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THE NATION'S ESSENTIAL ALERT FOR HEALTHCARE COMPLIANCE OFFICERS

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Government payment suspension threatens providers

Fourth Circuit ruling lays the groundwork for major reimbursement frays

Health care providers should brace for a surge in payment suspensions as the Health Care Financing Administration (HCFA) ratchets up the pressure on its fiscal intermediaries and Medicare Part B carriers to tighten their scrutiny of claims processing, warn several health care attorneys who specialize in this area.

Worse yet, the attorneys point out that under the Health Insurance Portability and Accountability Act (HIPAA), the government is now empowered under certain circumstances to freeze defendants' assets before any decision is reached in suspected health care fraud cases.

"It is a very frightening development," asserts **William Sarraille**, JD, with Arent Fox in Washington, DC. "It is hard to imagine a new element in the imbalance of power in False Claims Act cases, but this really does do that because it creates an immediate threat to the financial viability of the organization."

"It is a very powerful tool," agrees **Tom Crane**, JD, with the Washington, DC-based Mintz Levin. "If anything, I think providers should expect this to be a tool that will be used more and more in the future."

Sarraille says the government can use suspension of payments to put health care providers under investigation on the brink of collapse. "Although the penalties under the False Claims Act itself are overwhelming in and of themselves," he says, "this gives tremendous immediacy to the government's demands and really forces settlement at the point of a gun."

Health care attorney **John Boese** of Fried, Frank, Harris, Shriver & Jacobson in Washington, DC, says suspension of Medicare payments and asset freezes can be devastating to a provider's ability to conduct business on a day-to-day basis and pay for legal representation in the underlying litigation. Boese warns that the government's increasingly aggressive posture in cases of suspected health care fraud is finding support in federal courts. He points to two recent appellate decisions where courts granted government requests for pre-judgment injunctions, freezing defendants' assets in health care fraud cases. "In one case," he says, "the government was not even required to link the assets to the alleged fraud."

That case involves a *qui tam* relator who claims the government was overbilled for radiation oncology services. But even before the *qui tam* suit was initiated, Boese says HCFA had directed the carrier to suspend payments for

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How to limit your risk as a compliance officer

Here are strategies to manage liability

The secret is out that compliance officers face a growing personal liability as their positions within health care organizations continue to take hold and grow in importance. "I don't think I have had a discussion with a compliance officer that has not included concern for their own personal liability or a conflict of interest between what they felt was appropriate and what someone in the company wanted to do," asserts **Anne Novack Branan**, a health care attorney with Broad and Cassel in Ft. Lauderdale, FL.

Branan says specific techniques and strategies can be used to minimize that liability, not necessarily at the expense of the employer. Much of the fear that exists stems from the

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more than $2 million in services because of the suspected fraud.

Crane says HCFA has significant regulatory authority to suspend payment when there is suspicion of fraud. He adds that while the HIPAA regulations are relatively new, prosecutors are becoming more familiar with them and more comfortable using them. "Health care providers should expect those to be used more extensively down the road," he warns, "and those also are very powerful."

According to Boese, Medicare regulations require carriers to take "timely action" to obtain evidence that may be needed to make a determination about an overpayment and to make "all reasonable efforts" to expedite that determination. The regulations give carriers 180 days, although a one-time 180-day extension may be granted.

However, the regulations also allow those time limits to be waived at the request of the U.S. Department of Justice based on fraud investigation and pending criminal or civil actions.

In a decision issued earlier this month, Boese says, the Fourth Circuit reviewed a finding by a district court that halted the trend. In that case, the Fourth Circuit upheld a decision by a district court requiring HCFA to complete Medicare overpayment determinations within 20 days regardless of a pending False Claims Act complaint.

The court rejected the government's argument that the administrative mechanisms available to HCFA were inadequate because of the complexity of the alleged fraud. It also rejected the government's assertion that the administrative decision should be deferred until a decision was reached in the False Claims Act litigation and should be based on the outcome of that case.

"The Fourth Circuit's decision is important because it highlights the increasingly aggressive posture taken by the government in cases of suspected health care fraud," asserts Boese. But he adds that the court then gutted the effect of its own decision by allowing HCFA to delay its determination indefinitely.

"Although the practical effect of this decision may be negligible for defendants in this case," he says, "the ruling is significant because it holds that the government's investigation in a civil False Claims Act case does not eliminate defendants' rights under parallel administrative regimes."

According to Sarraille, the Fourth Circuit has become increasingly conservative and critical of the government in the last several years. Providers should not assume, however, the Fourth Circuit's apparent deference to procedural safeguards will carry the day across the country, he adds. "We continue to see a situation where, in most federal courts, the federal government in these fraud and abuse cases is given significant deference by the courts and significant latitude." ■

Nursing home manual changes bring more scrutiny

Nursing homes should brace for more intense scrutiny and stiffer penalties in the wake of the Health Care Financing Administration's (HCFA) Dec. 14 release of revisions to its State Operations Manual. HCFA's instructions to state agencies require immediate sanctions against nursing homes in more situations, including any time a nursing home is found to have caused harm to a resident on consecutive surveys.

HCFA's guidance includes the use of a new enforcement tool that allows fines of up to $10,000 for each serious incident that threatens residents' health and safety. In the past, fines could only be based on the number of days that a nursing home failed to meet federal requirements.

"There is a lot of room for concern here," says **Marie Infante**, a health care attorney with Pyles, Powers, Sutter and Verville in Washington, DC.

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"Facilities are really going to have to pay very close attention to these initial survey reports and the letters that accompany them."

Infante says the revision is a refinement of HCFA procedures largely based on the administration's own initiatives and Senate Special Committee on Aging Chairman Charles Grassley's (R-IA) insistence that the agency must tighten its enforcement processes. The new rules become effective Jan. 14.

"They have taken some procedural actions that are going to significantly step up the enforcement timetable and allow them to impose swifter penalties on nursing homes," says Infante. She says that will include civil monetary penalties and some transfer of enforcement authority from the federal government to the states.

Previously, HCFA's regional offices were responsible for issuing payment denials and new admissions based on recommendations from the state. Now states themselves will be vested with that authority.

There are new safety rules

According to Infante, there is also a new lengthy chapter about safety issues and a new set of guidelines for state survey agencies. The latter includes measures HCFA will use to monitor survey performance as well as the actions it will take in cases of inadequate survey.

The revision also enhances Nursing Home Compare, HCFA's consumer Internet resource, to include information about the prevalence of bedsores, weight loss, and other health conditions among residents in individual nursing homes.

Those actions follow other steps taken by HCFA earlier this year to strengthen the state inspection and enforcement process:

- HCFA instructed state inspectors to increase their focus on preventing bedsores, malnutrition, and abuse in nursing homes.
- HCFA established a new requirement for states to focus on complaints alleging harm to residents and conduct investigations within 10 days.
- States now must conduct more frequent inspections of nursing homes that have repeated serious violations without decreasing inspections of other facilities.
- State inspectors now must make the timing of inspections unpredictable and must conduct some visits on weekends, early mornings and nights to look for quality, safety, and staffing problems at those times. ■

Limit your risk

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government's effort to stem violations by creating personal liability through criminal and civil penalties, she explains. "The government uses paranoia about personal liability as a deterrent to crime."

Chris Idecker, a partner with Ernst & Young in Atlanta, agrees that while compliance officers can never completely eliminate the conflict of interest or personal liability inherent in their positions, they can manage that risk using a range of strategies.

Among the measures Idecker recommends are the following:

1. **Investigate the position before you accept the job.** Idecker, a former compliance officer with Medaphis, says compliance officers should become familiar with the company's past history and its response to investigations before accepting a new position. "You have to know the reputation of the company and the community," he warns. "Are they committed to doing the right thing? Is this part of their orientation when hiring new employees?"

Recent or anticipated acquisitions or mergers also can be a key factor, he adds. "When you buy a company, you buy their problems. I had a Department of Justice attorney once tell me that she didn't need whistle-blowers; all she needed was to read the *Wall Street Journal* and find out who was buying who."

2. **Understand the role of management.** It is also important to understand the organizational structure and the role management plays in compliance. Idecker says compliance officers should speak directly with the chief executive officer to gauge his or her level of commitment to integrating compliance into the company's mission. That includes what type of infrastructure will be established as well as compensation.

"I believe that measurements in compensation drive behavior," he says. While compliance officers won't often get a commitment on what will be spent, they should get a commitment that their recommendations will be considered strongly, he stresses.

Compliance officers also should speak with the chief operations officer to gauge commitment because of the central role that individual plays in most organizations, and they should meet with the board of directors, he adds. "Ultimately, you

have to run things by them and get their approval, and they are also your ultimate hammer. They are ones that you don't want to use very often, so be judicious."

It is also important to understand the organizational structure, adds Idecker. "Will you be the compliance officer for a subsidiary with no support from the parent company, or a compliance officer at a subsidiary where the parent has no knowledge of what goes on in the subsidiary?"

3. **Set ground rules with your employer.** Compliance officers should examine the scope of their duties, says Idecker. Depending on the job description, compliance officers may be responsible only for compliance, for compliance and internal audit, or compliance and quality control. All of those schemes can work, he says, but compliance officers have to understand before taking a position which arrangement it will be.

Even those arrangements can have their own nuances, he warns. "Sometimes they will ask you to head up the internal audit, and when you look at what is expected of you, it has more of a financial control orientation than a compliance orientation."

The composition of the compliance committee and its relationship to the compliance officer can also be a key factor, Idecker says. "A broad multidisciplinary compliance committee can make your job much easier. They can make the tough decisions and the politically unpopular decisions that you don't want to expend your political capital on."

4. **Ensure proper budgeting.** "The biggest problem I see in the field is underfunded plans," asserts Idecker. Not only does the Department of Health and Human Services Office of the Inspector General recognize the need for sufficient funding and staff, it also recognizes that the size and type of the organization dictate that need, he says.

One way to secure adequate funding is to point to areas where the organization can make additional money, he suggests. "Point out areas where correcting documentation shortfalls would have led to more reimbursement. Those are good stories to tell, and it helps make you part of that team. It shows them your value and ensures proper funding."

Idecker says the compliance officer's job is one of the most complex because it requires knowledge of organizational behavior, human resources, auditing, and legal issues. "It is an extraordinarily complex background, and you can't be all things to all people."

5. **Understand the reporting requirements.** Idecker says compliance officers should be wary of the knee-jerk tendency to report directly to the CEO. "That may not be appropriate," he says. But he adds that compliance officers should always report parallel to the people who are expected to comply.

"I think being tightly integrated with operations is the key to compliance. The more you make it a staff function and less of an integrated operational strategy, the less chance of success you will have." — ***Chris Idecker, Ernst & Young, Atlanta***

Reporting to the COO should not be ruled out automatically, he adds. "There is a theory in the government that this is like the fox guarding the hen house. I say if it is the fox guarding the hen house, then you have some compliance problems anyway." He says the key factor is whether that person has adequate time and commitment to devote to compliance.

Reporting to the company's legal officer also can be problematic, he cautions. "I tend not to favor that arrangement because the inherent tensions between legal and compliance are exacerbated," he says. "But I have seen it work in some organizations. It all depends on the makeup of your organization."

In all cases, Idecker says compliance officers must have direct access to the governing body and the CEO. "I also think it is important to document it. In any corporate governance litigation you might have downstream, it is your ultimate hammer, but use it sparingly."

"I think being tightly integrated with operations is the key to compliance," he concludes. "The more you make it a staff function and less of an integrated operational strategy, the less chance of success you will have." ■