

# UPDATES FROM BARATZ & ASSOCIATES, P. A. *FOR THE HEALTHCARE INDUSTRY*

November 2009  
Issue 13

## MORE PROSECUTION TOOLS FOR HEALTH CARE FRAUD ENFORCEMENT?

The Health Care Fraud Enforcement Act of 2009 was introduced by Senator Ted Kaufman (D-DE), a member of the Senate Judiciary Committee on October 28, 2009. The bill includes a number of significant proposed enhancements to the government's anti-fraud healthcare arsenal. This comes as no surprise, as there is an intense commitment at various federal and state levels nationwide to continue to be aggressive in attacking fraud, waste and abuse in the healthcare industry.

This is consistent with the theme at the recent American Health Lawyers' Association Fraud and Compliance Forum held in Baltimore, MD October 4 - 6, that focused on enforcement initiatives. Significant expansion of False Claims Act Exposure and Whistleblower Protections through the Fraud Enforcement and Recovery Act of 2009 ("FERA") and the American Recovery and Reinstatement Act of 2009 ("ARRA") are, at this point, well known. However, it is not going to stop there.

This recent proposed bill looks to add a new subsection to the law codifying criminal penalties for acts involving federal healthcare programs, including the anti-kickback statute. It seeks to statutorily solidify the "tainted" claims methodology of calculating loss amounts for both criminal kickback violations and Civil False Claims Act (FCA) actions predicated on kickback violations. A press release issued by Senator

Patrick Leahy (D-VT), a co-sponsor of the bill, indicates that it also aims to enhance the government's FCA "ability to recover from pharmaceutical and device manufactures (who provide kickbacks to physicians), because in such instances the claims arising from the illegal kickbacks typically are not submitted by the physicians that received the kickbacks, but by pharmacies and hospitals that had no knowledge of the unlawful conduct." The bill would also clarify the intent element for violations of the Health Care Fraud Statute defining "willfully" under the statute to not require proof that the defendant had actual knowledge of the law in question or specific intent to violate the law.

The bill would increase the offense level under the Sentencing Guidelines for many healthcare fraud offenses and also provide Department of Justice with broad new administrative subpoena authority to investigate violations of the Civil Rights for Institutionalized Persons Act. With all of the proposals comes an additional \$20 million a year (in fiscal years 2011 - 2016) to increase the number of health care fraud investigators and prosecutors.

Whether the bill is ultimately signed, it is clear that this expanded enforcement attempt will continue, and therefore, it is important that you and your organization have the internal and external expertise and support to guide you through the maze of regulatory constraints.

## Internal Revenue Service Gets In On the Act

With little fanfare, Congress has amended IRC (Internal Revenue Code) Section 7623 in 2006. What is Section 7623? Well it's known as the "whistleblower" section. That's right, the tax code, with Congress' direction and approval has created an office within the IRS that handles "whistleblower" cases exclusively.

Armed with rewards for enforcement, the IRS has been encouraged by the activity the program has created. The Whistleblower Office has indicated that individuals who are submitting information on a taxpayer have inside knowledge of the tax transaction, often with the necessary documentation to support the claim.

Awards issued to informants have been made ever more favorable. Under this new program, the maximum reward is 30% of the collected proceeds and the minimum is 15% for an eligible case.

The whistleblower concept is not a new program activity; it's been in the law since 1867! But the new office and new legislation has created heightened activity. Clearly, with the need to raise revenues, the IRS is aware that this program can help its tax collection efforts.

Important facts to keep in mind are that informants have specific rights and certain protections under the Law. It's interesting that many of the whistleblowers are blowing the whistle on their own employers, based on the inside knowledge they have observed and obtained.

There are a myriad of regulations in this area, but what one needs to take away from this article is that Congress has legislated incentives for whistleblowers. By being tax compliant, and maintaining the appropriate documentation, one can help protect against disgruntled employees

raising issues with the IRS. Also limiting employees access to sensitive documents should be part of a Company's overall Internal Control Policy. In fact, the Company should have an Internal Control Policy for all aspects of its finances.

Internal controls throughout the Company can also help limit employee theft and safeguard Company assets. So health care fraud and defense contracting are not the only areas that "whistle blowing" can apply. The IRS and also state and local taxing authorities are looking at this approach to "scare people straight" on how they look at taxes. Be proactive, put controls in place, educate employees and make sure that you have competent and ethical external advice.

## CMS Releases Final 2010 Medicare Physicians Fee Schedule

On October 30, 2009 the Centers for Medicare and Medicaid Services (CMS) released its 2010 Final Medicare Physician Fee Schedule. It is important that providers review and understand the changes and provisions in this release. Some of the highlights include:

- 21.2% reduction in 2010 Medicare physician payments (unless congress again intervenes) as of January 1, 2010.
- Eliminates the use of all consultation codes (inpatient and office / outpatient codes for various places of service except for telehealth consultation G-Codes) on a budget neutral basis by increasing the work relative value units (RVU's) for new and established patient office visits, initial hospital and initial nursing facility visits and incorporating the increased use of these visits into practice expense (PE) and malpractice RVU calculations

- Phases in new PE RVU's over four years using revised survey data that will result in significant increases and decreases to the PE values of many codes.
- Increase the utilization assumption for diagnostic equipment priced at more than \$1 million, which will decrease the technical component for services performed on this equipment. This change is phased in over the next 4 years

The American College of Cardiology ("ACC") has stated that these cuts will have a significant effect on the income of cardiologists. According to ACC, "with the exception of evaluation and management services, nearly all services that cardiologists perform will see cuts ranging from 10% to more than 40% for individual services phased in over 4 years." A few key examples cited included:

- SPECT Myocardial Perfusion Imaging (78452) -36% cut immediately
- Transthoracic echo with spectral and color flow doppler (93306) - 10% cut
- Coronary Stent (92980) - 4% cut
- EKG (93000) - 5% cut
- Level 4 established patient office visit (99214) - 7% increase

With the elimination of consultation codes, it is expected that the adjusted reimbursement, in office or hospital visit codes, will not offset the loss of consultation code reimbursement.

These changes can affect a number of things in your organization in addition to reimbursement. Existing employment compensation arrangements can be greatly affected. The use of RVU compensation methods will lose some year-to-year comparability and usefulness in current and future employment arrangements. Once again, it is critical to understand how this all impacts you, both from a business and regulatory standpoint. Don't get caught unprepared.

(Sources of information for this month's newsletter included CMS, American Health Lawyers Association, Journal of Accounting, Medical Group Management Association and the American College of Cardiology)

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