2011 Issue 5

www.ober.com

SPECIAL FOCUS: FRAUD AND ABUSE

OIG Ceases Exclusion Efforts Against Forrest Labs CEO - Not *All* Corporate Officers

By: Anthony J. Burba

The Office of Inspector General (OIG) for the U.S. Department of Health and Human Services has ended its effort to exclude former Forrest Laboratories' CEO Howard Solomon. The OIG informed Mr. Solomon by letter on Friday, August 5, 2011 that "Based on a review of information in our file, and consideration of the information your attorneys provided to us both in writing and in an in-person meeting, we have decided to close this case." Mr. Solomon's case had been the subject of considerable attention in the health care community as the OIG attempted to exercise its permissive exclusion authority under section 1128(b)(15) of the Social Security Act.

The OIG's (b)(15) exclusion authority allows it to exclude, at its discretion, an individual "who has a direct or indirect ownership or control interest in a sanctioned entity and who knows or should know . . . of the action constituting the basis for the conviction or exclusion. . . , or who is an officer or managing employee . . . of such entity." This "should know" language has been interpreted by the OIG to create what it calls its "Responsible Corporate Officer Doctrine." In guidance released October 20, 2010, the OIG explained that under (b)(15) it has authority to exclude the owner of a sanctioned entity if he or she knew or should have known of its conduct. "[I]f the evidence supports a finding that an owner knew or should have known of the conduct, OIG will operate with a presumption in favor of exclusion . . . , [which] may be overcome when OIG finds that significant factors weigh against exclusion." With respect to managing employees and officers of a sanctioned entity, OIG stated simply that it "has the authority to exclude every officer and managing employee of a sanctioned entity," and that, like with owners, the presumption is in favor of exclusion.

While over 30 individuals have been excluded by the OIG pursuant to its (b)(15) exclusion authority since HIPAA's enactment, the OIG's case against Mr. Solomon was seen by many as a game changer. Mr. Solomon's exclusion was seen as the first effort by the OIG to exclude an individual against whom no criminal charges were ever brought, and against whom the government was unable to prove a direct legal or regulatory violation. The closing of Mr. Solomon's case has been reported by some, including the Wall Street Journal, as a retreat by the government from the pursuit of responsible corporate officers who were not directly responsible for the sanctioned conduct. Unfortunately, it would be a mistake to interpret the OIG's action in Mr. Solomon's case as a change in direction in its efforts to hold corporate employees responsible for conduct occurring on their watch. Both the letter to Mr. Solomon and the OIG's press release indicated, without providing meaningful explanation, that the decision in Mr. Solomon's case was based solely on the facts of that case. Moreover, the OIG reaffirmed its commitment to sanctioning executives "who directly committed fraud as well as executives who were in a position of responsibility at the time of the fraud."

The Responsible Corporate Officer Doctrine continues to be considered by the OIG as an important weapon in its fraud and abuse war chest. It would be misguided to view Mr. Solomon's case as a retreat or change in direction by the OIG. Indeed, the closing of the case against Mr. Solomon raises more questions than it answers, as the OIG did not specify which information, or what types of evidence it relied upon in reaching its decision. Going forward, corporate executives and prudent corporate counsel should continue to view (b)(15) exclusion of responsible corporate officers as a real threat when negotiating settlements with the OIG and the Department of Justice.

***Health Law Alert*® is not to be construed as legal or financial advice, and the review of this information does not create an attorney-client relationship.**