

Fraud, anti-kickback penalties to double

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By [Lisa Schencker](#) | June 30, 2016

Fraud penalties for healthcare providers and others will soon likely double, according to an interim final rule published Thursday in the Federal Register.

Penalties for each false claim submitted to a government program, such as Medicare, will rise to a minimum of \$10,781 from a current minimum of \$5,500 under the [False Claims Act](#). The maximum would rise to \$21,563 per claim from a current maximum of \$11,000. It's not unusual for thousands of claims to be at issue in a False Claims Act case, leading to the possibility of total potential penalties in the millions and even billions of dollars.

According to the [rule](#), penalties for violations of the Anti-Kickback law will also rise from \$11,000 to \$21,563.

Legal experts, however, say the spikes aren't quite as scary as they sound. The increases could lead more whistle-blowers to file lawsuits against providers they suspect of committing fraud. In successful False Claims Act cases, whistle-blowers are entitled to a percentage of money the government is able to recover. In 2015, two-thirds of federal False Claims Act lawsuits filed by whistle-blowers targeted healthcare entities.

"The potential pot at the end of the rainbow has gotten bigger," said William Horton, a partner at Jones Walker who is chairman of the American Bar Association's health law section.

But the higher penalties won't necessarily result in providers having to actually pay more to settle such cases, Horton said. False Claims Act cases often settle because providers don't want to risk having to pay the already-large penalties, on top of triple damages.

"At the end of the day, I don't think it's going to (make) a tremendous difference because the penalties are already so large," said Jennifer Weaver, a partner at Waller Lansden Dortch & Davis who represents providers.

Weaver said she's never seen a False Claims Act case settlement that was based on penalties. Rather, settlement amounts are typically based on damages, or the government's actual losses, she said.

Plus, the government might be hesitant to pursue super-high penalties in cases against providers so as to avoid raising questions of constitutionality, she said. The 8th Amendment of the U.S. Constitution bars excessive fines.

Even some attorneys for whistle-blowers aren't sold on the higher penalties.

Marc Raspanti, a partner at Pietragallo Gordon Alfano Bosick & Raspanit who represents whistle-blowers, also said he worries that the new higher penalties would help fuel defendants' arguments about such fines being excessive and unconstitutional.

“From a practical point of view, if you double the fines and penalties, you're kind of playing into concerns both the government and defense counsel have had for years,” Raspanti said.

Bryan Vroon, a whistle-blower attorney whose recent False Claims Act case led to a then-record settlement with North Broward Hospital District, also said damages are much more of a deterrent than penalties in False Claims Act cases because settlements are typically based on damages.

Providers rarely have to pay the actual penalties because providers don't often litigate False Claims Act cases all the way to a verdict. Part of the reason a [\\$237 million judgment](#) against [Tuomey Healthcare System in Sumter, S.C.](#), made news last year was because it was a rare instance of a hospital litigating a False Claims Act all the way to a verdict. Ultimately, Tuomey [agreed to settle](#) with the government for \$72.4 million.

Horton said the higher penalties for violations of the Anti-Kickback law are also likely to have the same sort of effects—or lack thereof.

Providers are often accused of violating the Anti-Kickback law within False Claims Act lawsuits, and in such cases, providers would typically be subject only to the False Claims Act penalties, not the anti-kickback ones as well, Horton said.

The anti-kickback law is actually a criminal statute, unlike the False Claims Act. That means a provider or anyone else accused of violating the anti-kickback law could face prison time.

Prison time will likely remain a larger worry for those accused of anti-kickback violations than penalties, even the higher penalties, Weaver said.

The penalty increases weren't unexpected, but questions had remained about exactly how much those penalties would increase.

The [Bipartisan Budget Act of 2015](#) required civil monetary penalties to be raised by August 2016 to account for inflation. The U.S. Justice Department will accept comments on the rule through Aug. 29.