



## OFCCP RESCINDS DIRECTIVE ON JURISDICTION OVER HEALTH CARE PROVIDERS

The efforts of the Office of Federal Contract Compliance Programs (“OFCCP” or the “Office”) to assert jurisdiction over nearly all of the U.S. health care providers took an interesting turn on April 25, 2012, when the Office unexpectedly announced the rescission of Directive No. 293. As explained in a prior *Jones Day Commentary*, Directive No. 293 was an internal OFCCP memorandum entitled “Coverage of Health Care Providers and Insurers” (the “Directive”) offering instructions for how the Office intended to carry out its coverage assessments in the health care field. See *Jones Day Commentary*, “OFCCP Directive No. 293 Continues Expansion of Federal Contractor Status for Health Care Providers” (Jan. 2011). The Office’s Notice of Rescission stated the Office’s conclusion that “recent legislation and related developments in pending litigation warrant rescission of Directive 293 at this time.” See Notice of Rescission No. 301 (Apr. 25, 2012).

While the Directive was an internal memorandum that was never publicly released by the Office, it made its way into the public realm and was criticized widely

for its expansive position on the types of health care relationships that could subject a health care provider to the Office’s jurisdiction. Specifically, the Directive asserted that the Office had jurisdiction over:

- Health care providers participating in HMO health plan contracts covering federal government employees, despite that the propriety of such coverage was being litigated in federal court, see *UPMC Braddock v. Solis*, No. 1-09-CV-01210 (D.D.C. filed June 30, 2009);
- Health care providers participating in TRICARE—a U.S. Department of Defense military health care program providing coverage to active and retired U.S. military personnel, despite that the propriety of such coverage was being litigated at the Department of Labor’s Administrative Review Board (“ARB”), see *OFCCP v. Florida Hospital*, ARB Case No. 11-011; and
- Health care providers participating in Medicare Parts C or D, despite that the propriety of such coverage had never been litigated or otherwise asserted by the Office.

Late in 2011, Congress addressed the federal subcontractor status of TRICARE network participants through Section 715 of the National Defense Authorization Act for Fiscal Year 2012. See Pub. L. No. 112-81, 125 Stat. 1298 (2011). Section 715 explicitly prohibited OFCCP jurisdiction over health care providers based on their status as TRICARE network participants, stating that “[f]or the purpose of determining whether network providers...are subcontractors for purposes of the Federal Acquisition Regulation or any other law, a TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services or supplies on the basis of such requirement.” *Id.* § 715.

In light of the passage of Section 715, Florida Hospital requested that the ARB dismiss its case, in which the OFCCP based its jurisdiction solely on Florida Hospital’s status as a TRICARE network provider. The ARB requested briefing on Section 715’s impact on the Office’s ability to assert jurisdiction based solely on participation in TRICARE. The OFCCP, unsurprisingly but incorrectly, asserted that it still had jurisdiction over TRICARE network participants notwithstanding Congress’s clear intent to the contrary. Jones Day, together with in-house counsel for the American Hospital Association, submitted an *amicus curiae* brief on behalf of the AHA and in support of Florida Hospital’s motion to dismiss.

After Florida Hospital, the AHA, and other interested parties filed briefs urging the ARB to dismiss the case, the OFCCP held a webinar entitled “Status of Pending Compliance Evaluations of Entities that Participate in TRICARE Networks.” At the webinar, which was scheduled before *Florida Hospital* briefs were filed, OFCCP representatives explained that they would continue to hold in abeyance audits based solely on participation in TRICARE but would proceed with audits where there was an alternative basis for jurisdiction. Additionally, however, OFCCP Counsel Consuela Pinto made the unexpected announcement that the Office had decided to rescind the Directive in light of the passage of Section 715 and developments in litigation.

OFCCP’s Notice of Rescission states that the “OFCCP will continue to use a case-by-case approach to make coverage determinations in keeping with its regulatory principles applicable to contract and subcontract relationships and OFCCP case law.” Although rescission of the Directive should not be interpreted as OFCCP abandoning its interest in health care providers, it appears to be an admission that the Office recognizes its aggressive position on its jurisdiction over health care providers is vulnerable.

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