The False Claims Act (“FCA”), which was originally enacted in 1863 in response to rampant fraud being perpetuated against the Union during the Civil War, is now primarily used to combat fraud and abuse in federal healthcare programs. As a result, the FCA is, understandably, of great concern to physicians and others across the industry.

Under the FCA, individuals and organizations that submit false or fraudulent claims for payment to the government can be subject to treble damages, per-claim penalties, exclusion from government programs, and criminal charges. Although the Department of Justice (the “DOJ”) can bring criminal and civil actions under the FCA, the FCA can also be civilly enforced through “qui tam” lawsuits, which are lawsuits filed by private parties (called “relators”) on behalf of the federal government. To incentivize such lawsuits, the FCA awards successful relators a portion (currently 15-30%) of the government’s recovery.

There has been a strong upward trend in the number of FCA lawsuits and the size of FCA recoveries since the law was amended in 1986 to increase the potential reward for, and expand the pool of people who could bring, qui tam lawsuits. Indeed, the DOJ recently announced that fiscal year 2022 saw the second highest number of FCA cases, which resulted in over $2 billion in settlements and judgments, more than $1.7 billion of which (over 77%) involved the health care industry—including drug and medical device manufacturers, durable medical equipment, home health and managed care providers, hospitals, pharmacies, hospice organizations, and even individual physicians.

While physicians may not be the first group that comes to mind when one thinks of FCA violators, the DOJ has reiterated its commitment to holding individuals accountable for FCA violations, which further underscores why FCA compliance must be a top priority for physicians. Importantly, the law does not only apply when a physician intentionally defrauds the government. Instead, it may be sufficient if a physician knew or should have known that the claim was false. Some of the most common areas where physicians may run into trouble with the FCA include: billing for services that were not actually provided or that were not medically necessary; overbilling, including through upcoding or improperly unbundling services; failing to meet documentation requirements; violating anti-kickback laws; failing to return overpayments in a timely manner; and failing to properly supervise employees and contractors.

In order to minimize risk in these areas, physicians should strive to:

1. Keep accurate and complete medical records that precisely record what was done on which day, and then make sure that the coding and billing service codes and bills are based on those accurate medical records. Maintaining contemporaneous records and conducting regular billing audits will help ensure accurate and appropriate billing (including avoiding overbilling through upcoding or unbundling services).

2. Ensure that all claims submitted are supported by proper medical documentation. By conducting regular documentation audits, physicians can confirm compliance with applicable regulations and identify areas that may need improvement.

3. Get familiar with applicable anti-kickback laws and steer clear of any potential violation of those laws, including any arrangement that provides payments or other incentives in exchange for referrals or that provides improper inducements to patients. Be especially cognizant anytime a health care business offers anything for free or below fair market value.

4. Diligently identify and return overpayments received from federal healthcare programs within 60 days of identifying the overpayment.

5. Provide effective supervision, including regular training on compliance issues and close monitoring of all billing and documentation practices of employees and contractors.

6. Create a workplace that welcomes complaints, takes all complaints seriously, conducts prompt and thorough investigations, and takes decisive action to prevent further wrongdoing if an actual or suspected violation is discovered. Not only will this help foster a culture of integrity and accountability that timely addresses potential issues (including before an actual violation arises), but it will also lower the risk that an employee or contractor will feel that they have to turn to a qui tam lawsuit in order to have their concerns addressed.

7. Reach out early and often to internal or external legal counsel with any questions or concerns that arise.

TOP OF FORM

Having a solid understanding of the FCA and strong compliance and audit systems are a great foundation for avoiding trouble under the FCA. However, because FCA cases can be complex and involve significant financial and reputational risk, anyone who has questions about the FCA—whether about general guidance on how to comply with the law, or specific questions regarding a potential or actual violation—should promptly consult legal counsel. The lawyers at Ray Quinney & Nebeker’s Health Care Practice Group are always ready to help you with any questions or concerns you may have.

Jascha Clark is a shareholder at Ray Quinney & Nebeker, where he advises large and small companies, executives, and healthcare providers on a wide range of employment and healthcare law issues, including all aspects of health care regulatory and day-to-day operational matters, such as billing, telehealth, the Physician Self-Referral Law, the Anti-Kickback Statute, the False Claims Act, and the Health Insurance Portability and Accountability Act.

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