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AFFIRMATIVE ACTION ALERT

OFCCP CLARIFIES COVERAGE OF HEALTH CARE PROVIDERS...AT LEAST FOR NOW

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The Bureau of National Affairs has recently obtained and published a **directive** signed on December 16, 2010, by Patricia Shiu, Director of the Office of Federal Contract Compliance Programs. The Directive, entitled "Coverage of Health Care Providers and Insurers," follows three decisions addressing OFCCP jurisdiction over health care providers. The Directive has not yet been published by the OFCCP.

Summary of Directive

The Directive sets forth and explains the rationale for jurisdiction over health care providers as determined in ***OFCCP v. UPMC Braddock*** and ***OFCCP v. Florida Hospital of Orlando***: health care providers that agree to provide medical goods or services in furtherance of a prime contractor's agreement with the federal government are federal subcontractors and subject to OFCCP's jurisdiction (even if nothing in their contracts so states). The OFCCP says that health care entities providing medical services through an HMO agreement with the government or agreeing to provide medical services through a TRICARE network are federal subcontractors. On the other hand, following ***OFCCP v. Bridgeport Hospital***, the OFCCP reiterates that simply being reimbursed by an insurer, where the insurer has not contracted to provide medical services, will not render a health care provider a federal subcontractor.

Medicare Programs No Longer Entirely Exempt

Significantly, the Directive "supercedes" a prior agency Directive issued in 1993, which explained that health care providers that received payments from Medicare and/or Medicaid were not federal contractors. The new Directive explains the various Medicare programs: Part A (medical insurance), Part B (hospital insurance), Part C/Advantage (managed/coordinated care plans), and Part D (prescription drug plans). Although recipients of funds under Medicare Parts A and B and Medicaid continue to be excluded from federal contractor coverage (because these are considered federal financial assistance programs), the OFCCP now takes the position that contracts related to Medicare Parts C and D may render a company a federal contractor. An example from the Directive states:

> Company G has a reimbursement agreement with Medicare Parts A and B to receive payment for services it provides to Medicare A and B beneficiaries. Company G also contracted with Medicare ([Centers for Medicare

> and Medicaid Services] CMS) to establish a Medicare Advantage PPO and to be reimbursed for the health care services provided by the PPO. The PPO contract also includes the establishment of a prescription drug plan and claims processing services. The reimbursement agreement with Medicare A and B does not create a contractor relationship because Medicare A and B are Federal financial assistance programs.
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> However, Company G's contract with Medicare (CMS) to establish a Medicare Advantage PPO creates a covered *prime contract* pursuant to which Company G *may subcontract* with other companies to provide the required health care services, prescription drug program and claims processing. If Company G does enter into such subcontracts, the companies holding them will be covered subcontractors.

(Emphasis added.)

The "Trilogy" of Cases Prompting Directive

Constangy has reported on the *Bridgeport Hospital*, *UPMC Braddock*, and *Florida Hospital* cases in prior *Affirmative Action Alerts*, which are linked above. In *Bridgeport Hospital*, the Administrative Review Board of the U.S. Department of Labor held in 2003 that a hospital was not a federal subcontractor to Blue Cross/Blue Shield's contract with the federal government to provide health insurance. Although Blue Cross reimbursed the hospital for medical services provided to federal government employees, the provision of those medical services was not necessary to the performance of the insurance contract between Blue Cross and the government, and therefore, the hospital could not be considered a subcontractor.

The second decision, *UPMC Braddock*, addressed coverage of a hospital that provided medical services under an agreement with a health maintenance organization. The Board held in 2009 that the hospital was a federal subcontractor because the prime contractor, the HMO, had contracted with the government to provide medical services, and the hospital was performing a necessary part of that contract by providing the actual medical services. The hospital's appeal of this decision is pending in the U.S. District Court for the District of Columbia.

Most recently, an Administrative Law Judge with the DOL ruled in *Florida Hospital* that a hospital that contracted to provide medical services to beneficiaries under the TRICARE program was a federal subcontractor because it was assuming a portion of the prime contractor's responsibilities in doing so. This decision has also been appealed and is pending before the Administrative Review Board.

Despite the possibility that the *UPMC Braddock* and *Florida Hospital* decisions may be overruled on appeal, the OFCCP based its Directive on them. This may indicate that OFCCP intends to increase its enforcement activity in the health care industry unless a federal court reverses these decisions. Of course, the Directive could become moot if the decisions are overturned.

The determination of whether a health care provider is subject to OFCCP jurisdiction is a complicated and time-consuming task, requiring a review of various contracts and agreements. In light of the OFCCP's current stance, Constangy recommends that health care providers with any relationship to a federal program review the relevant agreements and consult with counsel. It is important to note that many of these agreements will not contain the contract clauses required to put entities on notice of their federal contractor status because neither the contracting agency nor the covered entity viewed these as federal contracts. In other words, to determine whether coverage

exists, it is necessary to view not only the relevant contract language but also the actual relationship with the federal government. Health care entities should also consider the possible temporary nature of the OFCCP's position, in light of the decisions on appeal, in assessing their own strategies for compliance.

If you would like assistance in this area, or with any other affirmative action matters, please contact any member of Constangy's **Affirmative Action Practice Group**, or the Constangy attorney of your choice.

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