BNA's

HEALTH CARE FRAUD REPORT

Reproduced with permission from Health Care Fraud Report, 13 HFRA 752, 09/23/2009. Copyright © 2009 by The Bureau of National Affairs, Inc. (800-372-1033) http://www.bna.com

The Recession's Effect on Health Care Fraud: The Challenge of Maintaining Effective Compliance in a Down Market

BY BRIAN D. ROARK & MARY BETH FORTUGNO

The past year has seen the United States' economy experience a recession unprecedented in most of our lives. Despite the recent uptick in stock prices and other limited signs that the worst may be past, unemployment remains high, and the timeline for any full recovery is uncertain.

Often perceived as immune from trends affecting the broader economy, this recession has affected the health care industry in several adverse ways, putting pressure on many health care organizations to trim budgets and find ways to control costs, including costs for compliance, internal audit, and legal departments.

The pressure to pull resources from compliance or legal budgets comes even as the Government is pursuing new enforcement initiatives and increasing the resources it devotes to fraud detection and enforcement.

This article considers the effect of the economic downturn on health care providers' ability to maintain effective compliance measures in the current environment of increased oversight and enforcement.

After reviewing the impact of the recession on the health care industry and providing a summary of the Government's increased enforcement initiatives, the article considers whether this environment will contribute to an increase in health care fraud litigation.

The authors are health care attorneys at Bass, Berry & Sims PLC in Nashville. Roark can be reached at broark@bassberry.com or (615) 742-7753, and Fortugno can be reached at mfortugno@bassberry.com or (615) 742-7739.
The authors wish to thank Pam Casey for her contributions to the article.

Finally, the article offers suggestions to health care organizations for making the most effective use of their compliance resources in this environment.

The Recession's Effect on Health Care

Like other businesses, many health care organizations—from multinational corporations to individual physician practices—have seen a decline in their financial health as a result of the recession.[1] The spike in unemployment has resulted in a reduction in the number of persons covered by insurance and in increase in persons seeking primary care from hospital emergency rooms.[2] Even with Medicaid or other assistance programs picking up coverage for some laid-off workers, many providers have seen a higher proportion of patients unable to pay for medical care.[3]

According to the American Hospital Association, many hospitals also have experienced an increase in interest expense at the same time that payments from insurers are coming in more slowly. Additionally, due to the turmoil in the credit markets, many hospitals have

[1] *See* American Hospital Association, *The Economic Crisis: The Toll on the Patients and Communities Hospitals Serve*, Apr. 27, 2009, at 3 [hereinafter ''*AHA Report*''].

[2] According to a report from the Kaiser Family Foundation, nearly all hospital emergency rooms are reporting rising volume and many emergency rooms are observing a ''recession'' population of uninsured and insured patients. *See* Kaiser Commission on Medicaid and the Uninsured, *Emergency Departments Under Growing Pressures*, Aug. 2009, at 1.

[3] A Kaiser Family Foundation report notes that the rise in the unemployment rate is expected to result in 4.5 million new Medicaid/CHIP enrollees. *See* Kaiser Commission on Medicaid and the Uninsured, *Struggling with Financing: The Recession and National Health Reform Dominate State Medicaid Concerns Going into FY 2010*, Aug. 2009, at 1.

found it increasingly difficult to access tax-exempt bonds or other sources of capital funding.[4]

As if this were not enough, the current health care reform debate has brought heightened economic uncertainty to providers as some of the proposals being considered by Congress would reduce Medicare and Medicaid reimbursement to finance wide-scale reform efforts.

Physician practices have faced the same economic pressures as hospitals. In February 2009, the Medical Group Management Association (MGMA), comprised of medical practice managers for physician groups, released a survey regarding the primary challenges facing physician practices.

The survey included: dealing with operating costs rising more rapidly than revenues, maintaining physician compensation levels in an environment of declining reimbursement, and collecting payment from self-pay, high-deductible health plan and/or health savings account patients.[5]

Reflective of these concerns, many physicians are turning to hospitals for more financial support, including on-call pay or employment.[6]

As a result of the recession, as of April 2009, nearly half of all hospitals had reduced staff and eight in 10 hospitals had cut administrative expenses.[7] Likewise for physician practices, the recession has led to postponed capital expenditures, operating budget cuts, and staff hiring freezes.[8]

The spending cuts at health care organizations often extend to compliance and legal departments as well. In December 2008, the Society of Corporate Compliance and Ethics and the Health Care Compliance Association (''SCCE/HCCA'') conducted a survey of 600 compliance and business ethics professionals in health care and other industries.[9]

With respect to whether spending cuts would extend to compliance, 36 percent of the respondents expected their budgets to decrease marginally in 2009 while another 50 percent of the respondents expected their budgets to remain about the same.[10]

Controlling costs in the compliance area could mean reducing salaries, laying off employees, not filling vacant positions, cutting travel budgets or continuing education budgets, or bringing work in-house that previously has been handled by outside law firms or consultants.

Despite pressures to reduce costs, many compliance professionals are being asked to take on more responsibilities, including HIPAA compliance or oversight of quality initiatives. Thus, not unlike other departments across the organization, the compliance, internal audit, and legal departments likely are being asked to do more work with the same or fewer resources.

Having to do more with less could mean that some issues go undetected or are not remedied in a timely fashion. For example, a typical compliance work cycle might be to audit a particular area, correct any problems uncovered, conduct employee education in that area, and then later perform a follow-up audit.

If compliance resources are stretched, that could mean that internal reviews are not performed as often as they were in the past, that employee education is not conducted at all or conducted in a less robust manner, that it takes longer to correct problems that are identified, or that there is no time left to perform a follow-up audit to ensure that corrections have worked.

According to the SCCE/HCCA survey mentioned above, 85 percent of compliance and business ethics professionals believed that the current economy greatly or somewhat increased the risk of compliance and ethics failures.[11]

Heightened Health Care Enforcement Measures

Even as health care organizations are looking for ways to control spending on compliance, internal audit, or legal budgets, the Government continues to increase the resources it devotes to the investigation and prosecution of health care fraud.

The imperative to reduce health care fraud has featured prominently in the Obama administration's push to pass health care reform legislation as the administration has argued that reducing waste and fraud in the system can provide a means to pay for reform without increasing the federal deficit.[12] Also, the strong stance against fraud provides an opportunity for the administration to demonstrate that it would be a responsible overseer of an expanded federal health care system.

Following up on its rhetoric, the administration has expanded collaborative efforts among the Department of Justice (''DOJ''), local U.S. attorney's offices, and the Department of Health and Human Services Office of Inspector General (''HHS OIG'') to fight fraud, most notably through the creation of Health Care Fraud Prevention and Enforcement Action Teams (''HEAT''), which are now in place in Miami, Los Angeles, Detroit, and Houston.

Not lacking for crime-fighting or military metaphors, the HEAT ''strike forces'' have obtained numerous well-publicized indictments and convictions.[13] The administration also has announced that it is looking for a ''superstar'' to lead DOJ's Criminal Fraud Section and that it intends to hire 10 trial attorneys for the section with

[4] *See AHA Report* at 15-16.

[5] *See Your Top Challenges: Results from MGMA's second annual member opinion survey*, MGMA Connexion, Jul. 2009, at 29, 29 [hereinafter ''*MGMA Report*''].

[6] *See AHA Report* at 20.

[7] *See id.* at 2.

[8] *See MGMA Report* at 29.

[9] *See Legal, Compliance and Ethics Risk in the Recession, A survey by the Health Care Compliance Association and Society of Corporate Compliance and Ethics*, Jan. 5, 2009, at 1.

[10] *See id.* at 4.

[11] *See id.* at 1.

[12] For an excellent overview of the increased resources devoted by the government to fight health care fraud and abuse and an overview of the amendments to the False Claims Act, *see* Thomas R. Crane, Sarah A. Kaput, and Jennifer E. Williams, *The Health Care Fraud Enforcement Juggernaut Continues: Congress Invests in Fraud Recovery Efforts to Help Reform and Strengthens the False Claims Act*, BNA's Health Care Fraud Report, Jul. 29, 2009.

[13] *See* DOJ Press Release, *Medicare Fraud Strike Force Operations Lead to Charges Against 53 Doctors, Health Care Executives and Beneficiaries for More Than $50 Million in Alleged False Billing in Detroit*, Jun. 24, 2009 (HHS Secretary Kathleen Sebelius commented that: ''The Obama Administration is committed to turning up the heat on Medicare fraud and employing all the weapons in the federal government's arsenal to target those who are defrauding the American taxpayer.'').

 COPYRIGHT © 2009 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 1092-1079

five of those positions dedicated to the prosecution of health care fraud.[14]

Two other developments from the past year that potentially will affect the amount of work for compliance and legal departments are the significant amendments to the False Claims Act (''FCA'') and the Government's expanded use of private contractors to perform Medicare/Medicaid audits.

In May 2009, Congress passed the Fraud Enforcement and Recovery Act of 2009 (FERA; Pub. L. 111-21), which provided the first major amendments to the FCA since 1986. The FERA amendments expand liability under the FCA in numerous respects, take away certain defenses previously available to defendants, provide enhanced investigative tools to the Government, make it easier for the Government to share information gleaned from investigations with *qui tam* relators, and expand whistleblower protections. These amendments are likely to lead to increased FCA litigation.

This year also has seen the 50-state rollout of the permanent Recovery Audit Contractor (''RAC'') program, following a demonstration project conducted by CMS in six states, which resulted in over $900 million in overpayments being returned to the Medicare Trust Fund.

All Medicare providers, such as hospitals, skilled nursing facilities, physicians, laboratories, ambulance companies, and durable medical equipment companies, are subject to RAC claims audits, which will select their areas of review based upon data mining techniques, and reports from government agencies.

In addition to the RACs, CMS also has created new entities called Zone Program Integrity Contractors (ZPICs) which will perform program integrity functions, including supporting law enforcement and investigating fraud and abuse. In sum, providers can expect more frequent and more sophisticated review of their Medicare claims.

Increased Health Care Fraud Litigation?

The combination of heightened government enforcement coupled with economic pressure on health care organizations would seem to make inevitable an increase in fraud-related investigations and litigation.

The economic stimulus package designated millions of dollars for healthcare fraud enforcement in addition to the hundreds of millions of dollars already being spent on those efforts. The additional resources mean more lawyers, investigators, and staff, which likely translate to more enforcement actions.

Furthermore, the recent amendments to the FCA discussed above will enable lawsuits to be brought regarding a broader range of conduct and, once filed, leave defendants with fewer grounds for dismissing those lawsuits.

As far as the direct impact of the recession on the volume of litigation or enforcement actions, there likely could be increased litigation due to a confluence of several factors: an economic downturn can lead to circumstances more conducive to fraud due to pressure to maintain revenues and meet numbers; the more employees who are laid off, the more disgruntled persons there are who could end up serving as whistleblowers; and reduced spending on compliance or internal audit could make it harder to detect and correct issues.

Because lawsuits brought by *qui tam* relators under the FCA must be filed under seal to permit the Government a reasonable opportunity to investigate the claims and determine whether to intervene in the case, the safest prediction is that it will take months or even years to know whether the current environment will result in additional fraud cases.

How to Maintain Effective Compliance During the Downturn

With the competing challenges faced by health care organizations to control costs yet deal with increased oversight and enforcement, the most important key to maintaining effective compliance is to not be shortsighted in the current environment.

Any short-term savings achieved from underfunding the core compliance function or failing to devote sufficient resources for responding to issues that arise will be outweighed quickly by long-term consequences from a single mishap.

It is much harder to lose 15 pounds than to keep from putting the weight on in the first place. If a mishap occurs, the organization then will be forced to deal with the negative implications from unfavorable press, the FTE costs associated with managing the response, and the costs from outside legal or accounting fees. In short, devoting appropriate resources to detecting and correcting issues will drastically exceed any short-term savings made by cuts.

Ironically, the same economic pressure forcing reductions in compliance and legal budgets may also contribute to an increase in the fraud or billing inaccuracies that compliance efforts are intended to detect and correct. Thus, if anything, compliance is even more important during times of economic downturn because of the chance that economic pressure can cause temptation to hit numbers or drive census.

Acknowledging that compliance and legal budgets are not unlimited, how does an organization make the best use of the resources it does have?

Let us offer a few suggestions.

Compliance Is a Team Effort. The most effective use of compliance resources involves spreading compliance responsibilities across the entire organization. While organizations need skilled compliance professionals to function as the conduit for coordinating compliance efforts, compliance should never be solely the responsibility of a stand-alone department. Rather, it should be part of the job duties of all management and employees. Organizations should consider making adherence to compliance a part of bonus calculations and employment/performance reviews.

Prioritize Available Resources and Recalibrate Those Priorities as Needed. Organizations should take the time to prioritize how to direct their compliance and audit resources and regularly assess and evaluate whether their resources are appropriately utilized to meet organizational goals. Organizations need to avoid getting stuck in a rut of doing compliance a certain way because that is the way it has always been done.

Organizations should pay attention to areas of government interest, review the OIG Work Plan, published guidance, and established benchmarks, and adjust the focus of their compliance work accordingly. Additionally, organizations should effectively use technology

[14] *See* Mike Scarcella, *DOJ Readying Fraud Attack*, NATIONAL LAW JOURNAL, Aug. 10, 2009.

which may ultimately reduce expenses such as FTEs and continuing education.

Being Proactive Saves Money in the Long Term. Identifying compliance issues early can result in significant savings for organizations. Additionally, a proactive response builds credibility about your organization's seriousness toward addressing compliance concerns. Finally, being proactive enables the organization to get back to business quickly, allowing the organization to move forward instead of using its energy to retroactively address compliance concerns.

Devote the Proper Level of Resources to Investigate and Remedy Issues That Arise. Responding appropriately to issues that arise is as important as having proactive compliance. Whether issues arise from an internal employee complaint, internal audit, or an external source such as a subpoena or civil investigative demand, the response needs to be calibrated to the problem. Not every problem requires ''calling in the cavalry'' or conducting a large-scale investigation, but some problems do.

Deciding whether to conduct an internal investigation will depend on several factors, including the nature and severity of the allegation, whether the allegation arose from a credible source or has a basis in fact, and how widespread the problem appears to be. The main benefit of conducting an investigation is that it enables the organization to learn the scope and seriousness of the alleged misconduct and take prompt remedial action with respect to the responsible parties or practices.

If an organization decides to conduct an investigation, it next must determine whether the investigation will be conducted by internal personnel such as in-house counsel, compliance, or internal audit, or externally by an outside law firm. The benefits of performing the investigation internally are lower cost; familiarity with the organization's personnel, policies, and culture; and that the investigation may be received more openly by employees and be less disruptive.

The benefits of outside counsel conducting the investigation are that communications clearly are protected by the attorney-client privilege; greater depth of resources to be able to staff-up quickly on a matter; previous experience with government enforcement personnel that could prove useful in navigating a self-disclosure or responding to a government investigation; and objectivity, particularly where the alleged misconduct implicates an individual who had regular contact with in-house personnel or counsel.

Conclusion

Recent economic circumstances and the Government's heightened enforcement efforts make the job of maintaining effective compliance even more difficult. At the same time, these circumstances confirm the importance of devoting sufficient resources to prevent problems from occurring or remedying those problems that arise.

 COPYRIGHT © 2009 BY THE BUREAU OF NATIONAL AFFAIRS, INC. HFRA ISSN 1092-1079