



## Make Sure Your Compliance Program is Compliant

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**Karen S. Rieger**, Director  
Healthcare Practice Co-Chair  
[karen.rieger@crowedunlevy.com](mailto:karen.rieger@crowedunlevy.com)

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Two recent developments once again demonstrate the need for healthcare providers to have an effective and up to date compliance program.

1. Passage of The Patient Protection and Affordable Care Act of 2010 (a/k/a the "Healthcare Reform Law"). The Healthcare Reform Law contains over 30 sections related to healthcare fraud and abuse and makes significant changes to existing laws used to combat fraud and abuse which will increase the exposure to liability by providers. Examples of such changes include:

a. Anti-Kickback Statute ("AKS"). The intent requirement of the AKS is amended to permit a violation to be established without showing the specific intent to violate the statute. The is further amended to explicitly provide that a violation of the statute may give rise to a false or fraudulent claim under the False Claims Act.

b. False Claims Act Qui Tam Public Disclosure Bar. Previously, qui tam relators could not pursue a claim if the allegations had previously been disclosed in certain forums. The False Claims Act has now been amended to provide that the public disclosure bar is not jurisdictional and does not require dismissal if the government opposes dismissal. In addition, the public disclosure bar is limited to federal administrative proceedings, but not state proceedings. In addition, prior to the amendments contained in the Healthcare Reform Law, a relator had to be the 'original source' of the information which was defined to mean that the relator had to have direct knowledge of the allegations. The original source exception is now amended to eliminate the direct knowledge requirement.

c. False Claims Act Liability for Overpayments. Pursuant to the Healthcare Reform Law, the retention of any identified overpayment for more than 60 days constitutes an "obligation" under the False Claims Act.

2. Changes to the U.S. Sentencing Commission Guidelines. On April 29, 2010, the U.S. Sentencing Commission adopted several amendments to the standards for an effective compliance program contained with the Federal Sentencing Guidelines ("Sentencing Guidelines"). The Sentencing Guidelines are not just significant for the direction they provide in the rare instance that



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a healthcare provider is convicted of a crime, but they also are used by investigators and prosecutors to decide if criminal charges should be brought.

The two primary changes made to the Sentencing Guidelines are: (a) clarifications regarding an organization's obligation to implement reasonable remediation efforts once criminal conduct has been detected; and (b) providing for a direct reporting relationship between the Board of Directors and the Compliance Officer.

More than ever, healthcare providers need to make sure that their compliance programs are updated and operated in an effective manner. If your organization has not updated your program in the past couple of years, numerous changes in both State and Federal law have been made which should, depending on the structure of your program, be incorporated. For example:

- 1.Oklahoma has implemented a law requiring healthcare providers to check violent crimes registry, 57 O.S. § 589.
- 2.The annual work plans issued by the Office of Inspector General have included additional billing infractions that they are monitoring including: (a) filing duplicate claims; (b) failing to use coding modifiers correctly; (c) inappropriately balance billing; (d) inadequate resolution of overpayments; and (e) lack of integrity in computer billing systems.
- 3.The implementation of the Red Flags Rule or other procedures to detect identity theft.
- 4.The issuance of OIG guidance on gifts and gratuities to patients. See, OIG Adv. Op. 08-07.
- 5.Stark Law amendments regarding relationships with physicians.
- 6.Amendments to HIPAA requiring breach notification and additional limitations on certain uses and disclosures of protected health information.
- 7.Clarifications to EMTALA regarding the maintenance of on-call lists, transfer requirements and participation in community call plans.

If you have any questions about the issues addressed in this Advisory, or would like us to review or update your Compliance Program, please contact:Karen S. Rieger at (405) 235-7788, karen.rieger@crowedunlevy.com or Cori H. Loomis at (405) 234-3238, cori.loomis@crowedunlevy.com.

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