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Individual Accountability Under Trump Administration

By Sharmila D. Jaipersaud, Esq.

On November 30, 2016, Department of Justice ("DOJ") Deputy Attorney General, Sally Q. Yates spoke regarding the DOJ's focus on individual accountability. Yates has authored what has been memorialized as the "Yates Memo," dated September 9, 2015. In the Yates Memo, Yates stated: "One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system." However, there have been numerous questions posed as to what will happen under a Trump Administration.

During the 33rd Annual International Conference on Foreign Corrupt Practices Act, Yates provided her opinion on the future of individual accountability. Yates indicated that it will be up to the "new team" to decide whether they will continue the policies that have been implemented in recent years. However, she is optimistic, stating: "Holding individuals accountable for corporate wrong-doing isn't ideological; it's good law enforcement." She expects that over the coming months and years, companies will enter into high-dollar resolutions with the DOJ and there will be a higher percentage of cases that will be accompanied by criminal or civil actions against responsible individuals. Yates also announced the launch of a new DOJ website, which was established to make new policies more transparent: https://www.justice.gov/dag/individual-accountability. The new website also includes a link to the Yates Memo.

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Supreme Court to Decide the Scope of ERISA Church Plan Exemption

By Daniel O. Carroll, Esq.

On December 2, 2016, the United States Supreme Court agreed to decide the issue of whether or not religious hospitals and health systems must abide by the requirements of the Employee Retirement Income Security Act of 1974 ("ERISA") that govern most private employer pension plans. Notably, certain "church plans" are exempt from ERISA's coverage. See 29 U.S.C. §§ 1002(33), 1003(b)(2). The long-standing interpretation of the church plan exemption by relevant federal agencies has construed this exemption broadly to include pension plans maintained by organizations that are associated with or controlled by a church, without regard to whether the church itself established the plan. In reliance upon this interpretation established and confirmed by agency opinions, letter rulings and settlement agreements, hundreds of religious hospitals and health systems have established and operate pension plans as ERISA-exempt church plans.

The validity of this interpretation has come into question after several class action lawsuits have been filed against various religiously affiliated hospitals and health systems by plan participants challenging reliance on the church plan exemption when establishing pension plans because these organizations are not themselves churches. The trial court results and rulings on the issue have not been uniform. However, the three U.S. Circuit Courts of Appeals that have decided the issue have all ruled against the hospitals and health systems finding that the plain language of ERISA allows the church plan exemption only for organizations set up by churches to manage their employee pension plans, not for separate entities like hospitals.

The lawsuits allege that the hospitals and health systems have failed to comply with various ERISA obligations, including failing to properly and adequately fund the

plans by tens of millions of dollars or more, and put employees' pensions at risk. The hospitals and health systems dispute this and argue that an adverse decision contrary to the government's well-established interpretation may require a costly overhaul of their benefits programs, creating enormous unbudgeted expenses. Moreover, those significant additional costs may pale in comparison to the retroactive penalties sought by litigants, which could amount to many times the value of net assets of the hospitals and health systems. As such, these hospitals and health systems fear that the financial impact from allowing this "gotcha litigation" to proceed and produce an adverse decision could be devastating and jeopardize their ability to provide care to their communities. By granting certiorari and consolidating Advocate Health Care v. Stapleton, 16-74; Saint Peter's Healthcare v. Kaplan, 16-86; and Dignity Health v. Rollins, 16-258, the U.S. Supreme Court has chosen to settle this important question of federal law by the end of the current term.

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Telemedicine: Coming Soon to a Screen Near You

By Meghan V. Hoppe, Esq.

New Jersey lawmakers are one step closer to enacting legislation that would regulate the practice of "telemedicine," where patients remotely receive medical services from their health care providers over the internet or by phone. In December 2016, the Assembly Health and Senior Services Committee heard testimony on a bill, A1464, which would authorize health care providers to engage in telemedicine, as well as establish guidelines for treating patients without an in-office visit, via telemedicine. The Senate Health and Human Services Committee and the Senate Appropriations Committee have already recommended unanimously the passage of an identical bill, S291.

This bill would allow patients to remotely establish relationships with health care providers, eliminating the need for an in-person examination under most circumstances. Telemedicine providers must utilize two-way videoconferencing or "store-and-forward technology," which is designed to replicate the traditional in-person encounter and interaction between health care provider and patient. These methods of communication would allow for interactive, real-time visual and auditory communication, and the electronic transmission of images, diagnostics, and medical records. The bill would also require health insurance companies to provide coverage and payment for services provided through telemedicine at least at the same rate as services provided in-person. The State licensing board would be responsible for adopting rules and regulations for telemedicine. If signed into law, the bill would take effect immediately, and New Jersey would join 31 other states in having legislation that regulates the provision of telemedicine.

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Phase 2 HIPAA Audit Program to Continue in 2017

By Deborah A. Cmielewski, Esq.

The U.S. Department of Health & Human Services, Office for Civil Rights ("OCR") continued its efforts to assess HIPAA compliance with the commencement of phase 2 audits this past summer. The phase 2 audit program followed pilot audits that took place in 2011-2012 and furthers the mandate in the 2009 Health Information Technology for Economic and Clinical Health Act ("HITECH") that the OCR conduct periodic audits to assess HIPAA compliance. Through the current program, which includes both desk and onsite audits, the OCR will assess a broad cross-section of both covered entities and business associates with the goal of issuing additional resources to assist the regulated community.

In July of 2016, the OCR notified 167 covered entities that they would be subject to desk audits. The target entities received questionnaires and document demands to be answered within ten (10) business days of the date of the request, through an online portal established by the OCR. Following its review of responsive documents and information from the audited entities, the OCR will provide each auditee with a draft report, including its

preliminary findings and the opportunity to issue feedback. Thereafter, the OCR will issue each auditee a final audit report. The same protocol is being applied to a second round of phase 2 desk audits of business associates that began this fall.

The OCR anticipated completing desk audits of covered entities and business associates by the end of 2016. A number of more comprehensive onsite audits are scheduled to commence in the first quarter of 2017; some desk auditees could also be subject to onsite audits. For serious compliance issues uncovered during the audit process, the OCR can initiate compliance reviews. The OCR will utilize the results of the phase 2 audits to target areas where it can issue guidance, technical support and additional tools to assist the regulated industry in breach prevention and self-evaluation.

With the new calendar year upon us, covered entities and business associates should initiate their HIPAA check-ups. Once an audit letter arrives, it is already too late to develop a compliance plan. Organizations need to conduct their own periodic audits to develop a culture of ongoing HIPAA compliance.

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New Regulations are Proposed for IRC § 509(a)(3) Supporting Organizations

By Farah N. Ansari, Esq.

The Treasury Department and the Internal Revenue Service have proposed regulations which would modify requirements for Type I and Type III supporting organizations. Internal Revenue Code (the "Code") § 501(c)(3) organizations are classified as public charities or private foundations. Public charity status is typically preferred because private foundations are subject to many restrictions and excise taxes. In addition, donations to public charities are subject to higher tax-deduction limits, allowing for a potentially larger deduction. One way an organization can achieve public charity status is by providing support to another public charity, as described in the Code § 509(a)(1) or (2), hence the name "supporting organization." Depending on the particular relationship the supporting organization has with the organization it supports, the supporting organization is further classified under Code § 509(a)(3) as Type I, Type II, Type III (functionally integrated) or Type III (non-functionally integrated). Each "Type" is subject to separate requirements.

The proposed amendment sets forth the requirement that in order for a parent of a supported organization to qualify as a Type III (functionally-integrated) supporting organization it must be part of an "integrated system" such as a hospital system. The Type III (functionally-integrated) supporting organization must also engage in activities of the type that are usually performed by a parent of an integrated system, such as policy development, overall planning and allocation of resources of the supported organization. The full text of the proposed regulations can be found here.

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