

Health Care ADVISORY

May 17, 2010

Overpayment Liability Under the “Reverse False Claims” Act

Historically, the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, under the “reverse false claim” provision, provides liability for any person making a fraudulent statement for the purpose of avoiding or decreasing an obligation to pay money owed to the government. The legislative history of the reverse false claim provision indicates that false claims liability should not be imposed for retention of overpayments pending their return through normal processes.

In 2009, President Obama signed the Fraud Enforcement and Recovery Act (FERA) into law, which amended the False Claims Act, 31 U.S.C. §§ 3729-3733. FERA increases the scope of false claims liability to include persons who knowingly conceal the retention of any overpayment of government money, thereby expanding the FCA’s reverse false claim provision. After FERA’s enactment, the FCA prohibited making a fraudulent statement for the purpose of avoiding, decreasing *or concealing* an obligation to pay or refund money to the government. FERA’s FCA amendment does not change the fact that false claims liability should not attach if, absent any falsification or other acts to knowingly avoid repayment, a person fails to immediately return an overpayment and, instead, takes steps to return the overpayment through an applicable reconciliation process.

Although FERA expanded the scope of the reverse false claim provision, members of the health care industry were still unclear as to the meaning of “obligation” and whether there was a specific duty to return Medicare and Medicaid overpayments. The Patient Protection and Affordable Care Act (PPACA), signed into law on March 23, 2010, answered these questions and directly linked the retention of overpayments to false claim liability. Under PPACA, “overpayments” are defined as “any [Medicare or Medicaid] funds that a person receives or retains . . . to which the person, after applicable reconciliation, is not entitled.” Health care providers, suppliers, Medicaid managed care organizations, Medicare Advantage organizations and PDP sponsors must “report and return” any overpayments within 60 days after either the date on which the overpayment was identified or the date any corresponding cost report was due, whichever is later. In addition, members of the health care industry must submit notification in writing to the entity to which the overpayment was returned as to the reason of the overpayment.

Any overpayment retained after the deadline becomes an “obligation” for purposes of the FCA. Therefore, a failure to return any Medicare or Medicaid overpayments by the deadline may result in false claim liability. In order to avoid such liability, health care providers and other entities receiving reimbursement under Medicare or Medicaid should implement policies and procedures on reporting and returning overpayments that are consistent with the requirements in PPACA.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

If you would like to receive future *Health Care Advisories* electronically, please forward your contact information including e-mail address to healthcare.advisory@alston.com. Be sure to put “**subscribe**” in the subject line.

For further guidance please contact one of the attorneys or advisors listed below:

Atlanta Office

Donna P. Bergeson
404.881.7278
donna.bergeson@alston.com

Angela T. Burnette
404.881.7665
angie.burnette@alston.com

William H. Jordan
404.881.7850
bill.jordan@alston.com

Robert C. Lower
404.881.7455
bob.lower@alston.com

Dawnmarie R. Matlock
404.881.4253
dawnmarie.matlock@alston.com

Kim McWhorter
404.881.4254
kim.mcwhorter@alston.com

William (Mitch) R. Mitchelson, Jr.
404.881.7661
mitch.mitchelson@alston.com

D'Andrea J. Morning
404.881.7538
dandrea.morning@alston.com

T.C. Spencer Pryor
404.881.7978
spence.pryor@alston.com

Robert D. Stone
404.881.7270
robert.stone@alston.com

Michelle A. Williams
404.881.7594
michelle.williams@alston.com

Esther Yu
404.881.4240
esther.yu@alston.com

Washington Office

Jennifer L. Butler
202.756.3326
jennifer.butler@alston.com

Laura E. Holland
202.239.3980
laura.holland@alston.com

Peter M. Kazon
202.756.3334
peter.kazon@alston.com

Stephanie A. Kennan
Senior Public Policy Advisor
202.756.3159
stephanie.kennan@alston.com

Keavney F. Klein
202.239.3981
keavney.klein@alston.com

Rudy S. Missmar
202.756.3034
rudy.missmar@alston.com

Mark Rayder
Senior Public Policy Advisor
202.756.3562
mark.rayder@alston.com

Colin T. Roskey
202.756.3436
colin.roskey@alston.com

Marc J. Scheineson
202.756.3465
marc.scheineson@alston.com

Thomas A. Scully
202.756.3459
thomas.scully@alston.com

Donald E. Segal
202.756.3449
donald.segal@alston.com

Tamara R. Tenney
202.756.3489
tamara.tenney@alston.com

Julie K. Tibbets
202.756.3444
julie.tibbets@alston.com

Timothy P. Trysla
202.756.3420
tim.trysla@alston.com

Marilyn Yager
Senior Public Policy Advisor
202.756.3341
marilyn.yager@alston.com

ATLANTA

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404.881.7000

CHARLOTTE

Bank of America Plaza
Suite 4000
101 South Tryon Street
Charlotte, NC 28280-4000
704.444.1000

DALLAS

Chase Tower
Suite 3601
2200 Ross Avenue
Dallas, TX 75201
214.922.3400

LOS ANGELES

333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
213.576.1000

NEW YORK

90 Park Avenue
New York, NY 10016-1387
212.210.9400

RESEARCH TRIANGLE

Suite 600
3201 Beechleaf Court
Raleigh, NC 27604-1062
919.862.2200

SILICON VALLEY

Two Palo Alto Square
Suite 400
3000 El Camino Real
Palo Alto, CA 94306-2112
650.838.2000

VENTURA COUNTY

Suite 215
2801 Townsgate Road
Westlake Village, CA 91361
805.497.9474

WASHINGTON, D.C.

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202.756.3300

www.alston.com

© Alston & Bird LLP 2010