

A TWENTY YEAR STATUTE OF LIMITATIONS?

Last month the Centers for Medicare & Medicaid Services (CMS) published proposed rules for reporting of overpayments. These proposed rules, if adopted and strictly interpreted, could effectively create a twenty-year statute of limitations under the False Claims Act.

The False Claims Act (31 U.S.C. § 3729 *et seq.*) was amended in 2009 pursuant to the Fraud Enforcement Recovery Act of 2009 (FERA) and again in 2010 as part of the Patient Protection and Affordable Care Act of 2010 (PPACA, also known as "Obamacare"). The effect of the two amendments was to create a new type of false claim, retention of overpayments. A health care provider, once it knows of an overpayment, must report and return the overpayment within sixty days. Failure to do so makes retention of the overpayment a violation of the FCA, subject to treble the amount of the overpayment as well as penalties between \$5500 and \$1100 per claim.

In February, 2012, CMS published proposed rules for implementation of the sixty day rule. Those rules provide examples of overpayments, define "person" as applied in the statute, describe the preferred method of reporting and repayment, and more. One section of the proposed rules, the section addressing the length of the "lookback period," how far the provider must "look back" to identify overpayments once on notice, may effectively create a twenty year statute of limitations for retention of overpayment claims under the FCA.

The False Claims Act has a two-part statute of limitations. It states:

A civil action under (the FCA) may not be brought -

(1) more than 6 years after the date on which the violation of (the Act) is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed

whichever occurs last.

What that actually means is that the basic limitations period for known false claims is six years. However, if the false claim is discovered late in the game, three years or more after it occurs, the government (whistleblowers are limited to six years unless the government intervenes) has an additional three years to file a suit, up to a maximum of ten years.

The proposed rule attempts to identify how old an overpayment is subject to the reporting and repayment requirement. It appears to be written to coincide with the FCA statute of limitations:

Lookback period. *An overpayment must be reported and returned in accordance with § 401.305 only if a person identifies the overpayment within 10 years of the date the overpayment was received.*

In summary, overpayments identified within ten years of receipt must be repaid. The corollary of this is that, once a mechanism that could cause overpayments is identified, the provider is obligated to look back ten years to identify those overpayments and to report and repay them. Anything less would constitute a knowing violation of the FCA through willful ignorance or reckless disregard of the truth. Examples of such mechanism include identification of a long-standing referral relationship in violation of Stark or the Anti-Kickback statutes, or a longstanding computer billing error.

On its face, this would appear to coincide with the FCA's statute of limitations, consistently defining the period of risk for a provider to ten years. However, based upon how FERA and the PPACA amended the Act, it may actually be twenty years.

An overpayment exists immediately upon receipt. However, it is not a False Claim until (a) it is identified, and (b) it is not reported and repaid within sixty days. The Act is only violated with the expiration of that sixty day time period. Therefore, the six to ten year statute of limitations of the FCA begins to run at the end of the sixty day period, not from the date of the overpayment. This is best explained with examples (in both examples the claim was billed subsequent to the effective dates of FERA and the PPACA, to avoid any discussions of ex

post facto laws):

Example 1

- January 1, 2011 - a Medicare provider erroneously, but unintentionally bills the government.
- February 1, 2011 - the provider receives payment for the claim.
- February 2, 2021 - the provider identifies the overpayment

Under the proposed rule, ten years have expired and there is no duty to report or repay the error.

Example 2

- January 1, 2011 - a Medicare provider erroneously, but unintentionally bills the government.
- February 1, 2011 - the provider receives payment for the claim.
- February 1, 2021 - the provider identifies the overpayment.
- April 1, 2021 - the sixty days to report the overpayment expire.
- April 2, 2021 - the provider is now in violation of the False Claims Act. The FCA statute of limitations begins to run.
- April 2, 2028 - the government learns of both the overpayment and the providers knowledge of the overpayment.
- April 2, 2031 - the government files a lawsuit under the FCA against the provider, based upon a claim more than twenty years old.

Under the proposed rule, the claim was brought within the statute of limitations and the provider must defend an action related to a claim more than two decades old.

The plain language of the proposed rule describes exactly such a scenario. However, the explanation provided with the rules indicates an intent by CMS to match the rule with the FCA's statute of limitations:

In § 401.305(g), we are proposing that overpayments must be reported and returned only if a person identifies the overpayment within 10 years of the date the overpayment was received. We selected 10 years because this is the outer limit of the False Claims Act statute of limitations. We believe that the proposed 10-year lookback period is appropriate for several reasons. First, we believe that providers and suppliers should have certainty after a reasonable period that they can close their books and not have ongoing liability associated with an overpayment. We also believe that the length of the lookback period is long enough to sufficiently further our interest in ensuring that overpayments are timely returned to the Medicare Trust Funds.

CMS's intent, based upon the explanation, is to make the reporting requirement run hand-in-hand with the FCA's statute, rather than to extend it back an additional decade. If that is truly what CMS intended, the rule will need to be re-written to be consistent with the explanation. Further, forcing providers to defend an FCA action based upon a claim more than twenty years old raises significant constitutional due process considerations, given the lack of witnesses, loss of memory, and destruction of records.

For more information, please contact **David B. Honig** at dhonig@hallrender.com or (317) 977-1447.