

## MASSIVE SPIKE IN FCA PENALTIES

In November 2015, the **Bipartisan Budget Act of 2015** went into effect. One aspect of that act was the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. The new law required that the Program Fraud Civil Remedies Act and the False Claims Act ("FCA") penalties be "corrected" to adjust for inflation since their last adjustment and then that the penalties be adjusted for inflation each following year.

This week, the **Railroad Retirement Board** was first to issue its inflation "corrections," and they shocked the FCA world.

In 1986, the False Claims Act was completely rewritten and that new rewrite included a minimum penalty of \$5,000 per claim and a maximum penalty of \$10,000 per claim.

In 1996, pursuant to the Debt Collection Improvement Act of 1996, the penalties were increased to \$5,500 and \$11,000. Practitioners expected the correction to run from that date, leading to an increase of approximately 140 percent with a maximum penalty of about \$15,000.

Instead, the Board disregarded that correction because it was subject to the ten percent cap of the 1996 act. The Board went all the way back to 1986, leading to a massive 216 percent penalty increase.

The new minimum penalty per claim under the FCA for railroad claims is \$10,781.40 and the maximum is \$21,562.80. These will have an immediate effect on health care providers as Railroad Medicare claims make up a significant percentage of all Medicare claims. Railroad workers' retirement is administered through the Railroad Retirement Board, rather than the Social Security Administration. Providers are not likely to even notice the difference between Social Security and Railroad Medicare cards as they look quite similar. Both are red, white and blue. The Railroad Medicare card says "Medicare Health Insurance provided by the Railroad Retirement Board" on it, and the patient's alphanumeric identifier starts, rather than ends, with a letter. Railroad Medicare is administered by Palmetto GBA.

More significantly, the Railroad Retirement Board is only the first agency to make its adjustments. There is no reason to believe other agencies won't do exactly the same thing. In fact, it is a near certainty as consistency in the FCA is an important governmental interest. Additionally, receipt of Medicaid money is contingent upon the states significantly mirroring the federal FCA, so expect similar changes in state penalties.

To government contractors, this is a foreboding change. The FCA was always onerous, to the point that the Eighth Amendment Excessive Fines Clause was often considered, though no case ever turned on that issue. This massive increase may well put that matter back in play, particularly for claims that are microscopic in comparison to the penalties, e.g. a \$5.00 laboratory service. While penalties are often not paid as part of negotiated settlements, they are mandated for any case decided by a court. It is that threat that often makes settlement discussions feel like coercion or even extortion to contractors.

For contractors, and particularly health care providers, this suggests new measures should be considered to insulate from these new penalties. One such suggestion is the batching of individual services to include as many as possible on a single "claim" to the government. The FCA applies to "claims for payment," not individually itemized services found within each claim. There is no case law yet to guide providers on whether services for multiple recipients found on a single claim for payment would be one or many claims. However, that is the best prophylactic action available and provides the sort of argument courts will welcome to avoid having to resolve issues on Eighth Amendment constitutional grounds.

The FCA's treble damages penalty was not changed as part of this adjustment.

The maximum civil monetary penalty was increased to \$10,781.

All of these changes are effective for claims or statements made after August 1, 2016. This includes any failure to identify a prior overpayment after more than 60 days under the **FCA's 60-Day Overpayment Rule**.

## HEALTH CARE TAKEAWAY

The FCA's already onerous penalties have become draconian for Railroad Medicare claims and are likely to do so for all claims in the coming months. Providers best avoid these new penalties with strong compliance programs and by working closely with their health care counsel to evaluate their programs, particularly in the billing and coding departments, as this terrifying specter looms over the entire industry. Providers can insulate themselves somewhat from these changes by adjusting their billing practices to include as many individual services on as few claims for payment as possible.

If you have any questions, please contact David B. Honig at [dhonig@hallrender.com](mailto:dhonig@hallrender.com) or (317) 977-1447 or your regular Hall Render attorney.

Assisting with this story were:

Lori A. Wink ([lwink@hallrender.com](mailto:lwink@hallrender.com) or (414) 721-0456) in our Milwaukee office;

Amy O. Garrigues ([agarrigues@hallrender.com](mailto:agarrigues@hallrender.com) or (317) 447-4962) in our Raleigh office; and

Steven H. Pratt ([spratt@hallrender.com](mailto:spratt@hallrender.com) or (317) 977-1442) in our Indianapolis office.