

Health Care Enforcement Defense Alert: Fraud and Abuse Enforcement: Big Recoveries in 2009; Big Plans for 2010

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Health care fraud and abuse enforcement and prevention were a top government priority in fiscal year (FY) 2009, and enforcement activity will only increase in FY 2010 and beyond, affecting providers of all types. On May 13, 2010, the Department of Health and Human Services (HHS) and Department of Justice (DOJ) released the Health Care Fraud and Abuse Control (HCFAC) Program Annual Report for FY 2009¹ (HCFAC Report). The HCFAC Report details the \$2.51 billion the government recovered through health care fraud and abuse enforcement activities, and describes the breadth of the government's enforcement initiatives, resources, and accomplishments.

A press release issued by HHS that same day highlights the new enforcement tools authorized by the Patient Protection and Affordable Care Act² (Affordable Care Act) and makes clear that enforcement activity will increase in FY 2010.³ In the release, HHS Inspector General Daniel R. Levinson states: “[c]riminals have concluded that health care fraud is a safe bet. It is imperative that we change the calculus. With the expanded resources and enforcement tools provided in the Affordable Care Act, OIG and its partners will be bringing the fight to the criminals to prevent, detect, and swiftly punish those who steal from taxpayers and abuse the public trust.”

Fraud and Abuse Enforcement Yields Billions in Recoveries and Results in Increased Prosecutions

In FY 2009, the HCFAC Program's “anti-fraud efforts resulted in \$2.51 billion being deposited to the Medicare Trust Fund, a \$569 million, or 29 percent, increase over FY 2008.”⁴ In addition, “over \$441 million in federal Medicaid money was returned to the Treasury, a 28 percent increase from FY 2008.”⁵ According to the HCFAC Report:

- The federal Government won or negotiated approximately \$1.63 billion⁶ in judgments and settlements in FY 2009.
- *Qui tam* relators (a/k/a “whistleblowers”) received payments of more than \$48 million.
- DOJ opened 886 new civil health care fraud investigations, and had 1,155 civil health care fraud matters pending.
- DOJ opened 1,014 new criminal health care fraud investigations, involving 1,786 potential defendants; had 1,621 health care fraud criminal investigations pending,

involving 2,706 potential defendants; and filed criminal charges in 481 cases, involving 803 defendants.

- A total of 583 defendants were convicted for health care fraud-related crimes during the year.

The Scope of Fraud and Abuse Prevention and Enforcement Initiatives Is Expanding

In FY 2009, the HCFAC Program initiated and pursued cases against providers of all types, expended substantial resources, and improved collaboration between DOJ and HHS through the Health Care Fraud Prevention & Enforcement Action Team (HEAT) initiative.

Providers of All Types Were Subject to Fraud and Abuse Enforcement

Though the largest health care fraud and abuse settlements tended to garner the most attention, the 71-page HCFAC Report serves as a stark reminder that all providers may be subject to fraud and abuse enforcement activities. The Report enumerates the FY 2009 fraud and abuse enforcement and prevention activities and accomplishments of DOJ and HHS—department by department. It lists penalties imposed, including prison terms, and monetary recoveries made from providers of all types: pharmaceutical manufacturers; physicians; practitioners such as physical therapists, podiatrists, and others; pharmacies; hospitals; laboratories; clinics; medical equipment suppliers; nursing homes; and mental health facilities.

Substantial Financial Resources Were Allocated to Fraud and Abuse

In FY 2009, the HHS Secretary and the Attorney General certified that the HCFAC Program required \$266.4 million in mandatory funding, and Congress appropriated an additional \$198 million in discretionary funding. HCFAC Program funding will only increase in subsequent years: the Affordable Care Act authorizes \$10 million in increased HCFAC program funding per year through 2020,⁷ and the Health Care and Education Reconciliation Act of 2010⁸ provides an additional \$250 million through 2017 to the HCFAC program, beginning with a \$95 million boost in 2011.

Improved Collaboration through HEAT

The HCFAC Report highlights the improved coordination between the Attorney General and the HHS Secretary that has resulted from the HEAT Program announced on May 20, 2009.⁹ During FY 2009, HEAT's Medicare Fraud Strike Force was expanded to include teams of investigators and prosecutors in Detroit and Houston, building upon the teams operating in Miami and Los Angeles. The Strike Force has generated impressive results, prosecuting 82 cases involving charges filed against 209 defendants, negotiating 94 guilty pleas, and litigating five jury trials, with guilty verdicts against 10 defendants. Results such as these virtually guarantee that Strike Force activity will continue, if not increase, in FY 2010 and beyond.

Plans for FY 2010

The government's focus on enforcement will only expand in FY 2010 and beyond, as the Affordable Care Act gives the HCFAC Program "new tools to fight fraud, protect consumers, and safeguard taxpayer dollars."¹⁰ These new tools will impact the enforcement of the Anti-kickback Statute, the False Claims Act, the Stark law, the Civil Monetary Penalties Law, and new provisions mandating the reporting and refunding of overpayments.¹¹ These increased enforcement efforts will be supported by the newly established Center for Program Integrity at the Centers for Medicare & Medicaid Services, which will use "state-of-the-art methods to implement provisions of the Affordable Care Act that detect fraud and prevent improper payments."¹² The Center will "work with the private health care sector to better target fraud and abuse."¹³

Conclusion

The HCFAC Report highlights the difficult enforcement environment in which health care providers and suppliers operate, and serves as an important reminder to them of the need to implement and maintain an effective compliance program to protect themselves from exposure to mounting criminal and civil penalties.

Endnotes

¹ Department of Health and Human Services and The Department of Justice, Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2009 (2010) (hereinafter "HCFAC Report"), available at <http://www.justice.gov/dag/pubdoc/hcfacreport2009.pdf>.

² Pub. L. No. 111-148.

³ Press Release, Department of Health and Human Services, HHS and DOJ Officials: Affordable Care Act Includes Important New Tools to Fight Health Fraud and Protect Medicare (May 13, 2010), available at <http://www.hhs.gov/news/press/2010pres/05/20100513a.html>.

⁴ *Id.*

⁵ *Id.*

⁶ The HCFAC Report states that "The amount [\$1.63 billion] reported as won or negotiated only reflects Federal recoveries and therefore does not reflect state Medicaid monies recovered as part of any global, Federal-State settlements. Measures have been put into place to track such related state Medicaid recoveries." HCFAC Report, at 1, available at: <http://www.justice.gov/dag/pubdoc/hcfacreport2009.pdf>.

⁷ Pub. L. No. 111-148, § 6402.

⁸ Pub. L. No. 111-152, § 1303.

⁹ For more information about HEAT, please see [Mintz Levin's Alert dated May 21, 2009](#).

¹⁰ Press Release, Department of Health and Human Services, HHS and DOJ Officials: Affordable Care Act Includes Important New Tools to Fight Health Fraud and Protect Medicare (May 13, 2010), available at <http://www.hhs.gov/news/press/2010pres/05/20100513a.html>.

¹¹ For more information on the fraud and abuse provisions in the Affordable Care Act, please see [Mintz Levin's Alert dated April 8, 2010](#).

¹² Press Release, Department of Health and Human Services, HHS and DOJ Officials: Affordable Care Act Includes Important New Tools to Fight Health Fraud and Protect Medicare (May 13, 2010), available at: <http://www.hhs.gov/news/press/2010pres/05/20100513a.html>.

¹³ *Id.*

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