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GREATER FALSE CLAIMS ACT PENALTIES LOOMING

On May 2, 2016, the U.S. Railroad Retirement Board ("RRB") issued an Interim Final Rule ("Interim Final Rule") significantly increasing its civil monetary penalties under the False Claims Act ("FCA") and the Program Fraud Civil Remedies Act ("PFCRA"). Specifically, the RRB implemented minimum and maximum penalties of $10,781 and $21,563 per claim, respectively, to be effective August 1, 2016. These increases were part of the RRB's efforts to "correct" penalties under the FCA and PFCRA as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the "Act"). A copy of the Interim Final Rule is available here.

The RRB's changes directly impact only claims submitted to the RRB, including but not limited to, Railroad Medicare claims. However, the RRB's increased penalty amounts are significantly higher than expected and are sending shockwaves through the health care provider community as other federal agencies are required under the Act to implement "corrected" penalty amounts no later than August 1, 2016.

BACKGROUND

The FCA was rewritten in 1986 to include a minimum penalty of $5,000 per claim and a maximum penalty of $10,000 per claim. Pursuant to the Debt Collection Improvement Act of 1996, these minimum and maximum penalties were increased in 1996 to $5,500 and $11,000, respectively. However, FCA penalties have remained unchanged since that time.

The Act went into effect in November 2015 and requires that FCA and PFCRA penalties be "corrected" to adjust for inflation since their last adjustment and that the penalties be adjusted for inflation each following year. All corrections must go into effect by August 1, 2016.

SIGNIFICANCE OF THE INTERIM FINAL RULE

The health care provider community expected that "corrections" to FCA and PFCRA penalties would be calculated from 1996, when the penalties were last updated. This would have resulted in an increase of approximately 140%, with a maximum penalty of about $15,000. The RRB in the Interim Final Rule, however, disregarded the 1996 changes since those increases were subject to a 10% cap. Instead, the RRB calculated its corrections based on the 1986 penalty amounts, which resulted in penalty increases of 216%.

The RRB's approach taken in the Interim Final Rule is significant because the RRB is the first agency to "correct" its FCA and PFCRA penalties. This sets a precedent for other federal agencies that are also required under the Act to implement corrections prior to August 1, 2016. It is possible, if not probable, that other federal agencies will follow the RRB's lead and increase FCA penalties based on the 1986 penalty amounts in order to ensure consistency under the FCA. States may also take steps to increase state penalties consistent with these FCA penalty changes since the receipt of Medicaid money is contingent upon states significantly mirroring the federal FCA.

PRACTICAL TAKEAWAY

Based on the Interim Final Rule, we now anticipate that health care-related FCA civil penalties, while already significant, may soon become even more weighty under the Act. And even though these penalties may not be applied in every FCA settlement, they will certainly raise the stakes even further for those providers considering the risks associated with litigating FCA matters.

This raises the importance of providers maintaining effective compliance programs to try to preclude situations in which the government may seek to invoke these new FCA penalties. Providers should ensure that their compliance programs have all the effectiveness elements in place based on prior guidance from the Office of Inspector General, including the maintenance of proactive auditing and monitoring functions. Self-reporting can also be an effective strategy when potential FCA risks are identified internally. Properly self-reporting and/or refunding identified overpayments and other compliance risks before they can escalate further should be considered a hallmark of any effective compliance program. This compliance program benefit becomes even more important now as the FCA stakes continue to rise.

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