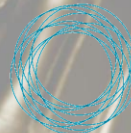


Health Care Reform: FINDING YOUR WAY

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Health Care Reform Law Expands Criminal Liability and Penalties

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EXECUTIVE SUMMARY

The federal health care reform law gives the federal government significantly more resources and legal tools for investigating and prosecuting health care fraud. The law provides hundreds of millions of dollars for investigating and prosecuting fraud in Medicare, Medicaid, and other government health care programs. It makes it easier for the federal government to obtain convictions for health care offenses, and substantially increases the potential prison sentences for those offenses.

Together, these criminal provisions in the law make it critical for all hospitals, doctors, and other health care providers to create and put into practice effective compliance programs. All providers should also consider drafting policies and training employees on the proper way to respond to contact by law enforcement.

BACKGROUND

The criminal provisions of the health care reform law are the latest step in the federal government's efforts to investigate and prosecute fraud in public health care programs. Before Congress passed this law, the Obama administration had already announced its intention to use Recovery Audit Contractors to root out fraud in Medicare claims. The 2009 amendments to the False Claims Act were similarly driven in large part by the desire to recover misspent health care funds.

The federal government has also been aggressively using techniques formerly reserved for street crimes to investigate health care fraud and other white-collar crimes. Those techniques include

wiretaps, confidential informants, and undercover agents. Another is the knock-and-talk, where federal agents come unannounced to an administrator's or physician's practice—or even home—to ask questions.

Investigating and prosecuting health care fraud was already a priority for the federal government. The new law gives the government additional funds and legal tools to turn that priority into an imperative.

RELEVANT PROVISIONS OF THE HEALTH CARE REFORM LAW

Funding to fight health care fraud. The law provides an additional \$250 million, over the next six years, to the Health Care Fraud and Abuse Control Account. Funds from that account are used for investigating and prosecuting health care fraud. (HR 4872, § 1304).

The law also provides \$75 million for the Medicaid Integrity Program for 2010. Starting in 2011, the funding for that program will increase with the rate of inflation. The program's activities include auditing claims and identifying overpayments. (HR 4872, § 1304).

Easier convictions. By reducing the burden of proof, the new law will make it easier for the federal government to obtain convictions under the criminal health care fraud statute, 18 U.S.C. § 1347.

The new law states that, to obtain a conviction for health care fraud, the government does not have to prove that the defendant specifically intended to defraud the government. (HR 3590, § 10606(b)). The government also does not have to prove that the defendant actually knew about the health care fraud statute. (HR 3590, § 10606(b)).

It is clear that the changes have lowered the government's burden of proof in health care fraud cases, making it easier to obtain convictions. Exactly how much the burden of proof has changed will have to be fought out in court, because the new law contains some imprecise language.

Harsher sentences. The health care reform law adds to the list of crimes classified as federal health care offenses. (HR 3590, § 10606(c)). It increases—in some cases by many years—the potential prison sentences for those offenses. (HR 3590, § 10606(a)(2)(C)). The law also gives the U.S. Sentencing Commission the authority to allow even harsher sentences for health care offenses. (HR 3590, § 10606(a)(3)(A)(ii)).

On an issue that is particularly important to providers, the law makes it easier for the government to inflate the calculation of the financial loss from health care fraud. Under the Federal Sentencing Guidelines, the amount of loss directly affects the potential sentence—a higher loss calculation can mean much more time in prison, and larger fines.

Many federal courts have held that, when calculating the amount of loss in a health care fraud case, a defendant is entitled to a credit for the value of any services actually provided. For example, if a hospital charges Medicare \$100 for a service that was never provided, the amount of the loss to the government is the full \$100. But if the hospital charges Medicare \$100 for a

service that had an actual value of \$80, then the hospital would receive a credit for the value of the service, and the amount of the loss would be just \$20.

The new law shifts to defendants the burden of proving the value of any services provided. Previously, some courts had held that the government had the burden of proving the value of those services. Now, it appears that all the government must do at sentencing is prove the total amount of bills submitted to the government program. The burden then shifts to the defendant to prove the value of the services provided.

WHAT THIS MEANS FOR HEALTH CARE PROVIDERS

Together, the criminal provisions in the health care reform law give the federal government substantial leverage in investigating and prosecuting health care fraud. The looser standards for a conviction, the longer potential prison terms, and the shift in the burden of proving the amount of loss could put pressure on defendants charged with health care fraud to accept a plea bargain rather than taking a case to trial.

These criminal provisions will also—at least indirectly—affect civil investigations and cases, such as those under the False Claims Act. The criminal provisions might give the government additional leverage in settlement negotiations, as health care providers attempt to resolve civil cases with the hope of avoiding a criminal charge.

The potential costs of a prosecution for health care fraud, or even just an investigation, are substantial. With the new health care reform law, the stakes have become even higher for providers. The best way to avoid an allegation of fraud is to create an effective compliance program. If your company or practice does not have a compliance program, this is the time to develop one. If you already have a compliance program, you should make sure that it is up to date, that it addresses the needs and specific risks of your business or practice, and that it is effective at detecting potential issues before they turn into major problems.

Also, with the additional money and political momentum for investigating health care fraud, more providers will be the subject of investigations (whether justified or not). Providers should assess whether their employees know how to respond appropriately to phone calls, letters, or personal visits from law enforcement agents. All health care providers should consider creating policies and training employees on how to deal with contact by government agents. If your company or practice is contacted by law enforcement, you should contact an attorney immediately.

FOR MORE INFORMATION

This Client Alert is the second in the “Finding Your Way” advisory series, designed to assist our clients and other health care providers as they prepare to respond to health care reform. Future articles will include discussions regarding the health care reform law’s provisions regarding employment, Stark self-disclosure, civil fraud and abuse, accountable health organizations, and health information technology.

For questions about the information contained in this Alert, or any of the fraud and abuse provisions in the health care reform law, please contact Scott Bennett at 602.381.5476 or sbennett@csblaw.com, or any other member of our Criminal Defense & Government Investigations Group:

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