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HEALTH CARE GROUP

Business Advisory

# "FEDERAL INVESTIGATORS" ARE LURKING WITHIN

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## Effective January 1, 2007, Health Care Providers Must Either Educate Employees About the False Claims Act and Whistleblower Protections or Face Medicaid Exclusion

On February 8, 2006, President Bush, strengthening his commitment to reducing the national debt, signed into law the Deficit Reduction Act (the "DRA"), an act that aims at reducing the national debt by almost $40 billion dollars in the next five years.

In addition to cutbacks to other federally funded programs, the DRA aims to reduce Medicare and Medicaid expenditures and to recoup losses and overpayments made to health care providers. Given that, in 2004, the United States spent approximately $1.9 trillion on health care, or approximately $6,280 per person, and that projections suggest that health care spending may account for as much as twenty percent of the gross domestic product by 2015, it comes as no surprise that the DRA targets these programs.

In the past, the federal government has effectively reduced its overall health care related expenditures by actively enforcing the False Claims Act (the "FCA") against health care providers. The FCA provides the federal government with a mechanism to recover funds wrongfully paid to individuals who "knowingly present[], or cause[] to be presented . . . a false or fraudulent claim for payment or approval." A qui tam relator, a private person not related to the government and also known as a "whistleblower", may likewise bring suit even if the defendant's conduct did not cause harm to the relator if the relator has information suggesting that the defendant presented a false claim to the federal government. Anyone who knowingly submits a false claim to the federal government may be held civilly liable for up to three times the amount of the federal government's actual damages and be required to pay an additional penalty of $5,500 to $11,000. Recoveries, including those obtained through settlement agreements, sometimes amount to hundreds of thousands, or even millions, of dollars.

Among the most noteworthy provisions included in the DRA is a provision that requires employee education about the FCA and applicable laws that protect, and even reward, employees who blow the whistle on their employers for violating these laws. The DRA specifically requires entities that receive or make annual payments of at least $5,000,000 pursuant to any state Medicaid program to establish written policies for employees that explain the provisions of the FCA, any state false claims laws and the applicable administrative remedies. The policies must also include a description of whistleblower protections and an explanation of internal policies that aim to prevent fraud and abuse. An employer must include a discussion of

these matters in the employer's employee handbook. Entities that fail to comply by January 1, 2007 risk exclusion from the Medicaid program.

Essentially, these provisions constitute a recognition by the federal government that employees often play key roles in federal FCA investigations. These provisions increase the likelihood that employees lurking within, armed with full knowledge of their rights, will bring qui tam actions. Despite the fact that health care providers covered by these provisions may be hesitant to comply, they have no choice, as exclusion from the Medicaid program would be devastating.

*Benesch's Health Care Practice Group regularly counsels clients on federal and state fraud and abuse laws. We strongly urge all entities covered by these new rules to begin now to develop and adopt written policies that fulfill these new requirements.*

**Please contact us so we may assist you in the development and adoption of policies that comply with these new requirements.**

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