



**FOLLOW-UP ALERT**

## The Siege Continues:

# The Justice Department Is Investigating Four Additional Medicare Advantage Plans On Risk Adjustment Issues

### WHO IS AT RISK

The federal government has indicated that it is still investigating, and could ultimately join a false claims whistleblower *qui tam* action against Aetna, Inc., Humana, Inc., Cigna, Inc. (through its Bravo Health unit) and Health Net, Inc. (now part of Centene). If other Medicare Advantage health plans are undertaking the type of risk adjustment program activities noted in the action, they also may be at risk of being the subject of federal government enforcement or other whistleblower claims. Indeed, it is clear that the risk adjustment approach of some Medicare Advantage Plans has caught the attention of both the federal government and the *qui tam* bar. We can only expect more lawsuits and enforcement initiatives to come. As a result, Medicare Advantage plans need to proactively and immediately conduct a comprehensive review of their overall approach to the HCC-RAF risk adjustment process. Suggested actions and background are below.

### WHAT ACTIONS ARE NEEDED TO REDUCE LIABILITY EXPOSURE

- *Review and Improve Operations.* Given recent enforcement action, Medicare Advantage health plans should consider an end to end review of their risk adjustment program activities that includes a careful examination of auditing protocols, relationships with providers and vendors, risk adjustment compliance programs and oversight, and risk adjustment incentive compensation structures for employees, vendors and providers. Use independent outside counsel experienced in Medicare Advantage risk adjustment to provide a showing of “good faith” intentions, to attempt to limit damage theories, and to avoid attorney-client privilege waiver issues.
- *Use a Balanced “Two-Way” Approach.* Medicare Advantage health plans also should consider whether their risk adjustment approaches are a balanced “two-way” approach (looking both for missed, uncaptured codes and also erroneous codes), rather than the “one-way” program (looking solely for uncaptured codes) that has been the recent subject of federal scrutiny.

- *Know What is In Your Internal Email That Can Be Used Against You:* Recent enforcement activity suggests that internal email communications regarding the profitability or revenue enhancement of risk adjustment programs can be used to plaintiff's advantage or to increase settlement size, so a thorough review and remediation of prior damaging email communications regarding risk adjustment can be helpful in reducing liability exposure. It is strongly recommended that such review be undertaken under attorney-client privilege through the use of outside counsel.
- *Re-set Internal Audit Procedures:* The frequency and scope of internal audit procedures for the risk adjustment program should be re-evaluated and potentially increased in frequency and/or scope.
- *Don't Make It Easier for Plaintiffs:* Plans who have actual or constructive knowledge of risk adjustment program concerns and who do not act to identify and correct such can find themselves being attacked as being either reckless or committing intentional fraud, thereby allowing plaintiffs an easier task of proving their case.

## BACKGROUND

In our prior [Urgent Alert](#), we reported that, at the request of the federal Department of Justice, the FCA qui tam whistleblower lawsuit in the case of *United States ex rel Benjamin Poehling v. United HealthGroup, Inc., et. al.* was unsealed on February 15, 2017. The complaint alleges that United HealthGroup, as well as a number of other defendants, had fraudulently collected “hundreds of millions—and likely billions—of dollars” in Medicare Advantage risk payments by claiming patients were sicker than they really were. At the time of the unsealing, the Department of Justice partially intervened in the lawsuit against only two of the defendants – UnitedHealth Group and WellMed Medical Management, Inc. – and declined to intervene against the other defendants

Now, the urgency for Medicare Advantage Plans to proactively and immediately conduct a comprehensive review of their overall approach to the HCC-RAF risk adjustment process has been underscored by the government's announcement in court papers filed last week that it is investigating at least four other Medicare Advantage Plans in the *Poehling* case, in addition to United HealthGroup and WellMed. Specifically, the Department of Justice filed a “Corrected Notice of Election” to intervene in the *Poehling* case, indicating that, despite its statement last month that it was declining to intervene against the other defendants in the case, it “has been conducting, *and continues to conduct*, on-going investigations” of other defendants, besides United HealthGroup and WellMed (emphasis added). The government specifically noted that it will continue its investigations of Health Net, Inc., Aetna, Inc., Bravo Health, Inc. (which is part of Cigna), and Humana, Inc.

The government stressed that, until those on-going investigations are completed, it cannot reach a decision about those defendants' liability under the False Claims Act as to the “truthfulness of their claims to the Medicare Program for risk adjustment payments, the truthfulness of their risk adjustment attestations to the Medicare Program, or their possible improper avoidance of returning overpayments.” The government should be filing its complaint intervening against United and WellMed by May 16<sup>th</sup>. Stay tuned for further developments against the other defendants and against other possible targets. Also, for copies of the government filings or for further discussion about your risk adjustment program, please contact either: Steven Chananie at [schananie@sheppardmullin.com](mailto:schananie@sheppardmullin.com) or Eric Klein at [eklein@sheppardmullin.com](mailto:eklein@sheppardmullin.com)

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