DLA PIPER

COMMUNITY HEALTH | BEST PRACTICES

Health Care Fraud and Abuse Enforcement and Investigations

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What We Will Cover

- Current Environment
- Investigative and Enforcement Techniques
- Individual Accountability
- 60-day Rule
- Payment Holds
- What Prudent Organizations Should Do

Current Enforcement Environment

- Blunt instruments in post-reform world
- Pressure on Medicaid programs
- Political grandstanding
- Adversarial relationships with hospitals, insurers
- DOJ focus on individual accountability

Investigative and Enforcement Techniques

- Data prospecting
- Statistical Extrapolation
- Uninformed investigators
- Unqualified consultants
- Greedy whistleblowers

Realities

- Being ethical organization, serving the underserved, providing a community benefit are not defenses
- Investigators do not understand complexities, nuances, practical limitations, your business
- Investigators look to make cases; not always interested in the truth or equities
- Former employees and competitors can pose substantial risks

Some Unique Risks

- Documentation: Adequacy, signature, qualifications, medical necessity, start and end times
- Claims: Coding, unbundling
- Provision of required and additional services
- Fee and discount schedules
- 340B drug discounts

- Cost reports and certifications, allowable expenses, accounting
- Grant applications, use, accounting
- Licensure and enrollment of care providers
- Conflicts of interest
- Collaborations and affiliations (Anti-Kickback)
- HIPAA
- Byzantine Federal and State regulations and interpretations

DOJ Focus on Individual Accountability – The "Yates Memo"

- *Individual Accountability for Corporate Wrongdoing*
- First major DOJ policy pronouncement under AG Loretta Lynch
- Applies to civil and criminal matters
- Purposes
  - Deter future illegal activity
  - Incentivize changes in corporate behavior
  - Ensures that proper parties are held responsible for their actions
  - Promotes public confidence in our justice system
- Challenges it addresses
  - Diffuse responsibility, insulation of top execs
  - Difficult to determine scienter or *mens rea*

6 Key Steps in Yates Memo

1. To be eligible for any cooperation credit, corporations must provide all relevant facts about individuals involved in misconduct.
2. Both criminal and civil investigations should focus on individuals from the inception.
3. Criminal and civil DOJ attorneys should communicate.
4. No corporate resolution will protect individuals from civil or criminal liability.
5. Corporate cases not resolved without clear plan to resolve individual cases before SOL expires; declinations memorialized.
6. Civil attorneys should consistently focus on individuals as well as company and evaluate suit against individual beyond simply ability to pay.

Concerns re: Yates Memo

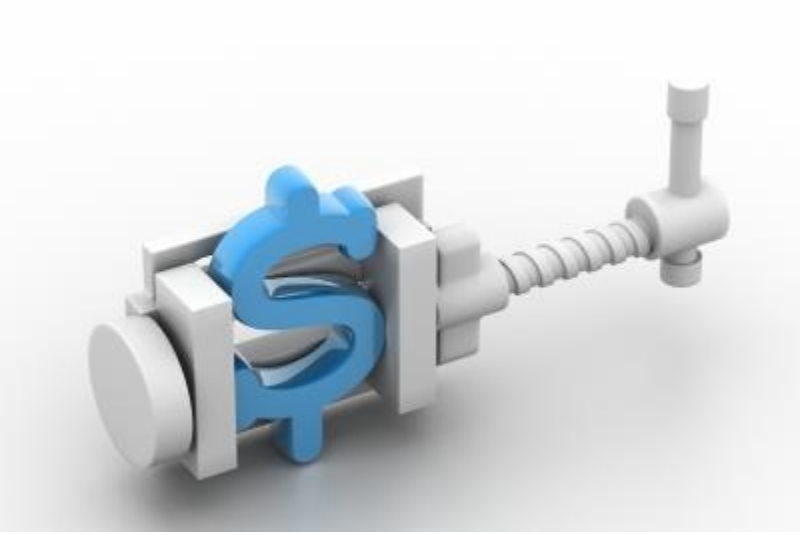
- May discourage internal investigations
- Creates potential conflicts for in-house and outside counsel
- May need more independent board involvement in investigations
- May need to use outside counsel more
- Impact on internal controls
- Importance of addressing matters promptly and appropriately

60-day Rule

- Failure to report and repay an identified overpayment by a federally funded program can lead to FCA exposure
- *Kane v. Continuum Health Partners, Inc.*, SDNY
  - Provider must report and repay Medicare and Medicaid overpayments within 60 days after put on notice of the potential overpayment, *not* 60 days after overpayment is quantified
- The issue was delay in addressing the potential overpayment
- Otherwise, "perverse incentive" to delay quantifying issues
- ". . .prosecutorial discretion would counsel against the institution of enforcement actions aimed at well-intentioned healthcare providers working with reasonable haste to address erroneous overpayments."

Payment Holds

- “Credible Allegation of Fraud”
- No meaningful process to contest
- Lasts for entire investigation
- Result: Presumed guilty until they put you out of business



Credible Allegation of Fraud

Credible allegation of fraud. A credible allegation of fraud may be an allegation, which has been verified by the State, from any source, including but not limited to the following:

1. Fraud hotline complaints.
2. Claims data mining.
3. Patterns identified through provider audits, civil false claims cases, and law enforcement investigations. Allegations are considered to be credible when they have indicia of reliability *and the State Medicaid agency has reviewed all allegations, facts, and evidence carefully and acts judiciously on a case-by-case basis*.

42 CFR 455.2 (*Medicaid*); 42 CFR 405.370 (Medicare)

What Prudent Organizations Should Do

- Increased Board involvement in compliance matters
- Assess Compliance Program, under privilege
- Enhance compliance resources and processes
  - Code of Conduct, Compliance Officer, policies, education, auditing and monitoring, responses to concerns, hotline, etc.
- Focus on Medicaid and managed care issues
- Investigate concerns completely and independently
- Respond appropriately and promptly to potential issues
- Use qualified counsel and consultants engaged by them
- Pragmatic self-disclosures and collaboration may be the best course to protect an organization, even if wrongly accused

Discussion

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