

COMPLIANCE ADVISORY

October 30, 2007

Government Brings False Claims Act Case Against Former Corporate Integrity Program Director and Associate General Counsel

Overview

On September 18, 2007, the United States of America filed a complaint against Christi R. Sulzbach, Esq. relating to events occurring while she served as corporate integrity program director and associate general counsel of Tenet Healthcare Corporation. The government alleges that Sulzbach caused the submission of false claims and false documents to the government in violation of the federal civil False Claims Act by signing certifications in 1997 and 1998 falsely stating Tenet was in material compliance with all federal program legal requirements. The government's complaint also states that at the time Sulzbach made the declarations, she knew them to be false because she had received two reports (one draft and one final) from Tenet's outside counsel suggesting that Tenet was violating the Stark law and illegally billing Medicare for referrals from physicians whose employment contracts were illegal under the Stark law. Finally, the government alleges that Sulzbach's certifications obstructed the government's efforts to recover past improper payments.

Implications

- The government's complaint alleges Sulzbach violated three provisions of the False Claims Act by:
 - Causing false claims to be submitted for payment relating to services based on a referral from a physician with a Stark law prohibited financial relationship. (31 U.S.C. §3129(a)(1)).
 - Submitting false records, including the signed compliance certificates required by Tenet's Corporate Integrity Agreement ("CIA"), which caused false claims to be paid by the government. (31 U.S.C. §3129(a)(2)).
 - Knowingly concealing an obligation to repay money, a so-called "reverse false claim." (31 U.S.C. §3129(a)(7)).

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- CIAs can create many new obligations for a Medicare provider. While they contain their own penalty provisions for the provider itself in the event of non-compliance, they can pose additional risks for individual officers as well. A provider may wish to consider establishing a process to support certifications made by officers by providing them with department-level representations of compliance. This process gets lower levels of management involved in the compliance process and delegates accountability to the appropriate level where the relevant information concerning compliance resides.
- The Sulzbach case is a harsh reminder that it is important to remember who the client is in the attorney-client relationship. In this case, the client receiving the privileged opinion was Tenet, which was free to waive its privilege regardless of the consequences to an individual officer. Now the court will have to determine the scope of that waiver.
- The case also suggests that clients and lawyers think carefully about the scope of an attorney's engagement and how the results may be used. Who is the client or clients, and what is the scope of work? In this case, the issue of fair market value, according to the complaint, was addressed in the opinion of outside counsel. Because there is a high risk of litigation in some physician compensation arrangements, a provider should consider what valuation approach or approaches will be employed and who will do the work, with the potential for a dispute in mind.

Summary of the Government's Complaint

Sulzbach's certifications of compliance took place in 1997 and 1998 at a time when Tenet was in the middle of a five-year CIA that commenced in 1994. Under the terms of the CIA, Tenet agreed to obtain formal approval of outside counsel for contracts involving payments to physicians, retain copies of their opinions, establish a corporate integrity program, provide annual reports to the U.S. Department of Health and Human Services ("HHS") certifying that the company was either in compliance or non-compliance with federal program requirements and apprise HHS of any ongoing internal investigations. Sulzbach signed Tenet's certification of compliance.

In February 1997, a Tenet executive submitted a memorandum expressing concern that certain physician contracts at North Ridge Medical Center, a Tenet-owned hospital, violated the Stark law. The memorandum stated that the physician contracts at issue exceeded fair market value and used the amount of the physicians' laboratory referrals as the basis for determining the value of their practice and the physician's compensation. Tenet delegated the matter to Sulzbach, according to the complaint, and she engaged outside counsel to investigate the issues and provide a report. Outside counsel provided an initial report in May 1997 that allegedly concluded that the physician employment contracts violated the Stark statute. These conclusions were reiterated in the outside law firm's final report in June 1997 on the government claims.

Days after receiving the May 1997 outside counsel report, Tenet submitted its CIA-mandated compliance report to HHS, which included a sworn certification by Sulzbach that to the best of her knowledge, the company was “in material compliance with the terms of the Corporate Integrity Agreement, as well as 42 U.S.C. Sections 1320 (a) – 7 (a) and 1320 (a) – 7 (b), and other federal program legal requirements....” Another report with the same certification by Sulzbach was submitted by Tenet in June 1998. At that time, eight of the 12 physicians whose contracts were questioned by Tenet’s outside counsel were still employed at North Ridge, the government alleges. Tenet did not disclose the results or the existence of its internal investigation or outside counsel’s opinions relating to the North Ridge Medical Center contracts to the government, according to the complaint.

Unbeknownst to Tenet, in May 1997, while Tenet was analyzing the internal memorandum questioning the physician contracts, a former Tenet employee filed a complaint under the *qui tam* provisions of the civil False Claims Act alleging that Tenet knowingly violating the Stark law and billed Medicare for referrals from North Ridge Medical Center physicians with whom Tenet had an improper financial relationship. During the litigation of the case, Tenet’s attorneys consistently argued that none of the physician contracts at issue violated the Stark law and denied that the compensation of the physicians exceeded fair market value. Tenet withheld the outside counsel reports as privileged. The *qui tam* litigation was settled in March 2004, and Tenet agreed to pay \$22.5 million to the government. The settlement did not release any claims the government might have against individuals.

In 2006, as part of a separate settlement with the government arising from an investigation of a variety of claims, Tenet agreed to produce certain documents that had been withheld as privileged in the prior *qui tam* litigation and thus waived any privilege it had concerning the outside counsel reports relating to the North Ridge doctors. After discovery of those reports, the government filed its False Claims Act complaint against Sulzbach, which alleges the submission of 70,000 false claims for \$18 million in reimbursement.

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