

# HCCA Atlanta Regional Conference

January 20, 2017

The Tricky Gets Trickier: Escalating  
Reliance on Provider Certification

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## *FCA False Certification Liability*

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- FCA imposes civil liability on “any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.”
- When are claims “false” or “fraudulent”?
- “Factual falsity” vs. “legal falsity”

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## *FCA False Certification Liability*

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- Under what circumstances can a defendant be liable under the FCA for violating a statutory, regulatory, or contractual obligation?
- “Express false certification” vs. “implied false certification”

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### **SECTION 15: CERTIFICATION STATEMENT (Continued)**

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#### **A. Additional Requirements for Medicare Enrollment**

These are additional requirements that the supplier must meet and maintain in order to bill the Medicare program. Read these requirements carefully. By signing, the supplier is attesting to having read the requirements and understanding them.

By his/her signature(s), the authorized official(s) named below and the delegated official(s) named in Section 16 agree to adhere to the following requirements stated in this Certification Statement:

1. I authorize the Medicare contractor to verify the information contained herein. I agree to notify the Medicare contractor of any future changes to the information contained in this application in accordance with the timeframes established in 42 C.F.R. § 424.516. I understand that any change in

3. I agree to abide by the Medicare laws, regulations and program instructions that apply to this supplier. The Medicare laws, regulations, and program instructions are available through the Medicare contractor. I understand that payment of a claim by Medicare is conditioned upon the claim and the underlying transaction complying with such laws, regulations, and program instructions (including, but not limited to, the Federal anti-kickback statute and the Stark law), and on the supplier's compliance with all applicable conditions of participation in Medicare.

and the underlying transaction complying with such laws, regulations, and program instructions (including, but not limited to, the Federal anti-kickback statute and the Stark law), and on the supplier's compliance with all applicable conditions of participation in Medicare.

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HEALTH INSURANCE CLAIM FORM  
APPROVED BY NATIONAL CONFERENCE OF COMPTROLLER SECRETARIES

QR Code

1- MEDICARE MEDICAID MEDICARE COMBINATION STATE MEDICAID STATE CHURCH OTHER

2- PATIENT'S NAME (Last, First, Middle, Initial) INSURED'S NAME (Last, First, Middle, Initial) OR Program or Plan ID

3- PATIENT'S ADDRESS (No. Street) INSURED'S ADDRESS (No. Street)

4- CITY STATE ZIP CODE TELEPHONE AREA AND NUMBER CITY STATE ZIP CODE TELEPHONE AREA AND NUMBER

5- OTHER INSURED'S NAME (Last, First, Middle, Initial) OR EMPLOYER'S COMPANY OR PRODUCT NAME

6- OTHER INSURED'S POLICY OR GROUP NUMBER INSURED'S EMPLOYMENT (Date in Progress)

7- OTHER INSURED'S POLICY OR GROUP NUMBER INSURED'S EMPLOYMENT (Date in Progress)

8- OTHER INSURED'S POLICY OR GROUP NUMBER INSURED'S EMPLOYMENT (Date in Progress)

9- OTHER INSURED'S POLICY OR GROUP NUMBER INSURED'S EMPLOYMENT (Date in Progress)

4) this claim, whether submitted by me or on my behalf by my designated billing company, complies with all applicable Medicare and/or Medicaid laws, regulations, and program instructions for payment including but not limited to the Federal anti-kickback statute and Physician Self-Referral law (commonly known as Stark law);

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100	101	102	103	104	105	106	107	108	109	110	111	112	113	114	115	116	117	118	119	120	121	122	123	124	125	126	127	128	129	130	131	132	133	134	135	136	137	138	139	140	141	142	143	144	145	146	147	148	149	150	151	152	153	154	155	156	157	158	159	160	161	162	163	164	165	166	167	168	169	170	171	172	173	174	175	176	177	178	179	180	181	182	183	184	185	186	187	188	189	190	191	192	193	194	195	196	197	198	199	200	201	202	203	204	205	206	207	208	209	210	211	212	213	214	215	216	217	218	219	220	221	222	223	224	225	226	227	228	229	230	231	232	233	234	235	236	237	238	239	240	241	242	243	244	245	246	247	248	249	250	251	252	253	254	255	256	257	258	259	260	261	262	263	264	265	266	267	268	269	270	271	272	273	274	275	276	277	278	279	280	281	282	283	284	285	286	287	288	289	290	291	292	293	294	295	296	297	298	299	300	301	302	303	304	305	306	307	308	309	310	311	312	313	314	315	316	317	318	319	320	321	322	323	324	325	326	327	328	329	330	331	332	333	334	335	336	337	338	339	340	341	342	343	344	345	346	347	348	349	350	351	352	353	354	355	356	357	358	359	360	361	362	363	364	365	366	367	368	369	370	371	372	373	374	375	376	377	378	379	380	381	382	383	384	385	386	387	388	389	390	391	392	393	394	395	396	397	398	399	400	401	402	403	404	405	406	407	408	409	410	411	412	413	414	415	416	417	418	419	420	421	422	423	424	425	426	427	428	429	430	431	432	433	434	435	436	437	438	439	440	441	442	443	444	445	446	447	448	449	450	451	452	453	454	455	456	457	458	459	460	461	462	463	464	465	466	467	468	469	470	471	472	473	474	475	476	477	478	479	480	481	482	483	484	485	486	487	488	489	490	491	492	493	494	495	496	497	498	499	500	501	502	503	504	505	506	507	508	509	510	511	512	513	514	515	516	517	518	519	520	521	522	523	524	525	526	527	528	529	530	531	532	533	534	535	536	537	538	539	540	541	542	543	544	545	546	547	548	549	550	551	552	553	554	555	556	557	558	559	560	561	562	563	564	565	566	567	568	569	570	571	572	573	574	575	576	577	578	579	580	581	582	583	584	585	586	587	588	589	590	591	592	593	594	595	596	597	598	599	600	601	602	603	604	605	606	607	608	609	610	611	612	613	614	615	616	617	618	619	620	621	622	623	624	625	626	627	628	629	630	631	632	633	634	635	636	637	638	639	640	641	642	643	644	645	646	647	648	649	650	651	652	653	654	655	656	657	658	659	660	661	662	663	664	665	666	667	668	669	670	671	672	673	674	675	676	677	678	679	680	681	682	683	684	685	686	687	688	689	690	691	692	693	694	695	696	697	698	699	700	701	702	703	704	705	706	707	708	709	710	711	712	713	714	715	716	717	718	719	720	721	722	723	724	725	726	727	728	729	730	731	732	733	734	735	736	737	738	739	740	741	742	743	744	745	746	747	748	749	750	751	752	753	754	755	756	757	758	759	760	761	762	763	764	765	766	767	768	769	770	771	772	773	774	775	776	777	778	779	780	781	782	783	784	785	786	787	788	789	790	791	792	793	794	795	796	797	798	799	800	801	802	803	804	805	806	807	808	809	810	811	812	813	814	815	816	817	818	819	820	821	822	823	824	825	826	827	828	829	830	831	832	833	834	835	836	837	838	839	840	841	842	843	844	845	846	847	848	849	850	851	852	853	854	855	856	857	858	859	860	861	862	863	864	865	866	867	868	869	870	871	872	873	874	875	876	877	878	879	880	881	882	883	884	885	886	887	888	889	890	891	892	893	894	895	896	897	898	899	900	901	902	903	904	905	906	907	908	909	910	911	912	913	914	915	916	917	918	919	920	921	922	923	924	925	926	927	928	929	930	931	932	933	934	935	936	937	938	939	940	941	942	943	944	945	946	947	948	949	950	951	952	953	954	955	956	957	958	959	960	961	962	963	964	965	966	967	968	969	970	971	972	973	974	975	976	977	978	979	980	981	982	983	984	985	986	987	988	989	990	991	992	993	994	995	996	997	998	999	1000
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PART II - CERTIFICATION

MISREPRESENTATION OR FALSIFICATION OF ANY INFORMATION CONTAINED IN THIS COST REPORT MAY BE PUNISHABLE BY CRIMINAL, CIVIL AND ADMINISTRATIVE ACTION, FINE AND/OR IMPRISONMENT UNDER FEDERAL LAW. FURTHERMORE, IF SERVICES IDENTIFIED IN THIS REPORT WERE PROVIDED OR PROCURED THROUGH THE PAYMENT DIRECTLY OR INDIRECTLY OF A KICKBACK OR WERE OTHERWISE ILLEGAL, CRIMINAL, CIVIL AND ADMINISTRATIVE ACTION, FINES AND/OR IMPRISONMENT MAY RESULT.

CERTIFICATION BY OFFICER OR ADMINISTRATOR OF PROVIDER(S)

I HEREBY CERTIFY THAT I HAVE READ THE ABOVE STATEMENT AND THAT I HAVE EXAMINED THE ACCOMPANYING ELECTRONICALLY FILED OR MANUALLY SUBMITTED COST REPORT AND THE BALANCE SHEET AND STATEMENT OF REVENUE AND EXPENSES PREPARED BY ST. MARY MEDICAL CENTER (14-0064) (PROVIDER NAME(S) AND NUMBER(S)) FOR THE COST REPORTING PERIOD BEGINNING 10/01/2013 AND ENDING 09/30/2014, AND TO THE BEST OF MY KNOWLEDGE AND BELIEF, IT IS A TRUE, CORRECT AND ACCURATE STATEMENT OF THE SERVICES PROVIDED AS

...I FURTHER CERTIFY THAT I AM FAMILIAR WITH THE LAWS AND REGULATIONS REGARDING THE PROVISION OF HEALTH CARE SERVICES, AND THAT THE SERVICES IDENTIFIED IN THIS COST REPORT WERE PROVIDED IN COMPLIANCE WITH SUCH LAWS AND REGULATIONS.

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## *FCA False Certification Liability*

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- Circuit Split
  - Seventh: rejected implied false certification liability
  - Second and Sixth: limited scope to legal requirements expressly designated as conditions of payment
  - First, Fourth, Tenth, Eleventh, D.C.: endorsed broader view of implied certification liability
- Many courts distinguished between “conditions of participation” and “conditions of payment”

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## *U.S. ex rel. Escobar v. UHS*

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- History
  - Teenage Medicaid beneficiary died after receiving treatment from unlicensed and unsupervised professionals
  - Parents filed complaints with several state agencies and a *qui tam* action
  - *Qui tam* suit alleged that lack of compliance with state regulations governing staff qualifications and supervision rendered claims “false”

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*U.S. ex rel. Escobar v. UHS*

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- District Court
  - Granted motion to dismiss
  - Parents’ complaint failed to allege that compliance with regulations at issue was a condition of payment of Massachusetts Medicaid
- 1st Circuit Court of Appeals
  - Reversed
  - Supervision standards at issue were “express and absolute” conditions of payment and provided “dispositive evidence of materiality”

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*U.S. ex rel. Escobar v. UHS*

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- Supreme Court granted cert on two issues:
  - Whether implied certification theory of liability under the FCA is viable.
  - Whether liability under the implied certification theory requires the underlying statute, regulatory, or contractual provision expressly state that it is a condition of payment.

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### *U.S. ex rel. Escobar v. UHS*

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- Whether implied certification theory of liability under the FCA is viable.
- Yes, in “at least some circumstances”:
  - (1) if the claim submitted by the defendant, in addition to requesting payment, “makes specific representations about the goods and services provided,” and
  - (2) “the defendant’s failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.”

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### *U.S. ex rel. Escobar v. UHS*

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- Whether liability under the implied certification theory requires that the underlying statute, regulatory, or contractual provision expressly state that it is a condition of payment.
  - “What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government’s payment decision.”
  - Scope of FCA liability can be policed through “strict enforcement” of materiality and scienter
  - Defendant’s “knowledge” can be actual knowledge, reckless disregard, or deliberate indifference

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## *U.S. ex rel. Escobar v. UHS*

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- “We now clarify how that materiality requirement should be enforced”:
  - Standard is “demanding” and “rigorous.”
  - Court “need not decide” whether (a)(1)(A) materiality governed by (b)(4) “natural tendency” definition or by common law.
  - Materiality “look[s] to the effect on the likely or actual behavior of the recipient of the misrepresentation.”
  - How the regulation is labeled is relevant but not dispositive.

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## *U.S. ex rel. Escobar v. UHS*

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- “We now clarify how that materiality requirement should be enforced” (cntd.):
  - Government’s right to refuse payment if aware of violation is insufficient, by itself, to demonstrate materiality.
  - Noncompliance cannot be minor or insubstantial.
  - Proof can include, but is not limited to, “evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement.”
  - Government’s payment of “particular claim,” or practice of paying “particular type of claim,” with “actual knowledge” of violation of certain requirements, is “strong evidence” that those requirements are not material.

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## *Escobar: Answers or More Questions?*

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- Does *Escobar* narrow or expand the scope of FCA liability for healthcare providers?
- Materiality “look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.”
  - Which is it?
  - Does *Escobar* change what is required to prove materiality?
  - Will *Escobar* change how discovery is conducted in implied certification cases?

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## *On Remand . . .*

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- *U.S. ex rel. Escobar v. Univ. Health Servs., Inc.*, 2016 WL 6872650 (1st Cir. Nov. 22, 2016).
  - Supreme Court adopted “holistic approach” to determining materiality
  - “whether a piece of information is sufficiently important to influence the behavior of the recipient”

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### *On Remand . . .*

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- Compliance with staffing regulations was material
  - Relator alleged compliance was a condition of payment
  - Centrality of licensing and supervision requirements go to “very essence of the bargain.”
  - Fact that Government might have paid with knowledge is not dispositive

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### *The Big Question:*

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- Post-*Escobar*, how does a provider evaluate whether a particularity regulatory or contractual requirement is material to payment?

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## *HYPOTHETICAL*

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### **Background Facts**

- You are the Chief Compliance Officer ("CCO") at a public, not-for profit acute care hospital located in the Southeastern United States. You report to the hospital's Chief Executive Officer ("CEO") and Board. Your hospital also has a Chief Operating Officer ("COO") that is responsible for much of the day-to-day operations of the hospital.
- Your hospital is a "safety-net" hospital and is one of the largest hospital in the region, with over 500 beds. Its payor mix includes a significant amount of Medicare patients. It offers a variety of in-patient services, including a dedicated 16 bed inpatient rehabilitation facility (the "IRF") within the hospital. The IRF's 16 beds are physically separate and not comingled with the hospital's other beds.

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## *HYPOTHETICAL, Cont.*

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### **Background Facts, Cont.**

- The 16 bed IRF has been certified for several years as a distinct part unit that is excluded for payment purposes from CMS' Inpatient Hospital Prospective Payment System ("IPPS"). This means, of course, that services provided in the IRF are paid by Medicare at a significantly higher rate than the IPPS.
- To maintain the IRF's exclusion from IPPS, in June of each year your hospital has to provide an attestation, signed by the hospital's CEO and the director of the IRF, to your state's survey agency certifying that the IRF continues to meet all of the applicable CMS regulations for exclusion from the IPPS.

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## *HYPOTHETICAL, Cont.*

- Included in that attestation process is a CMS work sheet that goes through each CMS regulatory requirement and asks whether or not the hospital is in compliance with each regulatory requirement. The CMS work sheet has the following question:

TAG	REGULATION	GUIDANCE	THE HOSPITAL REPRESENTATIVE WHO COMPLETES THIS ENTIRE FORM	YES	NO	N/A
A3506	(7) Have beds physically separate from (that is, not commingled with) the hospital's other beds. <b>NOTE</b> §412.25(a) (8)-(12) are verified by the FI.	<ul style="list-style-type: none"> <li>• Is the space containing the rehab beds physically separate from the beds in other units of the hospital?</li> <li>• There cannot be any beds that are located within the physical confines of the excluded rehab unit that are not excluded beds.</li> <li>• The IRF unit cannot use its beds for medical /surgical patients or any other type of patient. Those beds are solely for the use of IRF patients.</li> <li>• If the unit doesn't have enough patients to fill those beds, the beds must be left empty or the unit can decrease the number of beds in the unit after the hospital has notified CMS of its intent.</li> </ul>	Representative will verify that the beds on the rehab unit do not belong to medical/surgical patients but are dedicated to rehab patients only.			

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## *Scenario A*

- It is currently mid-January and your region is experiencing a particularly virulent flu season. As a result, inpatient admissions have surged and your hospital is regularly reaching full bedded capacity and is having to divert admissions due to a lack of bed space. At the same time, the IRF's daily census is regularly below 6, meaning that there are currently at least 10 empty beds in the IRF on a regular basis.
- Frustrated with having to turn away patients to competitors, your hospital's COO identifies the available bed space in the IRF as a potential solution. The COO asks the CEO for permission to begin putting overflow medical/surgical patients in the available IRF beds. The CEO asks you whether this intended course of action would raise any compliance concerns.
- **Question:** How do you respond to this suggestion by the COO?

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## *Scenario B*

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- It is currently mid-May and your region has just emerged from one of the worst flu seasons in recent history. This flu outbreak in your region made local and national news. After receiving a draft of the IRF attestation and work sheet that your hospital's CEO will be required to sign in June, the COO of your hospital asks to meet with you regarding the attestation. During that meeting, the COO discloses to you that during the flu season, IRF beds were regularly used for overflow medical surgical patients due to the surge in-patient admissions. However, the COO tells you that:
  - a. The medical/surgical patients who were placed in IRF unit beds were treated as such for billing purposes – these patients were not billed as if they were patients who had been admitted to the IRF unit. These patients were also treated by nurses and other staff who provided services to other medical/surgical patients; and

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## *Scenario B, Cont.*

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- b. The medical/surgical patients who were placed in IRF unit beds patients did not displace any patients who could have been admitted to the IRF unit.
- During the meeting, the COO stresses the importance to the hospital of maintaining the IRF's exclusion from the IPPS and wants to know how the CEO might be able to handle the upcoming attestation requirement.

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*Scenario B, Cont.*

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- **Question: Is there any way that the CEO can attest to the ongoing compliance with applicable CMS regulations to continue exclusion from the IPPS?**
- **Question: If the COO insists that the CMS worksheet question regarding commingled beds has to be completed with an unqualified yes, what should you do to fulfill your duties as Chief Compliance Officer?**
- **Question: What other actions must you consider in attempting to fully mitigate this scenario?**

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