

Health Care Alert – June 2009

Dear Clients and Friends:

The field of health law is a constantly evolving system of rules and regulations which have a great impact on all involved in the business of healthcare. Abrams Fensterman is dedicated to keeping not only ourselves up-to-date on the most recent changes, but also our friends and clients. We would like to take this opportunity to inform you of several new developments which may affect

“Red Flags Rule” Enforcement Date Delayed Again

The deadline for compliance with the Federal Trade Commission’s Red Flags Rule was delayed for an additional three months. The day before compliance was to have become mandatory. The new enforcement date is set for August 1, 2009. As we had previously reported, the so-called “Red Flags” rules were originally interpreted by the FTC as to require creditors who maintain “covered accounts” to implement ID theft prevention programs. The ID theft prevention programs are required to use “Red-Flags” which indicate possible risks. A few months ago the FTC announced that health care providers who do not require payment immediately at the time of service are considered creditors within the meaning of the Red-Flag rules and hence, must fully comply with the Red Flags Rule. Despite challenges to this interpretation, the FTC re-affirmed its position that as of August 1, 2009, healthcare providers must have a “Red Flags Rule” compliance program in place. In so doing, it indicated that the new rules would not be a significant burden to place on doctors because the level of sophistication which is required is determined by the risk involved and many health care practices are considered “low-risk”. For more information on the Red Flags Rule and information on what level of sophistication your practice will be required to implement, please contact the offices of Abrams Fensterman et al.

New Standards Set For Electronic Claims Submission

Effective January 1, 2012, healthcare providers, including all physicians and suppliers who bill Medicare, must be capable of submitting claims electronically using the X12 Version 5010 and NCPDP Version D.0 standards. This will also be a prerequisite for implementing the new ICD-10 codes. These will replace the current ICD-9 codes on or before Oct. 1, 2013. The implementation of HIPAA 5010 will result in a substantial change to the content of the data physicians will be required to submit with their claims. The data available to physicians in response to electronic inquiries will also be impacted. HIPAA 5010 implementation may require alterations to the software and procedures that physicians use for billing Medicare and other payers. To find out more about these changes and the impact on your practice, you can review the information on the CMS website @ <http://www.cms.hhs.gov/mlnmattersarticles/downloads/se0904.pdf>.

OIG Allows Hospitals to Compensate On-Call Physicians for Providing Services to Uninsured Patients

In an Advisory Opinion posted on May 21, 2009, the OIG found that a hospital could compensate on-call physicians for providing services to uninsured patients without the threat of anti-kickback violations and

accompanying sanctions. The opinion was in response to a request made by a nonprofit general hospital, which is the sole provider of acute care and inpatient hospital services in its county. The OIG stated that the proposed agreement would be permissible so long as the compensation paid to the on-call physicians by the hospital reflects: (1) fair market value in an arm's-length transaction for actual and necessary items or services; and (2) is not determined in any manner that takes into account the volume or value of referrals or other business generated between the parties.

Federal False Claims Act Liability Expanded By New Amendments

The Fraud Enforcement and Recovery Act of 2009 ("FERA") was signed into law by President Obama on May 20, 2009. FERA amended the FCA by both enhancing the investigative powers it confers and also expanding the scope of liability and severity of penalties associated therewith. FERA specifies that a violation of the FCA occurs when an entity or individual (including a doctor) "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval". These penalties are associated with not only the filing of false or fraudulent claims, but additionally the "retention of any overpayment". Further, liability has been expanded to include persons who did not even intend to specifically defraud the government. FERA overturns the 2008 Supreme Court decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), by removing the requirement that to constitute a false claim under the FCA, the claim had to be presented to a member of the federal government. FCA liability is expanded by FERA to include government funds dispensed by states and state agencies, including those dispensed under President Obama's economic stimulus package. This could potentially create FCA liability for claims submitted to Medicaid Advantage plans and Medicaid HMOs.

FTC Advises That Doctors May Team-up to Negotiate Jointly Without Violating Antitrust Laws

Antitrust laws usually do not allow individual doctors to group together to negotiate with health plans. However, in a recent advisory opinion, the FTC found that a group of physicians' proposed joint contracting venture would not violate antitrust laws because there was a high degree of commitment amongst the physician members to develop quality measures to track physician performance. Additionally, the venture involves the sharing of an electronic health records (EHR) system which allows the participating physicians to review patient outcomes and set clinical guidelines. The FTC found that the EHR system had the potential to lower health care costs and improve quality of care since shared EHR greatly enhances communication among doctors. The FTC did not see any clear evidence that the results of the venture would yield anticompetitive effects because, under the venture, insurers are still capable of contracting with the individual doctors themselves.

As always, should any question arise with regard to any of the information detailed above please do not hesitate to contact the law offices of Abrams Fensterman at 516-328-2300 or at 212-279-9200.