PUBLICATION

Federal Agencies Forced to Implement Huge Increases in Civil Monetary Penalties for Health Care Fraud [Ober|Kaler]

2016

Thanks to section 701 of the Bipartisan Budget Act of 2015, Public Law 114–74, federal agencies have been forced to implement huge increases in penalties intended to deter health care fraud. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Act), as section 701 is known, changes the way federal agencies deal with adjustments to civil monetary penalties (CMPs). As a starting point, the Act required all federal agencies to implement a "catch-up adjustment" to all CMPs under their jurisdiction by August 1, 2016. The "catch-up adjustment" required CMPs to be adjusted based on the difference between the Consumer Price Index (CPI) in October of the calendar year in which they were established or last adjusted and the CPI in October 2015. Thereafter, federal agencies are required to make annual adjustments to CMPs based on the difference in the CPI between the October preceding the most recent adjustment and the October the year before. This legislation has resulted in some eye-popping increases in CMPs.

In a June 30, 2016, Interim Final Rule [PDF], the Department of Justice (DOJ) implemented adjustments to the CMPs under its authority. DOJ's action nearly doubled the penalties for federal false claims act violations. The minimum per-claim penalty under section 3729(a)(1) of the False Claims Act (FCA) increased from $5,500 to $10,781 and the maximum per-claim penalty increased from $11,000 to $21,563. These adjusted amounts apply to CMPs assessed after August 1, 2016, for violations that occurred after November 2, 2015. Violations that occurred on or before November 2, 2015 and assessments made before August 1, 2016 (whose associated violations occurred after November 2, 2015) will be subject to the old CMPs.

The Department of Health and Human Services (HHS) followed suit on September 6, 2016. The HHS Interim Final Rule [PDF] provides for the required "catch-up adjustment" as well as subsequent annual adjustments. The changes apply to the myriad of CMPs under HHS's purview, with some CMPs increasing almost 150 percent.

Historically, HHS has not adjusted CMPs, some dating back to 1972, to account for inflation because the previous iteration of the Act – enacted in 1990 – excluded the Social Security Act and the Occupational Safety and Health Act from such adjustments. Under the Act, HHS is now being forced to increase CMPs to account for, in some cases, more than 40 years of non-adjustments. HHS indicated that it will publish annual adjustments of CMPs no later than January 15 of every year. The HHS Interim Final Rule is effective immediately for violations that occurred after November 2, 2015.

Some notable revisions to HHS CMPs are included below:

Authority	Description	Pre-Inflation Penalty	Post-Inflation Penalty	Percentage Increase

Authority	Description	Pre-Inflation Penalty	Post-Inflation Penalty	Percentage Increase
42 U.S.C. 1320a-7a(a); 42 C.F.R. Part 1003	Penalty for remuneration offered to induce program beneficiaries to use particular providers, practitioners, or suppliers	$10,000	**$15,024**	50.245%
	Penalty for employing or contracting with an excluded individual	$10,000	**$14,718**	47.177%
	Penalty for knowing and willful solicitation, receipt, offer, or payment of remuneration for referring an individual for a service or for purchasing, leasing, or ordering an item to be paid for by a federal health care program	$50,000	**$73,588**	47.177%
42 U.S.C. 1395nn(g)(3); 42 C.F.R. Part 1003	Penalty for submitting or causing to be submitted claims in violation of the Stark Law's restriction on physician self-referrals	$15,000	**$23,863**	59.089%