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Increased False Claims Act (FCA) Exposure Investigation may Result from Expanded Use of Billing and Coding Audits

On March 10, 2010, President Obama issued a presidential memorandum regarding finding and recapturing improper payments in Medicare, Medicaid, and other government programs through the use of "*Payment Recapture Audits*."[1] In this memorandum, the President directed government agencies to practice more aggressive billing and coding audits of providers to recover overpayments, with the goal of reducing overall health care costs and responding to critics of the healthcare reform costs.[2] President Obama instructed the Director of the Office of Management and Budget to develop guidance within 90 days of the memorandum on actions executive departments and agencies must take to carry out the requirements of the memorandum.[3]

A Payment Recapture Audits, similar in concept to a *Recovery Audit Contractor (RAC) program audit,* is a process of identifying improper payments made to contractors or other entities in which third-party private companies receive a percentage of the improper payments they recover from providers. These improper payments include, but are not limited to: duplicate payments; payments for services not rendered; overpayments; and, fictitious vendors.[4] In 2009, improper payments identified by these audits totaled $98 billion, with $54 billion stemming from Medicare and Medicaid. Over the next three years, the audits are on pace to identify $1 billion in improper payments, and the White House projects that number could double to $2 billion with the expanded use of the Payment Recapture Audits.[5]

Although the Payment Recapture Audit companies must identify both underpayments and overpayments, RACs identified a substantial majority of the overpayments during the demonstration program, with underpayments amounting to only 3.67%.[6] This increased identification of overpayments has serious implications for health systems and health providers. The audits may prompt increased False Claims Act (FCA) exposure and, therefore, will necessitate enhanced case management and preparation to defend the rising wave of FCA investigations that will likely result from the rise in audits.[7] Based on the RAC program demonstration, approximately two thirds of all hospital payment errors were due to care that lacked medical necessity.[8] Further, in March 2010, the U.S. Attorney's Office in the Western District of New York turned its attention to a RAC referral-inspired investigation of at least 24 health systems. This may indicate a new strategy of using Payment Recapture Audits to bring FCA actions against providers.[9]

The *Comprehensive Error Rate Testing (CERT) program* is another type of audit, which may be perceived by providers as less threatening. CERT program audits monitor the accuracy of Medicare fee for service payments.[10] In the CERT program, a third party contractor selects thousands of claims per year to check for payment errors and provider compliance by identifying procedure codes that statistically appear to be the result of potential incorrect billings or other payments.[11] If the CERT contractor determines that the records and claims did not warrant payment, it sends the provider a letter denying payment for the reviewed claims.[12] Further, negative findings from these audits can lead to a more extensive post-payment audit and even repayment demands for erroneous claims.[13] While CERT audits are similar to RAC audits, they are not designed to detect fraud, and errors discovered during a CERT audit are not considered fraud for purposes of the FCA. However, CERT audits can be used to identify billing patterns that suggest fraudulent behavior.[14]

The Centers for Medicare and Medicaid Services (CMS) believes that auditors will focus their activities mainly on hospitals and health systems, especially at the beginning of these increased audits, but will eventually extend the process to all types of healthcare providers.[15] Accordingly, health systems and health providers should take proactive steps to address any known concerns that may exist in their case management.[16] Additionally, they should implement systems for tracking record requests and providing timely responses, execute appropriate compliance programs, and make efforts to understand available audit defenses, including, waiver of liability, provider without fault, treating physician rule, challenges to statistics, and reopening regulations.[17]

With the recent passing of healthcare reform legislation, enhanced enforcement of fraud and abuse laws is high on the President's agenda, and the March 10, 2010 presidential memorandum has put a spotlight on the accountability of billing healthcare services to federal and state governments, providing clear notice to every Medicare and Medicaid provider to be prepared for more aggressive scrutiny under these programs.

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1 "Presidential Memorandum Regarding Finding and Recapturing Improper Payments, Memorandum for the Heads of Executive Departments and Agencies," By Barack Obama, The White House Office of the Press Secretary, March, 10, 2010, p. 1

2 "Increased Billing Audits Suggest Enhanced FCA Risk," By Joshua Buchman, Michael Peregrine, T. Reed Stephens, McDermott Newsletters, March. 15, 2010, p. 1

3 "Presidential Memorandum Regarding Finding and Recapturing Improper Payments, Memorandum for the Heads of Executive Departments and Agencies," By Barack Obama, The White House Office of the Press Secretary, March, 10, 2010, p. 1

4 "Presidential Memorandum Regarding Finding and Recapturing Improper Payments, Memorandum for the Heads of Executive Departments and Agencies," By Barack Obama, The White House Office of the Press Secretary, March, 10, 2010, p. 1

5 "RAC for All; Push for More Audits Could Affect Hospitals; experts" by Jennifer Lubell, Modern Healthcare, March 15, 2010, p. 1

6 "Recovery Audit Contractors and Medicare Audits: What Can Hospitals and Health Systems Expect as the RAC Program Expands Nationwide?" By Andrew Wachler, Abby Pendleton, and Jessica Gustafson, American Health Lawyers Association, Member Briefing, January 2009, p. 4

7 "Increased Billing Audits Suggest Enhanced FCA Risk," By Joshua Buchman, Michael Peregrine, T. Reed Stephens, McDermott Newsletters, March. 15, 2010, p. 1

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15 "The Medicare Recovery Audit Contractor (RAC) Program: An Evaluation of the 3-Year Demonstration," by the Centers for Medicare and Medicaid Studies, June 2008, p. 18, http://www.cms.hhs.gov/RAC/Downloads/RAC_Demonstration_Evaluation_Report.pdf (Accessed March 23, 2010)

16 "Increased Billing Audits Suggest Enhanced FCA Risk," By Joshua Buchman, Michael Peregrine, T. Reed Stephens, McDermott Newsletters, March. 15, 2010, p. 1

17 "Recovery Audit Contractors and Medicare Audits: What Can Hospitals and Health Systems Expect as the RAC Program Expands Nationwide?" By Andrew Wachler, Abby Pendleton, and Jessica Gustafson, American Health Lawyers Association, Member Briefing, January 2009, p. 13

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