60-DAY OVERPAYMENT RULE RELEASED

CMS has released its final 60-Day Overpayment Rule, providing clarity to the 2010 Affordable Care Act ("ACA") amendment to the False Claims Act ("FCA") that created FCA liability for failure to repay identified overpayment within 60 days. This is a long-awaited rule that provides essential clarity to an amendment that, until now, has vastly expanded FCA liability without any guidance.

The 2009 Fraud Enforcement Recovery Act amended the False Claims Act to create a new type of false claim known as the "retained overpayment false claim." A retained overpayment false claim occurs when a government contractor identifies an overpayment from the government even if innocent at the time received. In 2010, the ACA added a 60-day time limit for repayment once an overpayment has been identified. This has been discussed extensively, both in terms of what it means and what doubts surround the application of the new rules.

In Retention of Overpayments under FERA and the ACA, we discussed the application of the amendments to identified overpayments and suggested "any overpayment identified prior to May 22, 2010 should not create liability under the FCA as amended by FERA and the ACA." This analysis was based upon Supreme Court precedent in considering the retroactive application of statutory amendments. After that article was published, the *Government Contract Compliance Handbook*, § 1:15, Civil False Claims Act (4th Ed.) was written with the same conclusion.

In Retained Overpayments Change the FCA Ballgame, we asked the question, "When is an overpayment 'known' under the retained overpayment false claim theory?"

In DOJ Intervenes in Retained Overpayment Suit, we discussed *U.S. v. Continuum Health Partners, Inc., et al.*, which quickly became the test case for the application of the amendments. In *Continuum Health Partners,* the provider fully repaid all identified overpayments but did so over a two-year period.

In Up the Creek Without a Regulation, we discussed the delay in issuing a rule interpreting the 60-day rule, concluding the following.

The retained overpayment false claim is the newest and biggest tool that the government wields in its effort to rein in the costs of its health care programs. Yet there remain no rules or guidance on how, when or where that hammer can be used. A broad statute, increased government enforcement through both the civil and the criminal divisions of the DOJ and an army of avaricious whistleblowers and their attorneys creates a daunting environment for health care providers.

More recently, we wrote The 60-Day Vulture Comes Home to Roost. We discussed the trial court's denial of a motion to dismiss in *Continuum Health Partners* and its interpretation of the term "identified." The trial court ruled that "identified" was synonymous with "notified," deciding that it must be interpreted as follows.

Such that the sixty day clock begins ticking when a provider is put on notice of a potential overpayment, rather than the moment when an overpayment is conclusively ascertained.

As the reader can see, providers have been struggling in an environment defined by both doubt and the aggressive use of the retained overpayment false claim theory now for almost seven years without guidance from CMS.

Today, CMS has finally released its final rule. The summary from CMS is below.

This final rule requires providers and suppliers receiving funds under the Medicare program to report and return overpayments by the later of the date that is 60 days after the date on which the overpayment was identified; or the date any corresponding cost report is due, if applicable. The requirements in this rule are meant to ensure compliance with applicable statutes, promote the furnishing of high quality care, and to protect the Medicare Trust Funds against fraud and improper payments. This rule provides needed clarity and consistency in the reporting and returning of self-identified overpayments.

For FCA practitioners, the big takeaways from the new rule are that CMS adopted the FCA definition of "knowledge" to interpret "identified," much like the court did in *Continum Health Partners*, as discussed above, and it adopted a 6-year "look back" period for overpayments, meaning the retained overpayment false claim would be limited to claims made within 6 years. It should be noted, though, that the statute of limitations for the FCA can run as long as 10 years, so FCA liability for retained overpayments can go back a total of 16 years.

Please return tomorrow for a far more detailed analysis of the new rule, with considerations for health care providers and institutions. If you have any questions, please contact David B. Honig at dhonig@hallrender.com or (317) 977-1447 or your regular Hall Render attorney.