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A survey of new developments in tax-exemption law: What compliance officers need to know, Part I

by **Paul De Muro, C.P.A., M.B.A., J.D., and Laura Gabrysch, J.D., LL.M., Contributing Editors**

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Lerner predicts draft 990 will boost transparency; reiterates ban on political intervention

by **George Yaksick, Jr., Contributing Editor**

The recently released draft of Internal Revenue Service (IRS) Form 990, especially the proposed summary page, will be an opportunity for exempt organizations to take a critical look at their operations and make changes if they are uncomfortable with what they see, Lois Lerner, director of the IRS Exempt Organizations (EO) office, predicted. Lerner, who spoke recently at the American Institute of Certified Public Accountants (AICPA) Not-for-Profit Industry Conference in Washington, D.C., also reminded exempt organizations that the ban on political intervention is absolute.

Draft 990. The IRS released the draft of Form 990, *Return of Organizations Exempt From Income Tax*, on June 14, 2007. Lerner explained that while designing the proposed form, IRS drafters kept three goals in mind: (1) improving transparency; (2) reducing the burden on filers; and (3) making the form a better compliance tool.

"The proposed summary page is an incredibly good tool for transparency," Lerner said. The summary outlines the exempt organization's finances, governance, compensation, and operations. Lerner urged exempt organizations not to be "nervous" about the summary, but rather to view it as a tool for critical self-examination.

Jane Searing, CPA, MS, a shareholder with Clark Nuber, P.S., Bellevue, Washington, and a CCH author, predicted that the draft form will ultimately make the filing process easier. Searing, who is also a member of the AICPA Exempt Organization Technical Resources Panel, indicated that the response from practitioners appears to be positive. "I really think the new format will be helpful."

The redesigned Form 990 consists of the summary page, a core form and 15 schedules. All filers will complete the core form, Lerner said. While there are 15 proposed schedules, Lerner predicted that many charities will only have to file three schedules.

Lerner urged the exempt community and other interested persons to comment on the form. The IRS is also asking for comments on the proposed revisions to the instructions for Form 990 and a proposed glossary. "We really need help from the exempt community on the proposed glossary," Lerner said.

Political intervention. "In 2004, we saw a full gambit of improper political intervention," Lerner noted. She stressed that "There is an absolute prohibition on political intervention by exempt organizations."

Tax Exempt Organizations (cont.)

Exempt organizations have been barred from partisan political activity for more than 50 years. While exempt organizations may conduct voter education and other permissible activities, they cannot participate or intervene in any political campaign on behalf of, or in opposition to, any candidate for public office. Organizations that

violate the ban risk revocation of their tax-exempt status.

The IRS recently released examples of permissible activities and impermissible political intervention in IRS Revenue Ruling 2007-41. A 2006 Fact Sheet (FS-2006-17) also is helpful, Lerner said.

Voluntary compliance program. Lerner also reported that the IRS is look-

ing "very closely" at a voluntary compliance program for exempt organizations. The IRS Advisory Committee on Tax Exempt and Government Entities recommended a voluntary compliance program in its recent annual report. ■

CCH Washington Bureau, Sept. 14, 2007; For further discussion of Form 990, see Health Care Compliance Letter Vol. 10, Issue 18, IRS proposed 990 requires substantial disclosure, by Cynthia F. Reaves, Esq.

Medicare

Withholding requirements for Medicare payments to take effect in 2011

by Dennis Barry,
Contributing Editor

Government entities (including federal, state, and local governments, as well as multi-state agencies) will be required to withhold three percent of all payments for property and services for federal income taxes. Section 511 of the Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA) (PubLNo. 109-222) created a new subsection in the Internal Revenue Code of 1986 that sets forth the new withholding requirement. The requirement applies to all payments made by government entities for property and services after December 31, 2010.

The following payments are among those that are exempt from the TIPRA withholding requirements (see 26 U.S.C. §3402(t)):

- payments made in connection with a public assistance or public welfare program for which eligibility is determined by a needs or income test; and
- payments to any tax-exempt entity.

Providers and suppliers furnishing services to Medicaid patients should be exempt from TIPRA withholding because of the exemption for payment made in connection with a public assistance program for which eligibility is based on need. There is no exemption that would cover all Medicare payments. Tax-exempt providers and suppliers, however, will be exempt

from the three percent withholding for Medicare services.

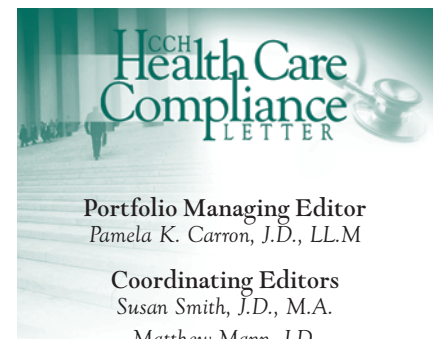
Physician group practice issues.

One area of potential confusion relates to payments made to physician group practices. Although the withholding will be from payments made to the group practice, most group practices are not taxable either because they are partnerships, or they have elected to have their income treated as the owners' income for tax purposes. Thus, there is a need for a mechanism to allocate the withheld amounts among the physician owners and employees of the practice. Presumably, the three percent withholding can be taken into consideration when owners make quarterly estimated tax payments.

TIPRA implications. The biggest effect of this law on health care providers and suppliers that are not tax-exempt will be on withholding on Medicare payments. That is not its sole effect, however. The law applies not just to payments by the federal government, but also to payments by state and local governmental entities that make payments of at least \$100 million a year for property and services. Thus, payments by a large city or county for health care services furnished to inmates would be subject to the three percent withholding.

With an effective date of January 1, 2011, the TIPRA withholding provision has received very little attention. As 2011 draws nearer, it is possible that those affected by the provision will lobby for abolition or modification of the withholding requirement. At present, however, it is the law. ■

Dennis Barry's Reimbursement Advisor, No. 1, Sept. 2007.



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Infusion therapy billing patterns in South Florida demonstrate fraud

by Valerie L. Witmer, J.D.,
Contributing Editor

Aberrant billing practices associated with HIV/AIDS infusion therapy demonstrate that South Florida remains a high-risk area for Medicare fraud and abuse, according to Inspector General Levinson. Levinson announced the release of a report by the Office of Inspector General (OIG), which analyzed the claims patterns of HIV/AIDS infusion therapy providers and beneficiaries during the second half of 2006 and determined that Miami-Dade, Broward, and Palm Beach counties account for a disproportionate number of claims submitted to Medicare for payment of services for beneficiaries with HIV/AIDS.

Findings. The OIG's analysis revealed that from July 2006 through December 2006:

- Half of the charges submitted to Medicare nationally for beneficiaries with HIV/AIDS originated in Miami-Dade, Broward, and Palm Beach counties, even though only 10 percent of Medicare beneficiaries with HIV/AIDS lived in those counties.
- The three South Florida counties accounted for 79 percent of the amount submitted to Medicare nationally for drug claims involving beneficiaries with HIV/AIDS.
- Nearly 61 percent of the total charges originating in the South Florida counties was for nonoral drugs, while nonoral drug claims represented only 16 percent of the submitted charges in other geographical areas.
- The mean amount submitted to Medicare per provider for beneficiaries with HIV/AIDS in the three South Florida counties was about 16 times higher than in the rest of Florida and 39 times higher than in all other states.

- The mean amount submitted per provider for drug claims involving beneficiaries with HIV/AIDS in the three counties was about 64 times higher than in the rest of Florida and 518 times higher than in all other states.

- 38 percent of the total charges submitted by providers in South Florida were for HIV/AIDS patients, while beneficiaries with HIV/AIDS accounted for less than 3 percent of providers' submitted charges in the rest of Florida or in all other states.

- 74 percent of the charges South Florida providers submitted for beneficiaries with HIV/AIDS were for drugs, compared with 19 percent in the rest of Florida and 6 percent in all other states.

- Of the 78 South Florida providers that billed more than \$1 million for beneficiaries with HIV/AIDS, 58 submitted more than half of their charges for drugs for these patients.

The OIG also found that average submitted charges per beneficiary were about 9 times higher in the three South Florida counties than in the rest of Florida or in all other states. South Florida HIV/AIDS beneficiaries also were associated with more and larger drug claims, as well as a

greater number of unique drug codes.

Recommendations. CMS has tried several approaches to control these aberrant billing practices, but none has proven effective. Last month, CMS launched a demonstration project aimed at preventing fraud among South Florida infusion therapy providers. (See *Health Care Compliance Reporter*, Vol. 10, Issue 18, Sept. 4, 2007).

The OIG has recommended that CMS (1) mandate site visits for certain providers in high-risk jurisdictions; (2) give contractors more time to review new applications from certain providers in high-risk jurisdictions; (3) require enhanced provider enrollment, data analysis, and claims-editing activities in high-risk jurisdictions; (4) require extensive review of all reassignments in high-risk jurisdictions to ensure that they are legitimate; and (5) strengthen revocations by shortening the notice period, requiring prepayment review on all claims from providers that have effective or pending revocations, and developing a strategy for minimizing the risk to Medicare from providers with multiple billing numbers. ■

OIG Press Release, Sept. 19, 2007; OIG Report, OEI-09-07-00030, Sept. 1, 2007, Health Care Compliance Reporter ¶1530,629.

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A survey of new developments in tax-exemption law: What compliance officers need to know, Part I

by Paul De Muro, C.P.A., M.B.A., J.D., and Laura Gabrysch, J.D., L.L.M.,
Contributing Editors

This article discusses and summarizes the recent developments of 2007 that apply to tax-exempt organizations, with an emphasis on health care organizations. As will become apparent, governance, transparency, and compliance are common threads among all of the developments. This two-part article provides the highlights of a more in-depth article that will be published in the November/December 2007 issue of the Journal of Health Care Compliance.

Congress passed the Sarbanes-Oxley Act (PubLNo. 107-204) in 2002 as a way to require that public companies be managed in a transparent manner. In contrast to the Securities Exchange Commission (SEC), the Internal Revenue Service (IRS) has no enforcement power over governance. There is no tax-exempt equivalent to Sarbanes-Oxley. There are no statutes or regulations that give the IRS the authority to force an organization to adopt a conflict-of-interest policy¹ or adhere to the rebuttable presumption of reasonableness when approving executive compensation. The IRS' efforts in the past year, however, have focused more on governance and transparency with the thought that a properly managed organization is the same thing as an exempt organization. Public and congressional scrutiny also has heightened the focus on governance and transparency.

Prior-year redux

In the summer of 2006, Congress passed the Pension Protection Act (PubLNo. 109-280), which contained the most sweeping reforms for tax-exempt organizations since 1969. The Pension Protection Act focused mainly on perceived donor abuses, but did contain provisions allowing for greater cooperation and sharing of information between the IRS and state governments with respect to exempt organizations. Further, there was a change of guard in Congress. One of the two primary congressional critics, Rep. Bill Thomas (R-Calif.), retired from Congress, and the other, Sen. Charles E. Grassley (R-Iowa), lost his chairship of the Senate Finance Committee when his party lost control of Congress.

Before he left Congress, Rep. Thomas introduced legislation in December 2006 that would have required that hospitals provide a minimal amount of charity care to indigents.² Thomas' bill did not go anywhere. It was intended more as a discussion tool than a serious piece of legislation.

At the same time, the Congressional Budget Office released a report that suggested that exempt hospitals only provided

0.6 percent more charity care than their for-profit counterparts, and on average operated in areas with higher average incomes and lower percentages of uninsured persons than for-profit hospitals. The report was based on limited information and only compared a limited number of hospitals in five states. Further, the report noted that tax-exempt hospitals were more likely to provide less profitable specialized services (such as high-level trauma care) than for-profit hospitals.³

Even so, the stage was set for 2007 and the series of developments discussed next.

IRS proposed "Good Governance Practices for 501(c)(3) Organizations"

Against this backdrop, in February 2007, the IRS introduced its "Good Governance Practices for 501(c)(3) Organizations" (GGPs) to a meeting of a group of practitioners.⁴ These suggested practices were nonbinding and intended to prevent charitable assets from being used for private interests. The GGPs were meant for smaller organizations. Informally, the IRS recommends that larger organizations follow the more detailed recommendations of the Panel on the Nonprofit Sector.⁵

In releasing the GGPs, the IRS acknowledged that it had no enforcement authority regarding exempt organization governance. In the IRS' view, however, good governance helps prevent exemption problems. The IRS since has backed off of the GGPs, citing the criticism the agency received over the guidance and the misperception among the exempt community that the practices were mandatory. Nevertheless, the practices represent the IRS' uneasy attempts to venture into an area in which it lacks statutory authority. Even though the IRS no longer is pushing the GGPs as strongly as before, it is a good idea for tax-exempt organizations to follow them.

IRS Report on Exempt Organizations: Executive Compensation Compliance Project

On March 1, 2007, the IRS released its Report on Exempt Organizations Executive Compensation Compliance Project.⁶ The compliance project involved two parts: (1) the compliance check letters⁷ sent to 1,223 organizations in the spring of 2006, and (2) the examinations of 782 organizations, 179 of which included unsatisfactory responses to the compliance check letters. The compliance checks generally were triggered by Form 990 reporting, which included: (1) not providing detailed compensation information, (2) reporting loans to disqualified persons exceeding \$100,000, and (3) answering “yes” or failing to respond to questions regarding participation in excess benefit transactions or transactions with disqualified persons. The IRS found that the compliance check responses revealed widespread reporting errors, which resulted in over 30 percent of the compliance check recipients amending their 990 Forms.

After reporting on the numbers, the IRS made several recommendations aimed at encouraging greater transparency and compliance. First, the IRS, noting that compliance checks were limited in scope, recommended that it conduct more field audits to gather information. Second, the IRS recommended that Form 990 reporting be revised and clarified (the IRS subsequently released the draft Form 990, which is discussed below). Third, the IRS suggested it may start assessing penalties for organizations that submit incomplete 990 Forms. Fourth, the IRS noted that it needed to encourage exempt organizations to meet the rebuttable presumption of reasonableness. Finally, the IRS stated that it would continue to focus on ensuring compliance with the excess benefit rules.

Several lessons can be gleaned from the Executive Compensation Compliance Report. First, loans to executives are audit triggers. It should also be noted that many health care system parents are “Type III supporting organizations,” and loans by these supporting organizations to disqualified persons (mainly executives and directors) will trigger automatic excess benefit penalties. Thus, loans to executives should be avoided and, at the very least, should be arms’ length and well within the realm of fair market value. Second, incomplete or missing information is an audit trigger. Electronic filing will eliminate some of the risk of incomplete or missing information, as blanks no longer will be accepted. Finally, organizations can put themselves in good stead by at least attempting to meet the rebuttable presumption of reasonableness. At the very least, the organization will be one up on almost half of the rest of the exempt community.

Political activities

With the 2008 election coming up, the IRS and the whistleblowing public will be closely scrutinizing exempt organiza-

tions for impermissible political activities.⁸ The IRS began working on its Political Activities Compliance Initiative in 2006 and issued a fact sheet as informal guidance. On June 18, 2007, the IRS issued Revenue Ruling 2007-41 as the first formal guidance in years with respect to political activities.⁹ The Revenue Ruling presents various scenarios and then discusses whether the fact patterns result in political activities.

The Revenue Ruling provides an example of several health care leaders, including the CEO of a health care system, personally endorsing a political candidate. The candidate takes out a full-page ad in a newspaper, lists the names of the health care leaders, and notes that the “[t]itles and affiliations of each individual are provided for identification purposes only.” Because the ad is paid for by the candidate, the ad appears in a local newspaper and not a health care system publication, and the CEO’s endorsement is in a personal capacity, there are no political activities. This result would change, however, if a hospital reimbursed a CEO for a fundraiser party, or if a hospital newsletter provided favorable comments about a candidate or party. Additionally, hospitals may run into problems by providing support to favored political action committees (PACs), such as those representing hospital interests. For instance, holding onsite meetings to encourage support for a hospital PAC, or allowing employees to make payroll contributions to a hospital PAC, will cause a hospital to run afoul of the political activities prohibition.

Many instances of political activities are inadvertent. Exempt organizations, including health care organizations, should consider adopting policies to ensure that they do not unintentionally participate in political activities.

Tax-exempt bond initiative

In June 2007, the IRS announced that it would send out 2,000 to 5,000 compliance check surveys to tax-exempt organizations that show a tax-exempt bond balance on their Form 990. The surveys will ask a broad range of questions about post-issuance compliance, including private business use, arbitrage, and management practices. Among the items that will be requested on the survey is information related to a tax-exempt organization’s record-retention policy, if any, and the organization’s compliance with that policy. These efforts are part of the IRS’ broader tax-exempt bond initiative that has been ongoing since 2005.

Qualified 501(c)(3) bonds often are used by hospitals and other health care organizations to fund facilities. The proceeds from qualified 501(c)(3) bonds must be used by 501(c)(3) organizations to further exempt purposes. If correctly issued and maintained, the interest payable on the bonds is not taxable to bondholders. In recent years, the IRS has expressed concern with several areas related to bond issuances. These areas include:

- private use of bond-financed facilities;
- impermissible use of bond proceeds to pay issuance costs;

- management service contracts that are based on net profits or which have automatic renewals; and
- arbitrage bonds that do not meet both the yield restriction requirements and rebate restriction requirements.

The IRS maintains that the following records should be kept with respect to tax-exempt bonds: (1) the bond transcript; (2) documents evidencing expenditure of bond proceeds; (3) documents evidencing use of bond-financed property, such as management contracts and research agreements; (4) documents evidencing sources of payment or security for the bonds; (5) documents regarding investments of bond proceeds, yield calculations for investments, actual investment income received on investments of proceeds, guaranteed investment contracts, and rebate calculations; and (6) all other records that are material to bond transactions based on particular facts. Records generally should be kept for as long as the bonds are outstanding, plus three years after the final redemption date of the bonds.

Failure to keep adequate records or adequately monitor the arbitrage, personal use, and other bond requirements can potentially result in a very expensive problem. Noncompliant bonds are hard to correct. While it may be possible to clean up some of the problems through redemption or otherwise, many compliance problems may be correctable only through a voluntary closing agreement with the IRS. To avoid these issues, organizations should consider adopting policies for post-issuance recordkeeping and compliance.

IRS questionnaire on post-issuance compliance for tax-exempt bonds

On August 21, 2007, the IRS released its specimen cover letter and questionnaire that will be the cornerstone of its post-issuance tax-exempt bond compliance project.¹⁰ The questionnaire initially will be sent to approximately 200 tax-exempt organizations that reported an outstanding bond issuance on their 2005 Form 990. The IRS then will collect and analyze the responses to determine whether to focus on outreach, compliance, or enforcement as part of its ongoing tax-exempt bond initiative. Further, the IRS informally has stated that it plans to send out this same questionnaire to 2,000 to 5,000 exempt organizations in the second phase of the tax-exempt bond compliance project.

The questions test not only recordkeeping and compliance, but also general knowledge of the requirements for maintaining the tax-exempt status of bonds. The questionnaire consists of a series of check-the-box questions, most of which are answered with a “yes” or “no.” The questionnaire is divided into five parts, and covers the following areas:

- The *general post-issuance compliance section* queries whether the organization has written policies with respect to general post-issuance requirements, such as those pertaining to the use of bond proceeds and bond-financed property and arbitrage restrictions.
- The *general recordkeeping section* asks the respondent to disclose how long the organization keeps bond records and whether the organization keeps the bond transcript and other miscellaneous organizational and financial records.
- The *investments and arbitrage compliance section* asks the respondent to disclose whether it maintains records regarding the allocation of investments and investment earnings, various investment documents, and arbitrage calculations and IRS filings.
- The *expenditures and assets section* asks whether the respondent organization keeps track of how bond proceeds are allocated and spent.
- The *private business use section* asks about unrelated business activities and third-party uses of bond-financed facilities and various contracts that could result in private use.

The questionnaire is deceptively simple, and consists of five pages of mostly “yes” or “no” questions, with lots of blank space. Exempt organizations with inadequate records, however, may find some of these questions difficult to answer. Even if an exempt organization is not among the unlucky 200 organizations that will initially receive the questionnaire, the organization may be among those that are targeted during the second phase of questionnaires. If the organization does not have in place the post-issuance compliance policies referenced in the questionnaire, these policies should be adopted. If there are compliance issues, an exempt organization should consider remedial measures, including using the IRS’ voluntary compliance program.

Conclusion

Public and congressional scrutiny and IRS efforts have focused on governance and transparency in the tax-exempt organization arena. Part I of this two-part article analyzed the IRS’ activities of the past year including the impact of the Good Governance Practices, the impetus to change Form 990, the focus on political activities and executive compensation, and tax-exempt organizations’ compliance with requirements related to tax-exempt bonds, specifically record retention. Part II will discuss the new draft Form 990, the IRS report on its findings related to its community benefits questionnaire sent to tax-exempt hospitals in 2006, recommendations for tax-exempt hospital reforms issued by Sen. Charles Grassley’s office, IRS Acting Commissioner Kevin M. Brown’s comments on top compliance issues for tax-exempt organizations, and other related developments.

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practices in the areas of taxation and health care. Ms. Gabrysch can be contacted at lgabrysch@fulbright.com.

- ¹ Many organizations applying for exemption, however, have found it extremely difficult to get a positive determination without adopting a conflict-of-interest policy.
- ² Tax Exempt Hospitals Responsibility Act of 2006, H.R. 6420, 109th Cong. (2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills=f:h6420ih.txt.pdf or <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.6420.IH:>
- ³ Congressional Budget Office, *Nonprofit Hospitals and the Provision of Community Benefits*, Pub.2707 (2006), available at <http://www.cbo.gov/ftpdocs/76xx/doc7695/12-06-Nonprofit.pdf>.
- ⁴ IRS, *Good Governance Practices for 501(c)(3) Organizations* (2007), available at <http://www.cbo.gov/ftpdocs/76xx/doc7695/12-06-Nonprofit.pdf>.
- ⁵ Reports of the Panel on the Nonprofit Sector are available at www.nonprofitpanel.org.
- ⁶ www.irs.gov/eo or directly at http://www.irs.gov/pub/irs-tege/exec._comp._final.pdf.
- ⁷ The IRS has started utilizing more compliance check letters as part of its initiatives, including the executive compensation, hospital, and tax-exempt bond initiatives. Compliance checks are less formal than official audits, and participation in the compliance check process is, in theory, “voluntary” on the part of the recipient organization. The IRS, however, has not hesitated to open audits on organizations that refuse to respond to compliance checks. Further, unsatisfactory or incomplete answers to compliance checks will often trigger full-scale audits.
- ⁸ A 501(c)(3) organization may not engage in any political activities without jeopardizing its tax-exempt status.
- ⁹ Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, available at <http://www.irs.gov/pub/irs-irbs/irb07-25.pdf>.
- ¹⁰ These documents can be obtained on the IRS website at <http://www.irs.gov/pub/irs-irbs/irb07-25.pdf>.

Fraud and Abuse (cont'd)

Senate bill proposes significant changes to the FCA

by Matthew Mann, J.D.,
Contributing Editor

The “False Claims Correction Act of 2007” (S. 2041) would significantly alter the federal False Claims Act (FCA). The bill, which was introduced by Senators Charles E. Grassley (R-Iowa), Richard J. Durbin (D-Ill.), Patrick Leahy (D-Vt.), and Arlen Specter (R-Penn.) on September 12, 2007, responds to perceived flaws in federal court interpretations of the FCA that threaten to limit its scope and applicability.

Presentment requirement. The bill would modify 31 U.S.C. §3729 by removing the requirement that false claims be presented “to an officer or employee of the United States Government or a member of the Armed Forces of the United States,” and instead applying liability directly to any false claim regarding government money or property. The catalyst for this legislative change was the 2004 decision by the U.S. Court of Appeals for the D.C. Circuit in *United States ex rel. Totten v. Bombardier Corporation* (see ¶880,739), which held that false claims to government grantees were not “presented” to a government employee and denied the government’s recovery of funds lost due to fraud.

In *Totten*, the majority found that the plain, unambiguous language of 31 U.S.C. §3729(a)(1) requires a claim to

be “presented to an officer or employee of the United States Government,” regardless of how “claim” is defined. According to the majority, there was no dispute that, under its enabling statute, the government grantee was not a “department, agency, or instrumentality of the United States Government.” Because the claims at issue were submitted directly to the government grantee and were not resubmitted to the government, the “presentment” requirement was not fulfilled and liability under the FCA could not be established.

Original source requirement. The bill also would add a provision to 31 U.S.C. §3730 that would grant the Department of Justice the exclusive right to dismiss relator claims on public disclosure grounds. This proposed change was suggested as a result of the 2007 Supreme Court decision in *Rockwell International Corporation v. United States*, which held that the public disclosure bar requires a *qui tam* relator to be an original source for all claims that are ultimately settled or upon which a verdict is rendered. If enacted, the bill would eliminate this jurisdictional defense.

Funds under U.S. government trust and control. The bill would amend the FCA to clarify that funds that are not technically U.S. government funds, but that are under the trust and control of the U.S. government, are subject to recovery. The term “government

money or property” would encompass money or property belonging to any “administrative beneficiary,” which would include any governmental or quasi-governmental entity on whose behalf the U.S. government, either alone or with others, collects, possesses, transmits, administers, manages, or acts as custodian for money or property.

This proposed amendment comes in response to a 2006 federal District Court for the Eastern District of Virginia decision in *United States, ex rel. DRC, Inc. v. Battles* (see ¶880,776). In *Battles*, the relators alleged that a security and logistics support firm defrauded the United States of \$3 million by submitting false invoices for work performed pursuant to a contract with the coalition provisional authority (CPA) in Iraq. According to the court, although the CPA was principally controlled and funded by the United States, this degree of control did not rise to the level of exclusive control required to qualify as an instrumentality of the U.S. government.

Government employee relators. The bill would further amend the FCA to explicitly allow government employees to act as *qui tam* relators in limited circumstances when they have reported activities up the chain of command, to the Inspector General, to the Attorney General, and only if no action was taken after 12 months. ■

S. 2041, 110th Cong., 1st Sess. (2007); Sen. Charles Grassley Press Release, Sept. 12, 2007.

FTC won't challenge clinical integration program

by Matthew Mann, J.D.,
Contributing Editor

The Bureau of Competition staff at the Federal Trade Commission (FTC) has recommended that the agency not challenge a physician practice association's proposal to operate as a nonexclusive physician network joint venture. The Greater Rochester Independent Practice Association (GRIPA) is a 575-physician practice serving a three-county area in the greater Rochester, New York area. The practice includes competing primary care and specialty physicians in 41 medical specialties.

Features of the proposed joint venture operation include: (1) a patient treatment and physician monitoring program that would measure physician performance against benchmarks for improved patient outcomes and reduced costs and resource use; (2) a disease and case management program; (3) an extensive Web-based electronic clinical information system that allows group physicians to share information and coordinate patient care; and (4) a peer review program that allows physicians to take disciplinary action against members who do not meet the organization's quality standards.

Under the proposal, GRIPA will contract jointly with health plans for the sale of its physicians' services on a fee-for-service basis. A key feature of the proposal is that GRIPA will operate a nonexclusive network, allowing member physicians to negotiate and contract separately with health plans and other customers who do not want to purchase GRIPA's services.

In a letter from the FTC's Bureau of Competition staff to GRIPA dated September 17, 2007, the FTC concluded that it was unlikely the organization will be able to exercise market power in the provision of physician services such that the proposal would be detrimental to consumers. There are other physician networks available in the area with which health plans may negotiate and enter into contracts thus, it appears that health plans will be able to maintain adequate physician networks for their programs. ■

FTC Press Release, Sept. 21, 2007.

In the News

Revisit user fee program established

Effective immediately, a system of revisit user fees applicable to health care facilities that have been cited for deficiencies during initial certification, recertification, or substantiated complaint surveys and require a revisit to confirm that corrections to previously identified deficiencies have been remedied has been established. A fee of \$168 will be charged per off-site revisit survey, while the fees assessed per onsite revisit survey vary according to the type of provider or supplier, the average number of hours that a revisit survey requires, and the average per-hour cost of a revisit survey. Medicaid-only facilities would not be assessed revisit fees. These user fees will apply only in situations in which a revisit is required to confirm that federal quality of care measurements have been met.

Final rule, 72 FR 53628, Sept. 19, 2007, *Healthcare Compliance Reporter* ¶700,050.

New York AG proposes home health aide registry

A legislative proposal aimed at combatting fraud and abuse in New York's home health care industry would create a statewide registry of home health aides, New York Attorney General (AG) Andrew Cuomo announced. The registry would include: (1) the name, address, gender, and date of birth of certified home health aides; (2) the name and date of state-approved training and competency evaluation programs successfully completed; (3) a copy of the training certificate issued to the aide; and (4) the aide's employment history in home care and health care. The proposal is the result of "Operation Home Alone," the AG's ongoing investigation of abuses in the home health industry. Cuomo will testify on the proposal and the results of the AG's investigation at a Senate-Assembly hearing that has not yet been scheduled.

New York Attorney General Press Release, Sept. 12, 2007.

OIG releases resource guide on corporate responsibility, health care quality

A resource guide for health care boards of directors entitled "Corporate Responsibility and Health Care Quality: A Resource for Health Care Boards of Directors," has been released by the Office of Inspector General (OIG) in partnership with the American Health Lawyers Association. The guide is part of Inspector General Daniel R. Levinson's quality-of-care initiative and seeks to help board members understand their important role in overseeing the quality of care provided in their institutions. The guide is intended to help board members ask appropriate questions related to health care quality requirements, measurement tools, and reporting requirements. In addition to the resource guide, OIG is hosting a series of roundtable discussions with industry leaders. The first roundtable discussion (cosponsored by the Health Care Compliance Association) will take place in December 2007, and will focus on the board's role in overseeing the quality of care provided in long-term care institutions.

OIG Press Release, Sept. 10, 2007.