

Report on Medicare Compliance Volume 32, Number 21. June 05, 2023 After Self-Disclosing During Investigation, Provider Settles FCA Case

By Nina Youngstrom

In a settlement that hinged partly on a self-disclosure in the middle of a whistleblower-fueled investigation, Massachusetts Eye and Ear Infirmary, Massachusetts Eye and Ear Associates Inc. and the Foundation of the Massachusetts Eye and Ear Infirmary Inc. have agreed to pay \$5.7 million to settle false claims allegations that compensation for 44 physicians violated the Stark Law, the U.S. Attorney's Office for the District of Massachusetts said May 24.^[1]

Massachusetts Eye and Ear Infirmary (MEEI) is a teaching hospital and Massachusetts Eye and Ear Associates is a physician group mostly comprised of ophthalmologists and otolaryngologists who perform medical services at MEEI's clinical locations. The foundation is the parent group of MEEI, Massachusetts Eye and Ear Associates and other entities. On April 1, 2018, the defendants were bought by Partners HealthCare System, which changed its name to Mass General Brigham on Nov. 27, 2019.

About six months after the acquisition, otolaryngologist Allan Goldstein filed a whistleblower lawsuit against his former employer, Massachusetts Eye and Ear Associates, as well as MEEI and the foundation. Goldstein, who died in February 2021, alleged the defendants violated the Stark Law and Anti-Kickback Statute (AKS). According to his complaint, they allegedly encouraged physicians to order outpatient services at MEEI outpatient departments by paying them bonuses from the facility fees. After Goldstein died, his estate continued the case on the government's behalf.

The whistleblower's complaint centered on the way that MEEI shared revenue with certain physicians who performed services at the hospital's outpatient departments/provider-based space.^[2] Medicare pays physicians a lower professional fee for services performed in hospital outpatient departments (HOPDs), but it also pays the hospital a facility fee. "The receipt of facility fees gives MEEI a strong financial incentive to have [Massachusetts Eye and Ear Associates'] physicians practice in its hospital outpatient departments rather than in office-based locations," the complaint alleged.

Deals Were Terminated After Acquisition

During the government's investigation of the whistleblower complaint, "the Defendants self-reported 7 compensation models involving 44 physicians that may have implicated the Stark Law," the settlement stated.^[3] The arrangements were executed before the Mass General Brigham acquisition. One arrangement ended before the acquisition and Mass General Brigham voluntarily killed the six other arrangements on Oct. 1, 2019.

The case "is reflective of the government emphasizing cooperation generally," said attorney John Lawrence, with K&L Gates in Research Triangle Park, North Carolina. The settlement specifically notes that the government "recognizes and credits the Defendants for disclosure, cooperation, and remediation of the Covered Conduct under the Department of Justice's guidelines for False Claims Act cases embodied in the Justice Manual, §4-4.112." Lawrence said there's been debate in the industry about whether self-disclosure and cooperation yield returns, "but here is an example of tangible returns for disclosure even if it was in the middle of an

investigation.” Of the settlement amount, \$3.56 million is restitution.

As the settlement explains, MEEI had various compensation arrangements with 240 physicians employed by Massachusetts Eye and Ear Associates that were investigated by the government. MEEI has various HOPDs in Massachusetts and some of them transferred a percentage of their operating margins—30% to 50%—to Massachusetts Eye and Ear Associates at the end of every fiscal year. “MEEI calculated the operating margin by subtracting the HOPD’s expenses from its fiscal year revenue, such that the operating margin included revenue from designated health services,” the settlement states. Massachusetts Eye and Ear Associates then included these funds in the overall revenue “allocated to otolaryngologists and/or ophthalmologists affiliated with the HOPD location,” against which Massachusetts Eye and Ear Associates subtracted employment expenses.

As part of their aggregate compensation, physicians were paid any surplus as a bonus. In most cases, Massachusetts Eye and Ear Associates allocated the funds to every physician based on personally performed services or time-based units for hours worked, although in one instance, the funds were allocated in equal shares, according to the settlement. The defendants contend that the physician compensation was consistent with fair market value.

The government alleged that MEEI’s incentive payments to Massachusetts Eye and Ear Associates, which were paid to its employed physicians from Oct. 1, 2008, to Oct. 1, 2019, created a financial relationship between MEEI and the physicians. Because the physicians referred Medicare patients to MEEI for outpatient hospital services that were billed to Medicare, and they didn’t satisfy any Stark exceptions, the government alleged claims stemming from the services violated the False Claims Act.

The defendants accepted responsibility for certain facts in the settlement. Other than the covered conduct, MEEI denied the allegations. Mass General Brigham declined to comment.

Self-Disclosure Is a ‘Complex Calculus’

DOJ sweetened the pot of voluntary self-disclosures in its January “corporate enforcement policy.”^[4] It gives tangible rewards to companies when they come forward and reveal their involvement in possible criminal misconduct. Although the corporate enforcement policy comes from the criminal division, “the criminal side informs the civil side,” Lawrence noted.

When criminal prosecution is warranted even with self-disclosure, DOJ will recommend at sentencing a 50% to 75% reduction of the fine range from the U.S. Sentencing Guidelines, except in cases of criminal recidivists. Companies also are required to cooperate with DOJ, remediate the wrongdoing and forfeit ill-gotten gains.

Whether or not organizations should self-disclose when they find out they’re under investigation depends on several factors, Lawrence said. Often the main consideration is whether the allegations at issue have merit, as determined by an internal investigation. “The significance of the issues and any potential exposure also represent significant points of consideration,” Lawrence said. Another factor can be whether the particular U.S. attorney’s office is inclined to give cooperation credit. “It can be a complex calculus,” he noted. If an organization goes the self-disclosure route and presents its findings to the government, and the internal investigation is perceived as credible and comprehensive, it often will help the organization because it saves the government time and resources, Lawrence explained. “A disclosure can send a clear message to the government that the company is committed to compliance and doesn’t represent a compliance risk moving forward,” he added.

Linda Severin, an attorney for the whistleblower, said, “We’re happy when companies cooperate and disclose compliance issues they discover while the government is investigating one of our *qui tam* cases. At the end of the

day, that cooperation may reduce the amount of money that the government—and our client—recovers, but it's a win-win-win. With cooperation and disclosure, a case can be resolved sooner. And the company pays less money while sending a strong message that it's committed to compliance."

DOJ recently said the self-disclosure policy is having an impact. In a May 24 speech at a white-collar crime conference sponsored by the New York City Bar Association, Assistant Attorney General Kenneth Polite Jr. said the "department has already seen a shift in the number of corporate disclosures," according to an article in the Wall Street Journal.^[5]

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1 U.S. Department of Justice, U.S. Attorney's Office for the District of Massachusetts, "Massachusetts Eye and Ear Agrees to Pay Over \$5.7 Million to Resolve False Claims Act Allegations," news release, May 24, 2023, <https://bit.ly/43iivOr>.

2 Complaint, U.S. v. Massachusetts Eye and Ear, <https://bit.ly/43C0797>.

3 Settlement agreement, U.S. v. Massachusetts Eye and Ear, May 2023, <https://bit.ly/3WHTjVg>.

4 Nina Youngstrom, "In New Policy, DOJ Spells Out Rewards for Self-Disclosure, Reinforces Compliance Programs," *Report on Medicare Compliance* 32, no. 3 (January 23, 2023), <https://bit.ly/3ZyvI9Z>.

5 Mengqi Sun and Dylan Tokar, "DOJ Says More Companies Are Voluntarily Disclosing Possible Wrongdoing," *Wall Street Journal*, May 24, 2023.

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