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Lessons To Be Learned: What Compliance Officers Can Learn From The Government's Latest False Claims Act Complaints

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One of the more difficult issues for a compliance officer to contemplate is the extent to which the government will find a particular practice to be in violation of the health care fraud and abuse laws. On March 15, 2001, when the United States filed its various complaints under the federal False Claims Act (FCA)[1] against HCA - The Healthcare Company (HCA), the government began to offer compliance personnel more concrete guidance both in terms of its shifting interpretation of various laws and its willingness to enforce those laws.[2] In its complaints, the government made wide-ranging allegations regarding cost-reporting fraud, violations of the Anti-Kickback Statute[3] and violations of the Stark Law.[4]

Although HCA promptly denied the government's allegations and the likelihood that the government will ultimately prevail on its claims is by no means certain, compliance personnel, nonetheless, by virtue of the complaints, are given a better picture of the government's enforcement objectives and the types of arrangements the government finds to be objectionable. Set forth below is a description of the specific allegations the government levied against HCA and an analysis of the lessons that compliance officers can apply to minimize the likelihood that similar allegations can be successfully waged against their institutions.

The Government's False Claims Allegations in the HCA Case

The FCA imposes liability upon those who submit or cause the submission of false or fraudulent claims with "reckless disregard" or in "deliberate ignorance" of the truth or falsity of the claim. The government's complaints can be distilled into three general types of alleged wrongdoing: misreporting of costs on cost reports, engaging in prohibited transactions with physicians and other referral sources, and failing to arrive at fair market value prices with vendors.

Cost-Reporting Allegations

In *United States ex rel. Alderson v. HCA – the Healthcare Co., et al.,* and *United States ex rel. Schilling v. HCA – the Healthcare Co., et al.*, the government contended that the defendants' cost report was false or fraudulent. The cost report certification requires providers to certify that

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[1] 31 U.S.C. § 3729 *et seq.*
[2] These complaints are available on the Department of Justice's Web site, http://www.usdoj.gov/civil/cases/alderson/march15_2001/index.htm.
[3] 42 U.S.C. § 1320a-7b(b).
[4] 42 U.S.C. § 1395nn.

they are "familiar with the laws and regulations regarding the provision of health care services, and that the services identified in th[e] cost report were provided in compliance with such laws and regulations."

The government contended that the defendant hospitals breached the certification because they maintained a policy and practice of including on their cost reports unallowable costs and of reporting otherwise allowable costs incorrectly to increase Medicare reimbursement without filing the cost reports under protest. The government alleged that this practice was manifested in the defendants' maintaining "reserve" cost reports that would identify the particular items included in the filed cost reports that defendants knew or expected would be disallowed if the government knew all facts material to the reimbursement decision. Because the defendants established reserves or "known disallowances" for items that would be lost if discovered by the fiscal intermediary, the government contended that the "cost reports were not "*true*, *correct*, and *complete* report … except as noted."

Kickback and Stark Allegations

In *United States ex rel. King v. HCA – the Healthcare Co., et al.; United Sates ex rel. Mroz v. HCA – the Healthcare Co., et al.*; and *United States ex rel. Thompson v. HCA – the Healthcare Co.*, the government contended that the defendants had breached the Stark Law and the Anti-Kickback Laws (which resulted in a violation of the FCA) because defendants "had offered remuneration to physicians in various forms, including but not limited to (1) payments enabling the physicians to purchase partnership interests in defendants' local hospitals; (2) loans offered to physicians with the understanding that no interest and/or repayment would be required; (3) various lease benefits, including free and reduced rent and free remodeling; (4) directorship contracts that provided for payments to physicians not required to perform any duties; (5) lavish trips for physicians and their spouses; (6) free pharmaceuticals; (7) salary payments to physicians' employees; and (8) excessive payments for businesses owned by physicians."

Vendor/Management Company Relationships

In *United States ex rel. Parslow v. HCA – The Healthcare Co., et al.,* the United States alleged that the defendants entered into management services contracts with Curative, which allowed the hospitals to use Procuren, a proprietary wound-healing salve Curative manufactured, for a fee. Under these arrangements, the government contended that Curative would charge the hospitals a management fee that usually was comprised of a fixed monthly fee and a variable per-patient or per-visit fee. Frequently, fees of $400 to $2,000 per new patient were paid under the contracts if the patient was "new to the hospital," as defined by the contract.

The government claimed that the defendants' relationship was improper in two respects. First, the government contended that a substantial portion of the management fee was to compensate Curative for performing marketing services and that the cost for these services was inappropriately included on the hospitals' cost reports. Second, the government contended that certain hospitals paid kickbacks to Curative for recommending and arranging for wound care patients to receive services at the hospitals. As proof, the government pointed to computer-generated pro formas that Curative would allegedly supply to the hospitals estimating the

services each patient would receive from the outpatient Wound Care Center it managed and the additional ancillary services and hospital services the patient would likely require.

Some Lessons To Be Learned from the Government's Complaints

There are several defenses available under the FCA. For example, the FCA does not apply when the defendant is merely negligent, relies upon a reasonable interpretation of the underlying rules and regulations or upon the advice of counsel.[5] Similarly, the FCA arguably does not apply when the government knows of the defendant's practices and notwithstanding that knowledge pays on the defendant's claims.[6]

In light of these defenses and the government's allegations in its various complaints, set forth below are some "do's" and "don'ts" related to cost reporting, physician relations and vendor relationships.

As to cost reporting, the following policies should minimize potential FCA exposure:

- If an issue regarding whether the cost claimed is permitted is ambiguous, carefully document the basis the company has for claiming the cost (so that if the government later challenges the cost the company can show that at worst it may have been negligent in claiming the cost but that it did not knowingly attempt to defraud the government); if necessary, rely upon the advice of counsel and/or other expert consultants.
- Disclose all pertinent documentation in support of the costs claimed; never segregate cost data and indicate that the material is confidential and should not be copied or disclosed to governmental officials (unless a strong basis of privilege exists).
- If the costs claimed are inconsistent with the government's regulatory or policy interpretations, flag the issue in the footnotes to the settlement work sheet so that the company can preserve the issue for appeal and, at the same time, not be accused of attempting to defraud the government by claiming the disputed cost.[7]

As to physician relations, the following policies, if adopted, are likely to reduce potential exposure:

- In undertaking joint ventures with physicians, do not selectively market to the highest referring physicians and track referrals from those physicians (or entice physicians to refer by showing a direct monetary return per referral); make sure that the physicians contribute capital on a basis similar to other non-referring investors and are paid based upon that contribution and not referrals; rely upon the advice of counsel and/or other expert consultants.

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[5] For a summary of the case law specifically applying these defenses, *see* Robert Salcido, *False Claims Act & the Healthcare Industry: Counseling & Litigation* §§ 2:03, 2:05 (American Health Lawyers Association 1999); *see also* Robert Salcido, *False Claims Act & the Healthcare Industry: Counseling &Litigation: November 2000 Supplement* at 10-27, 30-37 (American Health Lawyers Association 2000).

[6] *Id.*

[7] *But see United States v. Medco Physicians Unlimited*, No. 98 C 1622, 2001 WL 293110 (N.D. Ill. Mar. 26, 2001) (ruling that the addendum to the cost report stating that the disputed meal and transportation costs had been included in the cost report because they were consistent "with regulations issued in February, 1994" was knowingly false because, when challenged, the defendant could not "cite to any regulations in 1994" that supported his contention).

- When entering into a lease or personal services agreement with a physician, make sure that the agreement is in writing and that the company can demonstrate that it is at fair market value (and complies with the other express requirements of the Stark Law when designated health services will be provided).
- Closely scrutinize any practice that results in a referring physician receiving any benefit at less than fair market value.

Finally, as to relationships with vendors, some of the following practices may reduce potential exposure under the FCA:

- When outsourcing, ensure that the price is at fair market value.
- Evaluate the components of the services being provided; if any of the services are non-reimbursable, ensure that costs associated with those services are not claimed to the government.

Conclusion

The goal of effective compliance personnel is to maintain the company's adherence to the government's myriad rules and regulations while remaining competitive. The government's latest complaints in the HCA matter offer important insights into the types of practices the government now deems to be problematic, but, just as importantly, also offer insight into specific measures that can be undertaken to avoid these practices.

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