SNFs to ensure they have robust, working compliance programs that appropriately investigate any complaints.

Finally, the individual settlement is consistent with the government's articulated focus on individual liability. Corporate decision-makers should be mindful of these developments and, in certain situations, consider engaging independent legal counsel related to potential compliance matters for both the corporation and individuals.

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