Legal Backgrounder

WLF
Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 22 No. 45 November 2, 2007

THE DEFICIT REDUCTION ACT OF 2005: ELIMINATING FRAUD, WASTE AND ABUSE IN MEDICAID?

by

Rebecca C. Fayed

Just over a year and a half ago, on February 8, 2006, President Bush signed into law the Deficit Reduction Act of 2005 ("DRA"). The DRA includes a number of provisions aimed at eliminating fraud, waste and abuse in the Medicaid program. For example, the DRA includes a provision that provides a financial incentive to states to enact their own false claims laws similar to the Federal False Claims Act. The DRA also includes a provision requiring recipients of Medicaid funds to establish and implement fraud, waste and abuse policies and procedures as a prerequisite to receiving Medicaid funding. These provisions notwithstanding, the verdict is still out as to whether the DRA has been successful in eliminating fraud, waste and abuse in Medicaid or whether the confusion it has caused in the health care industry is so great as to prevent (or at least inhibit) such a result.

Encouraging the Enactment of State False Claims Acts. Section 6031 of the DRA encourages the enactment of state false claims acts by increasing the State's share of any recovery obtained in an action brought under that state's false claims act. Specifically, Section 6031 provides that the Federal medical assistance percentage will be decreased by 10 percent with respect to any amount recovered in a fraud action under the state's false claims act, thereby increasing the state's share by 10 percent.

To receive the additional 10 percent, the state's false claims act must meet certain requirements. Specifically, Section 6031 of the DRA requires that the state false claims act must:

1. establish liability to the state for false or fraudulent claims described in the Federal False Claims Act with respect to any expenditure under the Medicaid program;

2. contain provisions that are at least as effective in rewarding and facilitating *qui tam* actions for false or fraudulent claims as the Federal False Claims Act;

3. contain a requirement for filing an action under seal for 60 days with review by the State Attorney General; and

4. include a civil penalty that is not less than the civil penalty authorized under the Federal False Claims Act.

Rebecca C. Fayed is an associate in the Washington, D.C. office of the law firm Sonnenschein Nath & Rosenthal LLP.

In August 2006, the U.S. Department of Health and Human Services Office of Inspector General ("HHS-OIG") issued a notice setting forth its guidelines for evaluating state false claims acts. 71 Fed. Reg. 48552 (Aug. 21, 2006). For each of the four requirements set forth above, the HHS-OIG described what factors it would consider when evaluating whether a state's false claims act met the criteria necessary to entitle the state to the additional 10 percent share of any fraud recovery under that statute. To date, the HHS-OIG has reviewed the state false claims laws of thirteen states: California, Florida, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Nevada, New York, Tennessee, Texas and Virginia. Eight of these states (Hawaii, Illinois, Massachusetts, Nevada, New York, Tennessee, Texas and Virginia) have been found to meet the requirements set forth in Section 6031 of the DRA. The remainder of the states' false claims acts did not meet at least one of the four requirements set forth above.

In sum, based upon the HHS-OIG's review, it appears that at present only sixteen percent of states have false claims acts sufficiently rigorous in terms of preventing fraud, waste and abuse in the Medicaid program to warrant the receipt of additional funds recovered from fraud actions.

Employee Education About False Claims Recovery. While Section 6031 of the DRA does not require states to implement their own state false claims acts, Section 6032 of the DRA does require that states amend their Medicaid plans to include certain requirements regarding employee education about false claims recovery. Specifically, Section 6032 provides that by January 1, 2007, every "entity that receives or makes annual payments under [a] State [Medicaid] plan of at least $5,000,000" ("Qualifying Entity") must (1) establish policies and procedures for all employees, contractors and agents concerning federal and state false claims and whistleblower laws and the detection and prevention of fraud, waste and abuse and (2) update its employee handbooks, if any, to reflect such policies and procedures ("DRA Education Requirements"). Although technically a requirement for the states, the Centers for Medicare and Medicaid Services ("CMS") stated during a briefing call and in one of its guidance documents that CMS interprets this provision to require Qualifying Entities to have met the DRA Education Requirements as of January 1, 2007, regardless of whether their state amended the State Medicaid Plan.

Accordingly, in CMS' view, all Qualifying Entities should currently be in compliance with the DRA Education Requirements in order to receive Medicaid funding. However, as evidenced by the series of guidance CMS has provided and the questions that remain, Qualifying Entities have had (and continue to have) significant issues interpreting their compliance obligations.

By way of background, since the enactment of the DRA, CMS has stated that it does not intend to implement regulations further clarifying the obligations set forth in the DRA Education Requirements. However, due to the growing confusion in the industry, both on the part of Qualifying Entities and State Medicaid Directors, CMS issued a State Medicaid Director Letter ("SMD Letter") regarding the DRA Education Requirements on December 13, 2006, hosted two briefing calls in January 2007—one for State Medicaid Directors and one for other interested parties—and issued a second State Medicaid Directors Letter on March 22, 2007 attaching answers to frequently asked questions ("FAQs") in an attempt to address outstanding issues and provide answers to specific compliance questions. Importantly, during the briefing calls, CMS informed participants that it had implemented a CMS e-mailbox for submission of additional questions regarding the DRA Education Requirements. The FAQs issued in March were issued in response to questions submitted to that e-mailbox and to those questions presented during the briefing calls.

While many questions remain unanswered, the guidance provided by CMS to date has been helpful with respect to certain issues, although some may argue that it also has created a new layer of confusion. Some of the more significant issues are discussed below.

What is a Qualifying Entity? As a threshold matter, the SMD Letter defines the term "entity" to include "a governmental agency, organization, unit, corporation, partnership, or other business arrangement (including any Medicaid managed care organization, irrespective of the form of business structure or arrangement by which it exists), whether for-profit or not-for-profit, which receives or makes payments, under a State plan approved under title XIX or under any waiver of such plan, totaling at least $5,000,000 annually." According to CMS, the

Copyright © 2007 Washington Legal Foundation

ISBN 1056 3059

DRA Education Requirements apply to any entity that furnishes items or services at "more than a single location" or "under more than one contractual or payment arrangement," if the *aggregate* payments to that entity meet the $5,000,000 annual threshold. The fact that the various locations or arrangements use multiple provider identification or tax identification numbers does not alter the analysis, according to CMS.

CMS provided further guidance on this issue during its briefing call on January 11, 2007. Specifically, according to CMS, if a health system has *separately incorporated* subsidiaries, some of which receive $5 million or more in annual Medicaid payments and some of which do not, the health system as a whole would be considered a Qualifying Entity for purposes of the DRA Education Requirements. (Many in the industry have suggested that CMS will be pushed to reconsider this position insofar as it appears to be an aggressive interpretation and application of the statute.) Alternatively, however, CMS explained that with respect to a university that has both a health care campus and a non-health care academic campus, the DRA Education Requirements would apply only to the health care campus employees.

CMS provided additional guidance on this topic in the FAQs. Specifically, according to CMS, when determining if a non-health system parent corporation and its subsidiaries is a Qualifying Entity, the proper analysis is that "the [Qualifying] entity is the largest separate organizational unit that furnishes Medicaid health care items or services and includes all sub-units of that organizational unit that furnish Medicaid health care items or services, even if the components are separately incorporated or located in a different state." The exception to this general rule is the health system. According to the CMS FAQs, "with respect to a health system…the parent corporation, partnership, government agency or other owner, and its sub-units, are all integrally involved in furnishing Medicaid items and services. In that instance, the entire organization is the [Qualifying] entity." Thus, while the definition of Qualifying Entity is based upon the amount of Medicaid funding received, it appears that the categorization regarding to whom the actual DRA Education Requirements apply within or across that entity, depends on whether the employees are engaged in the provision of health care related services.

Who is a Contractor or Agent? The SMD Letter defines a contractor or agent to include "any contractor, subcontractor, agent, or other person which or who, on behalf of the entity, furnishes, or otherwise authorizes the furnishing of Medicaid health care items or services, performs billing or coding functions, or is involved in monitoring of health care provided by the entity."

The subject of great debate during the CMS briefing call, CMS stated that vendors that provide items or services used in furnishing health care would be considered contractors or agents if they had a contract (even if that contract has not been reduced to writing) with the Qualifying Entity. For example, according to CMS, a supplier of pressure bandages to a hospital would qualify as a contractor or agent of the hospital (assuming the hospital is a Qualifying Entity) if the supplier has a contract to furnish the items to the hospital. However, CMS also stated that contractors such as lawn maintenance companies, contracted cafeteria workers, copy machine vendors and office supply companies would not qualify as contractors or agents for purposes of the DRA Education Requirements, purportedly because the items they supply are not items used to furnish health care services. Although the slippery slope concern is evident, CMS has not yet changed its position with respect to this issue and, in fact, confirmed these statements in its FAQs.

With respect to whether physicians on a hospital's medical staff are contractors or agents for purposes of the DRA Education Requirements, CMS initially stated during the briefing call that physicians who are members of a hospital's medical staff (who are not employees and do not have a contract with the hospital) are not considered contractors or agents for purposes of the DRA Education Requirements. However, CMS agreed to consider further the issue of whether these physicians are more likely to qualify as contractors or agents if they are required to follow certain of the hospital's policies by virtue of their credentialing obligations. In the FAQs, CMS adopted the position that "physicians (including but not limited to, house staff, hospitalists and independent contractors)" are contractors furnishing Medicaid health care items or services.

Are Contractors and Agents Required to Adopt a Qualifying Entities Policies and Procedures? While Section 6032 of the DRA only requires Qualifying Entities to "establish" certain policies regarding fraud, waste and abuse, in the SMD Letter, CMS expanded this obligation to require Qualifying Entities to disseminate these policies to employees, contractors and agents and to require that contractors and agents adopt the policies and

Copyright © 2007 Washington Legal Foundation

ISBN 1056 3059

procedures. Shortly after the publication of the SMD Letter, many within the industry realized that implementation of this adoption requirement likely would prove challenging for Qualifying Entities, and it remained unclear how contractors would adopt and follow multiple policies issued by the various Qualifying Entities with which they contract.

Consistent with the SMD Letter, at the beginning of the briefing call, CMS indicated that contractors and agents are required to "adopt" an entity's policies and procedures even though the DRA does not contain such a requirement. CMS assured participants that it was not requiring Qualifying Entities to amend all contracts with contractors and agents, but rejected the notion of providing any guidance as to how Qualifying Entities otherwise could require its contractors and agents to follow its policies and procedures. Following push back and arguments from participants that the practical effect of such a requirement, for example, would be that contractors, such as hospitals that are in a provider network for an HMO that is a Qualifying Entity, would be required to "adopt" the policies and procedures of multiple entities, even when they may have their own DRA policies, CMS agreed to follow up on this issue and provide additional guidance in the near future, suggesting that it may reconsider its requirement that contractors and agents "adopt" a Qualifying Entity's policies and procedures.

CMS provided the additional guidance in the FAQs. In response to the question of whether contractors and agents must adopt the Qualifying Entity's policy or whether it was adequate that the policies be made available, CMS explained that Section 6032 of the DRA required a Qualifying Entity to "establish written policies…of any contractor or agent of the entity." CMS further explained that in order to "establish" the policies, the Qualifying Entity had to disseminate the policies to the contractor or agent, which must then "abide" by the policies in addition to making the policies available to its employees. While CMS did not use the word "adopt" in the FAQs and reiterates that it is not requiring Qualifying Entities to renegotiate contracts, its use of the word "abide" seems to mean that while a formal adoption process is not necessary, in practice, the contractor or agent and its employees must be acting in accordance with those policies.

In response to the specific concern that hospitals that are in a provider network for an HMO that is a Qualifying Entity would be required to "adopt" the policies and procedures of multiple entities, CMS stated that parties that contract with multiple entities must abide by each entity's policies to the extent that the policies are relevant to the interaction between the parties.

Conclusion. It is questionable whether, to date, Congress' efforts toward combating fraud, waste and abuse in the Medicaid program have panned out. Very few states have implemented state false claims acts sufficiently similar to the Federal False Claims Act to warrant "approval" by the HHS-OIG. Moreover, while the DRA Education Requirements at first blush appear to be relatively straightforward, many questions and issues remain unanswered nine months after the compliance date. Qualifying Entities likely are reviewing and revising or drafting policies and procedures and disseminating such policies and procedures in an effort to comply with the DRA Education Requirements. Beyond that, however, against the backdrop of confusing and somewhat inconsistent statutory language and agency guidance, Qualifying Entities are struggling to determine what additional steps must be taken in order to avoid jeopardizing their Medicaid funding. At bottom, although a worthwhile attempt to combat fraud, waste and abuse, the relevant DRA provisions and subsequent guidance have created a temporary state of confusion that makes it difficult for Qualifying Entities to realize whether they are required to comply and, if so, what steps are necessary to ensure compliance with the DRA Education Requirements.

Copyright © 2007 Washington Legal Foundation

ISBN 1056 3059