Health Care Reform Legislation: Prepare for a New Wave of Governmental and Private Health Care Fraud Enforcement

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Scattered throughout the Patient Protection and Affordable Care Act ("PPACA") are a number of technical but highly significant pro-enforcement health care fraud measures. They include the following:

- Mandatory Compliance Programs for providers and suppliers enrolled in Medicare and Medicaid on a timeline to be established by the secretary of the U.S. Department of Health and Human Services (HHS). The secretary will also prescribe the core elements of such compliance programs within a particular industry or category. See Section 6401(a).
- Mandatory Return and Reporting of Overpayments within 60 days after the date on which the overpayment is identified or the date any corresponding cost report is due, along with a written explanation of the reason for the overpayment. Retention of an overpayment beyond the 60-day deadline is deemed an "obligation" under the civil False Claims Act ("FCA"), thereby subjecting the provider or supplier to treble damage and civil penalty liability. See Section 6402(a).
- Possible Suspension of Payments From Medicare and Medicaid to a provider or supplier, pending completion of an investigation of credible allegations of fraud.

Question: Will a criminal indictment for fraud and/or the filing of a complaint by the U.S. Department of Justice ("DOJ") under the FCA be deemed "credible allegations of fraud" for purposes of suspending the provider or supplier? The possibility of suspension of Medicare and Medicaid payments may strengthen the government's hand in negotiating settlements resolving disputed criminal and FCA allegations of fraud. See Section 6402(a).

- Civil False Claims Act Liability for Claims Resulting From an Anti-Kickback Act Violation—The PPACA amends the Anti-Kickback Act to make a claim that includes items or services resulting from an Anti-Kickback Act violation of a false or fraudulent claim for purposes of FCA liability, thereby expanding the universe of potential qui tam plaintiffs. See Section 6402(a).
- Narrowing the Public Disclosure/Original Source Defenses to Civil False Claims Act Liability by amending the FCA to: (a) permit the DOJ to oppose dismissal of a qui tam action on public disclosure grounds, (b) narrow the public disclosure defense to a qui tam by eliminating public disclosures in state proceedings as grounds for dismissal, and (c) broaden the "original source" exception to the public disclosure defense by permitting qui tam plaintiffs who have independent knowledge and "materially add" to the publicly disclosed information to qualify as original sources. See Section 10104(a).

These are only a few of the pro-enforcement changes. The health reform legislative package provides for an additional $350 million over the next 10 years to agencies investigating health care fraud. The PPACA lowers the level of intent required in criminal prosecutions under the health care fraud statute, 18 U.S.C. 1347 and the Anti-Kickback Act, 42 U.S.C 1320a-7b. In such prosecutions, the government need no longer prove that the defendant had actual knowledge of these statutes or that the defendant specifically intended to violate them, as some courts have required. It also revises the definition of "health care fraud offense" in the federal criminal code to include violations of the Anti-Kickback Act, thereby subjecting violators to possible prosecution for money laundering and criminal-asset forfeiture. Additionally, the PPACA provides for increased fines and jail terms for persons convicted of health care fraud offenses by statutorily revising the calculation of "intended loss" under the United States Sentencing Guidelines.

As a result of these changes, there will be more qui tam actions, more DOJ and HHS-Office of Inspector General ("OIG") fraud investigations, increased costs to providers for implementing and operating compliance programs that include the secretary of HHS's "core elements," increased costs to providers for responding to grand jury and HHS-OIG subpoenas, and increased costs to providers in defending against and resolving parasitic and meritless qui tam actions.

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Practice Areas

Health Care