Health Care Reform Places Affirmative Duty on Providers to Refund Overpayments from Federal Health Care Programs

By Darrell Armer, Ashley Johnston and Tom Rhodus, Looper Reed & McGraw

Health care reform raises many difficult issues for health care providers. Risks that now accompany a failure to make timely repayment of overpayments place particularly difficult burdens upon providers. Although health care reform presents numerous challenges, this alert will only address issues associated with important changes to the "reverse false claim" provisions of the False Claims Act that impact health care providers and the mandated compliance programs.

> Recent Legislation Affecting the False Claims Act

The False Claims Act, 31 U.S.C. § 3729 et seq., involves any false billing to a federally-sponsored program, including but not limited to health-related programs. The Fraud Enforcement and Recovery Act of 2009 ("FERA") made significant changes to the False Claims Act. Among other things, FERA significantly expanded the "reverse false claims" provision of the False Claims Act by imposing liability on any person who fails to make timely repayment of any "obligation to pay or transmit money or property to the Government."

On March 23, 2010, the President signed legislation formally entitled the Patient Protection and Affordable Care Act of 2010, as amended by the Health Care Education Reconciliation Act of 2010, more commonly referred to as the Health Care Reform law. The Health Care Reform law specifically addresses health program overpayments and explicitly recognizes that a provider's retention of overpayments from a federally-funded health-care program may result in liability under the False Claims Act.

> Liability Under the False Claims Act

Prior to its recent amendment, the False Claims Act addressed two potential types of liability: (1) situations where a party submitted a claim or record to the federal government to obtain payment from the government that it knew (or should have known) to be false; and (2) situations where a party had previously obtained money from the federal government to which it was not entitled, and subsequently used false statements or records to conceal the overpayment and wrongfully retain the money.

The second type of potential liability is often referred to as a "reverse false claim" because even though no claim was filed that was known to be false at the time of filing, the payee subsequently discovered that it had received a payment to which it was not entitled. FERA eliminated the requirement predicating liability for retaining erroneous or improper payments upon the affirmative use of false statements or records to retain or conceal such payments.

> Under the New Law, Providers Have an Affirmative Duty to Identify and Refund Overpayments

As amended, the False Claims Act imposes liability in any situation where a party "knowingly and improperly avoids or decreases an obligation" to pay money to the Government. Affirmative use of a false record or statement to retain the money or conceal the obligation to repay is no longer required. Mere passive retention of a known overpayment is now a violation of the False Claims Act.

The word "obligation" is broadly defined to mean any "established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment." 31 U.S.C. § 3729(b)(3). Under the amended False Claims Act, liability arises in any instance where receipt of an overpayment from a federally-funded program, and the corresponding obligation to make repayment, is recognized and knowingly ignored. The recipient has an affirmative duty to identify overpayments and to make repayments. The

legislative history of FERA makes it clear that "notice [to the provider] by the Government about the overpayment" is not a necessary element of liability.

The Health Care Reform law specifically defines "overpayments" to mean "funds that a person receives or retains under [Medicare or Medicaid] to which the person is not entitled". It further requires overpayments to be "reported and refunded" by the later of "60 days after the date on which the overpayment was identified" or "the date any corresponding cost report is due". The Health Care Reform law specifically makes the duty to report and repay any overpayment an "obligation" under the False Claims Act, so that the failure to report and return an overpayment from a federally-funded health care program within the applicable deadline is a violation of the False Claims Act.

Finally, the Health Care Reform law provides that when making a refund, a provider must provide the agency to which the overpayment is returned with written notice specifying the reason for the overpayment.

The law does not specify when an overpayment is considered to have been "identified," thereby commencing the running of the 60-day repayment deadline to avoid liability. Although the OIG has historically taken the position in the context of self-disclosure that an overpayment is not considered to have been "identified" until an internally-initiated investigation has been completed (see, e.g., the OIG's "Provider Self-Disclosure Protocol," 63 Fed. Reg. 58,399), the government will not necessarily accept a similar position in the context of enforcing the False Claims Act.

> Sanctions Under the False Claims Act Are Severe

Setting aside the possibility of criminal sanctions, civil monetary penalties under the False Claims Act are severe: three times the aggregate amount of the false claims, plus civil monetary penalties of $5,500 to $11,000 per claim. (At a minimum, "per claim" means "per invoice", and has even been construed to mean that each and every incorrect charge on a single invoice is a separate "false claim" for purposes of computing civil monetary penalties.) Violation may also result in exclusion from federally-funded healthcare programs such as Medicare and Medicaid.

By specifically linking failure to refund overpayments to liability under the False Claims Act, the recent changes in the law have dramatically expanded the potential False Claims Act liability of health care providers. Potential sources of possible overpayments are enormous, ranging from things as simple as duplicate payments, to payments for ineligible beneficiaries and determinations that services were not medically necessary, to Stark law violations such as Medicare billings and payments for designated health services. Overpayment obligations could also arise from more subtle violations, such as where patient charts have not been appropriately maintained, or from payments to or from physicians where a valid Stark law exception is not present: for example, where service agreements with referring physicians have expired, where such agreements fail to appropriately describe the scope of services covered by the agreement, or are not based on fair market value, or are not for a commercially reasonable purpose.

The effective date of the amended "reverse false claims" portions of the False Claims Act, as further modified by the Health Care Reform law, is the date of enactment, March 23, 2010. Presumably, the law will apply to overpayments received prior to the effective date, but which are discovered after that date.

> Mandated Compliance and Ethics Program for Providers and Suppliers

With the passage of the Health Care Reform law, Congress has mandated that current providers, suppliers and physicians adopt a compliance and ethics program and has established that, as a condition of enrollment in the Medicare/Medicaid program, new providers and suppliers must establish a compliance program that contains certain core elements established by the Health and Human Services (HHS) in consultation with the OIG within particular industries or categories. Although the core elements and the specific implementation timeline for the development or implementation of these compliance programs is yet to be determined for many types of provider, it is anticipated that the compliance program requirements will be published in the Fall of 2010. We expect the HHS to track prior OIG guidance and federal Sentencing Guidelines in developing required compliance program elements for other providers and suppliers. Early adoption of these compliance programs may minimize the likelihood of incorrect billings and to avoid receiving overpayments.

Health Care Reform

> Providers Cannot Avoid Liability by Putting Their Heads in the Sand

Although the False Claims Act only punishes "knowing" violations, "knowingly" is defined not only to comprise actual knowledge but also to include "deliberate ignorance" and "reckless disregard". 31 U.S.C. § 3729(b). With the additional requirement that providers and suppliers develop and implement a compliance program, implementing a compliance program now may be an effective tool for providers and suppliers to minimize the likelihood of incorrect billings and to identify erroneous overpayments immediately upon receipt. Providers should also initiate an immediate review of all contracts and relationships to ensure compliance with all safe-harbors under Stark and other laws.

Given the fact that any violation of the False Claims Act has potential criminal ramifications, any questions or problems should immediately be brought to the attention of the provider's legal counsel (as communications between providers and non-attorneys are not covered by attorney-client privilege and will not be considered to be "confidential" in the event of a governmental investigation).

Although numerous questions remain to be answered, LOOPER REED & MCGRAW believes that in view of the potential liabilities associated with violation of the False Claims Act, a conservative position is generally mandated.

This Looper Reed & McGraw Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice.

> About the Looper Reed & McGraw

Founded in 1985, Looper Reed & McGraw is a full-service, Texas based law firm with more than 95 lawyers practicing in Houston, Dallas and Tyler. Looper Reed & McGraw offers a wide range of legal services including business litigation, corporate transactions, oil & gas, tax planning and litigation, real estate, healthcare, trusts and estates, employment law, family law, and bankruptcy. For more information, visit www.lrmlaw.com.

Houston | 1300 Post Oak Blvd., Suite 2000 | Houston, Texas 77056 | 713.986.7000
Dallas | 1601 Elm Street, Suite 4600 | Dallas, Texas 75201 | 214.954.4135
Tyler | 1397 Dominion Plaza, Suite 100 | Tyler, Texas 75703 | 903.593.8885

Looper Reed
Looper Reed & McGraw P.C.

LOOPER REED

LOOPER REED & MCGRAW P.C.

Houston | 1300 Post Oak Blvd. Ste 2000
Houston, Texas 77056 | 713.986.7000

Dallas | 4600 Thanksgiving Tower
1601 Elm Street | Dallas, Texas 75201
214.954.4135

Tyler | 1397 Dominion Plaza, Ste 100
Tyler, Texas 75703 | 903.593.8885

www.lrmlaw.com