

# HEALTH LAW

## *Update*

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

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## CMS Issues Guidance on False Claims Act and Whistleblower Education Requirements for Medicaid Providers

December 21, 2006

On December 13, 2006, the Centers for Medicare and Medicaid Services (CMS) issued a letter to state Medicaid agencies offering guidance on the implementation of Section 6032 of the Deficit Reduction Act of 2005 (DRA). Under Section 6032 of DRA, every entity that makes or receives at least \$5 million in Medicaid payments annually must, by January 1, 2007, (a) establish written policies for all of its employees, contractors and agents providing “detailed information” about false claims, false statements, and whistleblower protections under applicable federal and state fraud and abuse laws, and describing the entity’s policies and procedures for detecting and preventing fraud, waste and abuse, and (b) include in any employee handbook a specific discussion of the laws described in the written policies, the rights of employees to be protected as whistleblowers, and the entity’s policies and procedures for detecting and preventing fraud, waste and abuse.

For the last several months, state Medicaid agencies and healthcare providers have been awaiting regulations or other guidance clarifying the new requirements of Section 6032. Although CMS’s letter is specifically aimed at assisting state Medicaid agencies, much of the information provided in the letter is also applicable to healthcare providers.

**How to Calculate The \$5 Million Threshold.** Section 6032 applies to any entity that makes or receives at least \$5 million in annual payments under an approved state Medicaid plan. The CMS guidance confirms that the term entity is broadly defined and includes “a governmental agency, organization, unit, corporation, partnership or other business arrangement (including any Medicaid managed care organization, irrespective of the form of business structure or arrangement by which it exists), whether for-profit or not-for-profit. Further, the letter explains that the \$5 million threshold will be calculated based on aggregate payments made or received by the entity as a whole, even if the entity furnishes items or services at more than a single location or under more

than one contractual or other payment arrangement and irrespective of whether the entity submits claims for payment using one or more provider identification or tax identification numbers.

What remains somewhat unclear is whether, with respect to a publicly traded chain of healthcare facilities, or a hospital system or healthcare system, CMS would calculate the \$5 million threshold based on payments made or received by the entire chain or system, as opposed to an individual entity or subsidiary within the system. Whistleblowers and/or CMS potentially might calculate the threshold based on payments received throughout the entire system, especially given CMS' comments about aggregating payments received under one or more tax identification numbers.

An entity will have met the \$5 million annual threshold as of January 1, 2007, if it has made or received payments in that amount in federal fiscal year 2006 (October 1, 2005 – September 30, 2006). Future determinations regarding the applicability of Section 6032 will be made by January 1 of each subsequent year, based upon the amount of payments the entity made or received under the state Medicaid plan during the preceding federal fiscal year.

**What is the “Detailed Information” that Section 6032 Requires?** A principal mandate of Section 6032 is that every entity covered by Section 6032 must establish written policies for all employees and for all contractors or agents of the entity, which provide “detailed information” about false claims, false statements, and whistleblower protections under applicable federal and state fraud and abuse laws. Unfortunately, CMS does not clarify the meaning of the “detailed information” that must be included in these new compliance policies. In addition, CMS' letter indicates that CMS will not be providing model language for the required policies (although states may elect to do so).

**What Personnel Are Covered by the New Policies?** Section 6032 requires each entity covered by Section 6032 to disseminate its written policies to its employees, contractors and agents (i.e., any officer or employee of the entity, as well as any contractor, subcontractor, agent or other person which or who, on behalf of the entity, furnishes or otherwise authorizes the furnishing of Medicaid healthcare items or services, performs billing or coding functions, or is involved in the monitoring of healthcare provided by the entity). CMS' letter states that the entity's written policies “must also be adopted by [the entity's] contractors or agents.” It is unclear whether CMS means that an entity's agents and contractors must formally adopt the entity's policies as their own internal policies, or merely adhere to the entity's policies.

**What Form Must the New Policies Take?** The CMS guidance clarifies that the policies may be on paper or in electronic form, provided they are readily available to all employees, contractors and agents. Although the language of the statute requires each entity to include a specific discussion of the entity's policies “in any employee handbook for the entity,” the CMS letter instructs state Medicaid agencies that there is no requirement that an entity create an employee handbook if none already exists.

**Condition of Reimbursement.** Compliance with Section 6032 will be a condition of Medicaid reimbursement as of January 1, 2007, and failure to establish and disseminate the required information could result in false claims exposure or exclusion from federal healthcare programs.

If you would like assistance in developing any of the new compliance policies mandated by DRA, or if you have any questions about this Health Law Alert, please contact one of the Bass, Berry & Sims attorneys in our Healthcare Practice Area, listed below.

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