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Lawsuit Spotlights GCs' Risk of Personal Liability

By Melissa Klein Aguilar — January 15, 2008

A high-profile case in the health care sector has underscored the potential exposure legal and compliance officers can face as a result of the certifications they make and serves as a sharp reminder to wield their pens with care, experts say.

As regulators and enforcement authorities continue to expand the targets of their investigations beyond companies to the individuals who lead them, chief legal and compliance officers, like other corporate officers, are increasingly likely to find themselves under scrutiny as a result of their reporting and disclosure obligations.



Gurland

“Every time they use their pens to represent their company, they put themselves on the front lines of any investigation,” says Michael Gurland, a former federal prosecutor and now a white-collar crime specialist with the law firm of Neal Gerber & Eisenberg. “When general counsels and CCOs attest to any fact or statement on behalf of the company in a government filing, if that fact isn’t true, they become an easy target. Their signature is essentially a one-way ticket to criminal prosecution or civil liability.”

At issue is a lawsuit filed last September by the Department of Justice and the U.S. attorney for the Southern District of Florida against Christi Sulzbach, former general counsel for Tenet Healthcare. In what’s considered a novel application of the False Claims Act, the government alleges that as part of a corporate integrity agreement, Sulzbach submitted false statements representing that Tenet was in compliance with federal health care laws—even though she knew an investigation by the company’s outside counsel had concluded that Tenet violated federal law and overbilled Medicare for millions in the 1990s.

Observers say the case is notable both because the False Claims Act is being applied to a general counsel and because Sulzbach wasn’t involved in the underlying conduct at issue: the Medicare fraud. Rather, a corporate predecessor to Tenet committed the fraud, which was then confirmed and documented by outside counsel in 1997. Sulzbach (who resigned from Tenet in 2003) still submitted reports saying the company was in compliance with federal Medicare law, more commonly known as the Stark Law. As part of a separate lawsuit that Tenet settled in 2006, the company disclosed numerous documents related to its possible Stark Law violations—namely, the outside counsel’s memo that Tenet *had* violated the Stark Law, and Sulzbach’s

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-  [DoJ Complaint: *U.S. vs. Sulzbach* \(Sept. 18, 2007\)](#)
-  [Jenner & Block Alert Regarding Sulzbach \(Oct. 1, 2007\)](#)
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subsequent compliance report stating that it hadn't.

"This is a case everyone is watching, in part because of the extension of an FCA case to a general counsel, and in part because it will be informative about how corporate integrity agreements are enforced," Gurland says.



O'Brien

Indeed, David O'Brien, a partner at Crowell & Moring says: "Successful or not, the message to come out of this case is that the government will scrutinize any certification, whether pursuant to a [corporate integrity agreement] or a regulatory obligation, and if it comes to conclude that the certification was problematic, it will take action."

Thomas O'Neil of the law firm DLA Piper and a former general counsel of the MCI Group agrees. He says the case is the Justice Department's way of alerting corporate officers responsible for submitting periodic compliance reports under corporate integrity agreements that prosecutors will pursue them separately under the False Claims Act, even if they didn't have anything to do with the claim at issue, if those certifications aren't "completely forthcoming and accurate."

Legal observers say the unique circumstances of the case make it unlikely that prosecutors will apply the False Claims Act the same way on a large scale. But, they warn, the lawsuit holds valuable lessons for in-house lawyers and compliance officers nevertheless. Indeed, experts say it's a stern reminder that corporate integrity agreements and other similar pacts, like deferred prosecution agreements, must be taken seriously.



Malone

"When they enter a corporate integrity agreement or a deferred prosecution agreement, corporate compliance officers need to make sure they can in fact live with what they're agreeing to," says Edward Malone, a partner at the law firm Jenner & Block. "The government is saying you can't just enter into one of these agreements and put it in a drawer."

In-house attorneys and compliance officers should negotiate such agreements with care and understand that the government will have "an ongoing expectation ... that the company, the compliance officer, and in-house counsel be completely transparent with enforcement authorities," O'Neil says.

The case also demonstrates the importance of an effective corporate compliance program, O'Neil adds. "If you don't already have a comprehensive corporate compliance program in place, you should be moving quickly to devise and adopt one so you can avoid ever being in a position to have to enter a corporate integrity agreement," he says.

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— Edward Malone,
 Partner,
 Jenner & Block



O'Neil

For those already operating under a corporate integrity agreement, “It’s critical that your internal organizations all coordinate carefully and have an ongoing dialogue with your business units to ensure awareness of what’s going on real-time,” he says.

The case also highlights the government’s view of general counsels and compliance officers as gatekeepers who are supposed to watch for potential criminal and civil violations, Gurland says.

Another takeaway may be that “it’s not always a good idea to mix the legal and compliance roles,” Gurland says. Sulzbach is a prime example of the danger of mixing those roles he says: As both general counsel and director of Tenet’s corporate integrity program, she was “defending her company from the very conduct she was supposed to be telling the government about.”

While many companies combine the roles because the general counsel’s legal background is well suited to address issues raised in the compliance office, Gurland says, “It’s hard to advocate for the company on the one hand and also be responsible for the compliance obligations on the other.”

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