MASSIVE PENALTY SPIKE DARKENS THE FCA LANDSCAPE

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.

In May, the Railroad Retirement Board was the first agency to issue its inflation "corrections," shocking the FCA world. This week, the Department of Justice ("DOJ") followed suit, expanding the spike to the entire FCA world.

In 1986, the FCA was completely rewritten and included a minimum penalty of $5,000 per claim and a maximum penalty of $10,000 per claim.

In 1996, under the Debt Collection Improvement Act of 1996 ("1996 Act"), the minimum and maximum penalties were increased to $5,500 and $11,000, respectively. Practitioners expected the correction to run from that date, leading to an increase of approximately 140% with a maximum penalty of about $15,000.

Instead, the government disregarded that correction because it was subject to the 10% cap set forth in the 1996 Act. The government went all the way back to 1986, leading to a massive 216% penalty increase.

The new DOJ minimum penalty per claim under the FCA is $10,781 and the maximum is $21,563. These will have an immediate effect on health care providers submitting Medicare and Medicaid claims.

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 defense 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 heightened 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 penalties assessed 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. Notably, the DOJ stated that penalties associated with violations that occurred prior to November 2, 2015, the date the Bipartisan Budget Act went into effect, will still be subject to the old penalties.

HEALTH CARE TAKEAWAY

The FCA's already oppressive penalties have become draconian. 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 protect themselves somewhat from these changes by adjusting their billing practices to include as many individual services on as few claims for payment as possible.

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