



Client Alert

Contact Attorney Regarding
This Matter:

Aaron M. Danzig
404.873.8504 - direct
404.873.8505 - fax
aaron.danzig@agg.com

PRESIDENT OBAMA SIGNALS INCREASE IN HEALTHCARE INVESTIGATIONS

On September 9, 2009, President Obama addressed a Joint Session of Congress to present his plan for healthcare reform. He estimated that the cost of his plan will be \$900 billion dollars but emphasized that no money from the Medicare trust fund would be used to pay for the plan. Instead, the main source of funding the healthcare reform plan would be by finding more efficient outcomes and eliminating fraud and abuse. In his speech, the President said, "[W]e've estimated that most of this plan can be paid for by finding savings within the existing health care system, a system that is currently full of waste and abuse. Right now, too much of the hard-earned savings and tax dollars we spend on health care don't make us any healthier. That's not my judgment. It's the judgment of medical professionals across this country." According to the head of the FBI's Healthcare Fraud Unit, "Health care fraud is the defrauding of the health care system, either public or private, here in the United States, and it is fraudulently obtaining funds through either up-coding, which is in fraudulent billing, or billing for services not rendered, or any number of criminal acts."

Whatever one's view on the viability or desirability of the Obama Administration's healthcare plan, it has become apparent that there will be an increase in healthcare investigations. Indeed, even if the current reform proposals are not passed, the focus on attacking fraud and abuse by investigating healthcare providers has been heightened. Earlier this year, the Federal Bureau of Investigation (FBI) estimated that fraudulent billings to public and private health care programs account for anywhere from 3–10 percent of total health spending. This would amount to anywhere from \$75–\$250 billion in fiscal year 2009. In the effort to combat fraud, the government formed healthcare strike forces in certain cities in the United States in 2007. Since their formation, over \$240 million in criminal fines, civil recoveries and restitution have been secured by the government. These strikeforces were expanded in May 2009 when the Attorney General and the Secretary of the Department of Health and Human Services announced the creation of a new interagency group, the Health Care Fraud Prevention and Enforcement Action Team (HEAT) to combat Medicare fraud. In addition to the establishment of the strike forces, it is clear that the government will be prioritizing investigations and allocating additional resources in this area. In 1992, the FBI conducted less than 600 healthcare fraud investigations. As of fiscal year 2008, the FBI had over 2,400 pending healthcare fraud investigations.

As shown above, the current FBI estimates on the amount of fraud and abuse in the healthcare system vary widely. It is not clear that eliminating all fraud and abuse, even assuming that is possible, will pay for the government's

Arnall Golden Gregory LLP
Attorneys at Law
171 17th Street NW
Suite 2100
Atlanta, GA 30363-1031
404.873.8500
www.agg.com

health care reform plans. Moreover, most healthcare providers properly navigate through the complex web of laws and regulations to provide excellent care to the American populace. Unfortunately, in this environment, healthcare providers will face increased scrutiny. They may find themselves in the government's crosshairs even if they have done nothing wrong.

In light of this era of heightened scrutiny, it is even more important for healthcare providers to institute a robust compliance program that regularly trains and audits employees to ensure they follow all applicable rules, regulations, and the company's code of business conduct. This is the single most important thing healthcare companies can do to protect themselves against a potential fraud investigation and is especially true in the health care arena where the laws and regulations are so complex.

A compliance program should be overseen by a high-level executive, and compliance training programs should be provided for all, including officers and directors. In medical practices, it is important that a physician participate in such a program. Additionally, there should be a periodic review and evaluation of the program to ensure that the program is effective in preventing and deterring wrongful conduct and, equally important, in promoting a culture within the company that encourages and promotes compliance with the law. Outside counsel can assist in preparing and implementing such a program, which should include periodic reviews and education to employees.

Having a strong compliance culture will lessen the chance that an employee commits a violation of the law that may have adverse results for the healthcare provider, but also increases the chance that, if something like that should occur, it will be discovered and addressed in a timely manner and before it becomes a more serious problem. Investing in a strong compliance program on the front end can help the company avoid the devastating financial and reputational costs of a federal investigation and, potentially, a prosecution or civil enforcement action.

While a compliance program is not a guarantee that a government investigation will not occur, if a potential criminal problem arises, the existence of a robust and vibrant compliance program is a significant factor that the government considers when deciding whether to prosecute a company. If a company is prosecuted, the existence of an adequate compliance program will limit the potential penalty.

Healthcare providers now find themselves under a more-focused microscope by the government. They must take steps to protect themselves.

Arnall Golden Gregory LLP serves the business needs of growing public and private companies, helping clients turn legal challenges into business opportunities. We don't just tell you if something is possible, we show you how to make it happen. Please visit our website for more information, www.agg.com.

This alert provides a general summary of recent legal developments. It is not intended to be, and should not be relied upon as, legal advice.