# The Advisory Board Company
# Health Care Law Roundtable

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## Attestations and Potential Liability Under Meaningful Use

Steps to Minimize False Claims Act Liability as a Meaningful User

*by Laura Colombell Marshall*

### *The Attestation Requirement*

The Health Information Technology for Economic and Clinical Health (HITECH) Act includes provisions intended to promote the adoption and use of electronic health records (EHR). Using a carrot and stick approach, the Act provides for Medicare incentive payments to promote the "meaningful use" (MU) of certified EHR technology, as well as penalties that will impose Medicare reimbursement reductions on "eligible professionals" (e.g., doctors) (EPs) and hospitals (EHs) who are not meaningful users of certified EHR technology beginning October 1, 2014 for EHs and January 1, 2015 for EPs. EHs and EPs must continue to demonstrate meaningful use every year to avoid payment adjustments in subsequent years.

MU is demonstrated through a web-based system whereby data is entered regarding applicable objectives and measures and the EP or EH "attests" that they have used certified EHR technology (including specification of the technology used) and satisfied the required objectives and associated measures, as well as agreeing to the following attestation statements (among others):

- The information submitted is accurate to the knowledge and belief of the EP or the person submitting on behalf of the EP or EH;
- The information submitted is accurate and complete for numerators, denominators, exclusions, and measures applicable to the EP or EH; and
- The information submitted includes information on all patients to whom the measure applies.

### *False Claims Act Liability*

The February 2014 indictment of a CFO for a now closed medical center in Texas for making false statements and committing aggravated identity theft in connection with Medicare MU payments increased speculation that CMS meaningful use compliance audits would result in referrals to law enforcement for investigations under the False Claims Act (FCA). The indictment alleges that the CFO forged the signature of the center's Director of Nursing on the MU attestation after she refused to sign because she knew the center's EHR technology was not compliant. While the case appears to be a factual outlier, it does signal that the government is receptive to prosecuting cases stemming from false MU attestations.

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In addition to the attestation statements listed above, an EH or EP must also acknowledge that the filing of the attestation itself equates to submitting a claim for federal funds, and that any false statement in the attestation is punishable under federal or state criminal laws and subject to civil penalties. A false MU attestation is therefore clearly material to the claim as a precondition of the EHR incentive payment. Liability can also arise from a "reverse false claim" which now includes the knowing retention of an overpayment. In order to properly assess the risk of an FCA investigation or action, it is important to understand the requisite intent under the statute. The terms "knowing" and "knowingly" are specifically defined in the statute to include "deliberate ignorance" or "reckless disregard" of the truth or falsity of the information. As a practical matter, this means that it is not enough for the attester to wholly rely on the representations of a vendor or employee to certify that a provider has met the MU requirements under the EHR program. Although not an FCA case, the 2013 repayment of millions in MU payments by a large for-profit provider demonstrates the severe financial risk associated with noncompliance. The for-profit provider's repayment was the result of an internal audit which revealed that the company received MU payments for multiple hospitals over a three-year period which had not met the applicable criteria. The provider cited a "material weakness in internal control related to the administration and oversight of its EHR enrollment process" and stated that an error was made in applying the MU requirements. The exact nature of the compliance lapse is unclear. However, the EHR program requires full recoupment of incentive payments in the event of partial noncompliance.

Medicare and Medicaid audits of MU payments began in 2013 and will continue. EHs and EPs will be selected at random for audit and required to produce documentation to support the attestation. An FCA investigation can result from these audits or from a whistleblower looking for a qui tam opportunity. Prosecutors will be looking for aggravating facts that will escalate a compliance issue into a full blown criminal or civil enforcement action. In this regard, EHs and EPs should be looking for any conduct that arguably creates the false appearance of EHR compliance, such as entry of data from hard copy records "after the fact" or copying and pasting data from one patient visit to the next.

In light of the potential for significant liability in this area, EPs and EHs should, at a minimum:

- Implement internal processes to capture, verify and document the data that supports a MU attestation, with careful consideration of the supporting documentation for audits guidelines provided by CMS.
- If a provider identifies a compliance issue after the attestation has been made, determine whether it is the result of a benign error or some systemic failure that could be interpreted as fraudulent. This determination is critical in determining next steps and how best to mitigate liability under the FCA for damages and penalties.
- Conduct compliance due diligence with respect to MU payments received by a target company in a proposed acquisition or joint venture. Given the potential risk, such an audit could inform whether the deal should go forward, or at the very least factor into the valuation.