

False Claims

**Justice Department Hikes
FCA Penalties in New Rule**

Civil penalties will nearly double for False Claims Act violations under an interim final rule from the DOJ.

The FCA is the law used by whistle-blowers to sue health-care providers for alleged Medicare and Medicaid billing fraud. The increase means hospitals and providers could face financially devastating penalties because the new maximum could be applied to each health-care claim submitted to a federal health program in violation of the FCA.

The FCA per-claim civil penalties under the new rule published June 30 (81 Fed. Reg. 42,491) rise to a minimum of \$10,781 and a maximum of \$21,563 per false claim submission, up from the former penalty range of \$5,500 to \$11,000.

The FCA imposes triple damages for the government's losses due to violations by defendants in addition to per-claim penalties. The penalty increase was based on a cost-of-living inflation adjustment, though subsequent inflation adjustments will be based on the consumer price index.

Attorney Reactions. Kirk Ogrosky, an attorney with Arnold & Porter in Washington, told Bloomberg BNA June 30 that "the increase in statutory penalties will ultimately require courts to decide if application is so grossly disproportional to the underlying conduct that it is Constitutionally infirm."

Ogrosky said the volume of claims involved in health-care FCA cases, coupled with the new per-claim penalty, could result in "facially absurd" penalty amounts, especially "in comparison to the underlying conduct."

The new penalties are effective Aug. 1, and will be applied for violations occurring after Nov. 2, 2015.

The DOJ is also soliciting public comments on the new rule through Aug. 29.

Jay P. Holland, an attorney with Joseph Greenwald & Laake PA in Greenbelt, Md., who represents whistle-blowers, said the increase was "long overdue," and "really just accounts for inflation," since the last adjustment in 1999.

Holland said he didn't think the increased penalties would lead to an increase in FCA case filings however, because the government judges potential FCA cases

based on strong indications of actual liability, and "calculations of damages where the government's [fraudulent] payout is substantial."

R. Scott Oswald, another attorney who represents whistle-blowers, told Bloomberg BNA July 5 that the higher FCA penalties will "encourage relators—and their attorneys—to continue litigating meritorious cases even when the government doesn't intervene." Oswald, who practices with The Employment Law Group in Washington, said this will be an "important effect" of the penalty hike "[a]s some U.S. attorney offices near their capacity for interventions in qui tam cases."

Holland told Bloomberg BNA July 1 that he didn't see the increase as a "dramatic issue" in FCA litigation, however. He said it was "very rare" for the government to base settlement amounts on per-claim penalties in an FCA matter.

Instead, Holland said usually per-claim penalties are either "used for leverage" in a settlement negotiation, or are "off the table" entirely. Holland said the government will usually focus on the government's actual damages from the alleged fraud, and "typically will settle for double" of what the government finds are its actual damages.

Ogrosky said that the DOJ "uses the threat of excessive fines to extract settlements" and the overwhelming push for FCA defendants to settle cases means that "there are very few cases where penalties are assessed."

Anti-Kickback Penalty Increased. The new rule also hiked the penalty for violations of the federal anti-kickback law to \$21,563 per violation as well.

Holland said that the increased anti-kickback penalties "could play a role in cases where an important public policy was implicated," or where the government's damages are difficult to estimate. Holland gave the example of a government contract that was obtained by a private party using false information, in which the government might not necessarily have overpaid for a service, but nevertheless implicated an important public policy of the government.

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The interim final rule is at <http://src.bna.com/grk>.

