ARNOLD & PORTER LLP

ADVISORY

May 2010

LAWMAKERS PROPOSE TOUGHER PENALTIES FOR HEALTHCARE FRAUD AND ABUSE OFFENSES

On April 15, 2010, Representatives Ron Klein (D-FL) and Ileana Ros-Lehtinen (R-FL) introduced HR 5044, the Medicare Fraud Enforcement and Prevention Act (MFEPA) which would amend the federal False Claims Act and Anti-Kickback Statute to toughen criminal penalties and fines, define a new offense for theft of beneficiary ID numbers, strengthen Medicare fraud prevention activities, and commission a US Government Accountability Office (GAO) study. The bill has been referred to the House Committee on Energy and Commerce and House Committee on Ways and Means. As of today, it has nine co-sponsors. MFEPA follows substantial fraud and abuse changes that were enacted as part of the Patient Protection and Affordable Care Act of 2010 (PPACA) and Fraud Enforcement and Recovery Act of 2009 (FERA).[1]

ENHANCED CRIMINAL PENALTIES

The legislation would double criminal penalties and fines for violations of the federal False Claims Act and Anti-kickback Statute. Generally, the federal healthcare fraud and abuse laws allow fines of up to US$25,000 and imprisonment for up to five years for each violation. This bill would increase those limits to a maximum of US$50,000 and 10 years imprisonment. In addition, the bill would double penalties for lesser violations from the current limit of a US$10,000 fine and one year imprisonment, to a US$20,000 fine and two years imprisonment.

NEW VIOLATION FOR THEFT OF BENEFICIARY ID NUMBERS OR BILLING PRIVILEGES

The bill would create a new offense for illegally purchasing, selling, or distributing a Medicare or Medicaid beneficiary identification number or billing privileges. Violators of this provision could be imprisoned for up to three years and compelled to pay a fine.

1 Arnold & Porter LLP has written several advisories on FERA and PPACA, including: "Fraud Enforcement and Recovery Act Increases the Scope of False Claims Act Liability" (June 2009), *available at:* http://www.arnoldporter.com/public_document.cfm?id=14372&key=15C0; "UPDATE: Healthcare Reform: A Pocket Guide for Pharmaceutical and Device Manufacturers" (March 2010), *available at:* http://www.arnoldporter.com/public_document.cfm?id=15548&key=24I0. Arnold & Porter also has developed a Healthcare Reform Chart that links to select key documents and can provide easy access to information on the healthcare reform issues likely to be of greatest interest, *available at*: http://www.arnoldporter.com/public_document.cfm?id=15086&key=7G2. For the ABA's 20th Annual National Institute on Health Care Fraud 2010, Arnold & Porter attorneys Daniel A. Kracov and Kirk Ogrosky wrote an article, "The Impact of the Patient Protection and Affordable Care Act on Fraud Prevention and Enforcement," *available at:* http://www.arnoldporter.com/public_document.cfm?id=15662&key=12C2.

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ENHANCED CIVIL AUTHORITIES FOR MEDICARE AND MEDICAID FRAUD

The bill would add two new categories of acts subject to civil monetary penalties: conspiracy to commit one of the violations already enumerated in law, which would carry a US$50,000 penalty; and "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to a Federal health care program, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to a Federal health care program," which would carry a penalty of US$50,000 for each false record or statement, or concealment, avoidance, or decrease.

The bill also would extend the look-back period for civil monetary penalties from six years to ten years. The bill would broaden the definitions of "claim" and "item or service," and add definitions for "obligation" and "material" under the civil monetary penalties statute.

The bill would require the Secretary of US Health and Human Services (HHS) to suspend payments to a provider of services or a supplier when an investigation is pending regarding a credible allegation of fraud against the provider of services or supplier (unless the Secretary determines there is good cause not to suspend such payments). Under prior law, the Secretary had the authority to suspend such payments; this new bill would make payment suspensions mandatory absent "good cause."

IMPROVED FRAUD PREVENTION

The bill would require the Secretary of HHS to conduct criminal background checks, fingerprinting, unscheduled and unannounced site visits (including preenrollment site visits), database checks (including such checks across States), and "such other screening as the Secretary determines appropriate." The recently enacted PPACA *authorized* the Secretary to conduct these types of background checks based on the risk of fraud, waste, and abuse by a given provider. HR 5044 would *require* the Secretary to conduct such checks, "as the Secretary determines appropriate based on the risk of fraud, waste, and abuse."

The bill also would grant the HHS Inspector General and the Attorney General real-time access to claims and payment data for combating healthcare fraud. This provision would require the HHS Inspector General, in consultation with the Attorney General, to implement mechanisms for sharing information about suspected fraud in the Medicare, Medicaid, and state children's health insurance programs.

HR 5044 would direct the Secretary to conduct a five-year pilot program to study the use of biometric technology to ensure that Medicare beneficiaries are physically present at the time and place of receipt of covered items and services. The bill would authorize financial incentives payments to encourage providers to participate.

GAO STUDY

The legislation would direct GAO to study ways to improve the fraud-detection activities of Medicare Administrative Contractors (MACs) and Recovery Audit Contractors (RACs), including training RAC staff on how to identify fraud and the use of real-time data mining software.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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