

## Report on Medicare Compliance Volume 30, Number 45. December 20, 2021

### DOJ 'Pivots' to Code Abstraction in Chart Reviews in Recent MA FCA Cases

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By Nina Youngstrom

There's been a recent shift in the premise of False Claims Act (FCA) cases against Medicare Advantage (MA) plans, and it may not bode well for physicians who perform retrospective chart reviews in this arena, said Brenna Jenny, CMS's former chief legal officer. For a number of years, the Department of Justice (DOJ) has been interested in FCA cases alleging that MA plans improperly increase their enrollees' risk scores and therefore the plans' reimbursement. More recently, DOJ seems to have "pivoted" from criticizing audits that fail to verify codes to focusing on whether code abstraction as part of retrospective chart reviews is appropriate, said Jenny, who is now with Sidley Austin LLP.

"DOJ seems to be breaking new ground in expressing skepticism about chart reviews," she said. This development affects MA plans and providers, she said. "They should reconsider policies and procedures around retrospective chart reviews that result in adding codes."

In earlier FCA cases against some MA plans, DOJ focused on so-called one-way audits, Jenny said. DOJ alleged the plans reviewed charts with the goal of adding diagnosis codes that weren't submitted before and didn't bother deleting codes with unsupported diagnoses. "DOJ's position is that if the provider opens up a chart and only looks to add codes but ignores whether diagnosis codes are supported in the medical record, the provider is in reckless disregard under the FCA of whether the diagnosis code represents an overpayment," Jenny said. DOJ's position is rooted in MA plans' obligation under Medicare's 60-day overpayment refund rule to report and return overpayments, she explained.

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