Responding to Investigations: How to Ensure Effective Compliance When Facing Scrutiny

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Overview

> Enforcement Agencies and Landscape
> Statutes
> Government Procedure
> Internal Investigations
> Responding to Government Action
> New Enforcement Agenda?
> Conclusion
Enforcement Agencies

U.S. Department of Justice (DOJ)

- Commitment to prosecute healthcare fraud
  - Criminal/Civil/Antitrust Divisions
  - Consumer Protection Branch
  - Healthcare fraud coordinators within 94 United States Attorneys' Offices
  - Federal Bureau of Investigation
  - Drug Enforcement Agency
  - Partnerships with private payors

- Distinct funding sources
Other Enforcement Players

- Local District Attorneys
- Offices of Inspector Generals
  - Federal and State
- Medicaid Fraud Control Units
- Centers for Medicare and Medicaid Services
- Medicaid State agencies
- Tricare Management Authority
- Federal/State contractors
- Commercial “Special investigative units”
- Licensing boards
- Whistleblowers

Enforcement Landscape
Government Activity

> Big budget for enforcement
  - $672 million for Health Care Fraud and Abuse Program
  - ROI at least $5 to $1
> DOJ Recovery in 2016
  - Total $4.7 billion (up from $3.8 billion in 2015).
    ▪ $2.5 billion paid from healthcare industry
    ▪ $2.9 billion from whistleblower cases
      • Whistleblowers received a record $519 million.

Notable 2016 Settlements

> Wyeth and Pfizer, Inc.: $784.6 million
  - Allegation that Wyeth underpaid drug rebates to Medicaid for drugs used to treat acid reflux
  - Largest health care settlement of 2016
> Olympus Corp. of the Americas: $646 million
  - Allegation that Olympus paid kickbacks to doctors and hospitals in exchange for the purchase of endoscopes and other medical and surgical devices
Notable Settlements, continued

> Novartis Pharmaceuticals Corp.: $410 million
  - Allegation that Novartis paid kickbacks to specialty pharmacies to promote distribution of certain drugs
  - Novartis agreed to expand an existing CIA to include its specialty pharmacy relationships and extend agreement by five years

> Millennium Health: $260 million
  - Allegation that Millennium:
    ▪ Billed Medicare, Medicaid, and other federal programs for excessive and unnecessary urine drug and genetic testing; and
    ▪ Gave free items to physicians to obtain lab tests in violation of the Anti-Kickback Statute (AKS) and the Stark Law

OIG-HHS Activity

> Creation of Health Care Fraud Prevention and Enforcement Action Team
  - New laws and tools for government to combat fraud, waste, and abuse

> In June 2015 announced formation of new affirmative litigation team to focus exclusively on pursuing civil monetary penalties and exclusions
  - Doubles number of litigators to bring cases
  - Team will review FCA cases as sources of potential enforcement actions
Measuring Compliance Program Effectiveness: A Resource Guide

- Known as the Compliance Guide
  Product of a January 2017 roundtable between OIG and HCCA professionals
- Provides health care organizations with an "idea bank" for measuring the elements of their compliance programs
- The Compliance Guide is not a checklist—organizations should select measures that are practical to their effectiveness reviews in any given year

The Compliance Guide: Seven Elements

- Standards, Policies, and Procedures
- Compliance Program Administration
- Screening and Evaluation of Employees
- Communication, Education, and Compliance Training
- Monitoring, Auditing, and Internal Reporting Systems
- Discipline for Noncompliance
- Investigations and Remedial Measures
DOJ's Yates Memorandum

> Yates Memo (9/9/2015): “Individual Accountability for Corporate Wrongdoing”
> Emphasizes DOJ’s commitment to combat fraud “by individuals.”
> Recommends:
  - Not to give cooperation credit unless company provides facts re: individuals
  - To focus investigations on individuals “from the inception”
  - Not to release “culpable individuals” from liability absent “extraordinary circumstances”
  - Not to settle with company without “clear plan to resolve related individual cases”

A New Era?
Future Investigations Outlook

> State and federal enforcement actions rising
  - Increased *Qui tams* in 2016
> Medicare insolvent in 15 years
> State budget shortfalls
> Federal and commercial rules remain complex
> Demonstrating effective compliance is crucial
> Increasing attempts to ensure individuals accountable

ACA and Enforcement

> Patient Protection and Affordable Care Act
  - Enacted March 23, 2010
> Amendments to Anti-Kickback statute
  - Rejects stringent definition of knowledge
  - Violations result in falsity under the False Claims Act (FCA)
    - FCA violations can occur even if claim was submitted by an “innocent” third-party
> Clarification of sentencing guidelines
  - Presumption intended loss is value of claim, not actual payment
Changing Political Makeup and the Potential Effect on False Claims and Anti-Kickback

> A new administration could ease Yates policy and other agencies could follow lessening individual liability

> Change in Supreme Court
  - Could weaken interpretation of Escobar and what is “material” to a false claim
  - 100 vacancies for federal judges

Changing Political Makeup, continued

> Congress recently passed repeal and replace of ACA, but outcome on FCA remains uncertain
  - Public Disclosure Bar
    - Removed express reference to jurisdictional nature of public disclosure bar
    - Gave government the ability to object to dismissal due to the public disclosure bar
    - Narrowed categories of what constitutes as “public” disclosure
      - Repeal could expand the protections of this defense
    - Provided relator with a lower standard to qualify as an “original source”
Changing Political Makeup, continued

Outcome on FCA remains uncertain

- 60-Day Rule: A person who has received an overpayment must report and return such overpayment within 60 days after overpayment was identified
  - Repeal could cause confusion over timing and what qualifies as “overpayment”
- Provided violation of Anti-Kickback constitutes a false claim
  - Repeal could weaken government’s implied certification argument

Overview of Healthcare Statutes
Health Care Fraud Statute

> Federal criminal statute for public AND private health care fraud, 18 U.S.C. § 1347
> Knowingly and willfully execute/attempt a scheme or artifice to:
  - Defraud health care benefit program; or
  - Obtain by false or fraudulent pretenses property under custody/control of program in connection with delivery or payment for items or services
> 10-year imprisonment, restitution, and fine

The Federal Anti-Kickback Statute

> Criminal statute, 42 U.S.C. § 1320a-7b(b)
  - Remuneration is anything of value
  - One Purpose Test
> Recommend or arrange for items/services under federal programs
  - Includes non-clinicians
  - State analogs may limit kickbacks in cash/private plans
> Greater compliance with safe harbor generally means less risk
  - Advisory Opinions address industry concerns
> Forms basis for civil liability
> Must be commercially reasonable
FCA

> A false claim or statement for payment to the United States 31 U.S.C. § 3729(a)
  - Conspiracy
  - “Reverse” false claims is the knowing retention of a known overpayment
> Claim must be submitted "knowingly"
  - Actual knowledge
  - Deliberate ignorance
  - Reckless disregard
  - No specific intent to defraud required
> Other state/federal law violations may be bases for liability

FCA, continued

> Six-year statute of limitations
  - Three years from date material facts are known or reasonably should be known by responsible official
  - DOJ is the official, not agent
  - Not more than 10 years after the violation
> Remedies
  - Damages not required
  - If found liable, mandatory treble damages and penalties
  - Attorneys’ fees and costs
> Increased penalties for violations after Nov. 2, 2015
  - Minimum per claims penalties: $10,781 from $5,500
  - Maximum per claim penalties: $21,563 from $11,000
Statutory Considerations

> Civil (31 U.S.C. § 3729)
  - Either USAG or a relator (whistleblower) may bring FCA cases
  - *Qui tam* provisions filed under seal
    - DOJ has 60 days to intervene
    - Awards relator 15-30% recovery + attorneys fees
  - 6 year SOL and 3 year tolling provision
  - 29 states and D.C. have adopted a statute equivalent to FCA
  - Remedies: Mandatory treble damages and civil monetary penalties between $10,781 and $21,563 per false claim

> Criminal

FCA *Qui tam* Provisions

> Relator files case on behalf of government
  - Under seal for at least 60 days as DOJ reviews and usually longer
  - May pursue without DOJ involvement
  - Protected from retaliation under section 3730(h)

> Plead with particularity under Rule 9(b)

> Relator entitled to share of proceeds
  - 15 – 25% if government joins
  - 25 – 30% if government declines

> Procedural defenses
  - Public disclosure bar
  - First-to-file rule
Dodd-Frank

- Dodd-Frank Wall Street Reform and Consumer Protection Act enacted on July 21, 2010
- Established “bounty” for reports by whistleblowers could receive 10-30% of the monetary sanctions over $1,000,000 collected
  - Has to be based on the original information provided by the whistleblower
  - See 15 U.S.C. § 78u-6(b)(1),
- A whistleblower is “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission [SEC], in a manner established, by rule or regulation, by the Commission [SEC]”
  - See Section 15 U.S.C. § 78u-6(a)(6)

Types of FCA Cases

- Fraudulent Billing
- Anti-Kickback Statute Violations & Stark schemes – physician salaries, discounted office space, etc.
- Pricing fraud – “Best Price” AWP fraud, best value, 340(b) diversion
- “Off-Label” marketing
- Switching schemes
- Hospice – ineligibility
- Nursing home worthless services
- Nursing home inflation of RUG scores/medically unnecessary
- Unnecessary lab testing – especially urine testing for opioids
- Manufacturing standards
- Other medical necessity claims
  - Ambulance
  - DME rentals
  - Home health
Stark Law

> Prohibits self-referrals for federal business, 42 U.S.C. § 1395nn
  - Must involve physician referral
  - Designated health services
  - Medicare and Medicaid only
  - Ownership interest or compensation arrangement
  - Generally must be commercially reasonable and fair market value
  - State law may limit non-Medicare business agreements

> Strict liability
  - Must fully satisfy statutory or regulatory exception

> Remedy is payment disallowance
  - Exclusion and CMP liability
  - May be violation of FCA

Civil Monetary Penalties Law

> HHS-OIG administrative remedy, 42 U.S.C. § 1320a-7a(a)
  - Permissive exclusion and money damages for specific violations like payment or receipt of illegal kickbacks

> Mirrors FCA but not governed by civil rules of procedure or evidence
  - Limited discovery
  - Hearsay admissible

> OIG usually releases this authority in exchange for compliance obligations
Government Procedure

Risk Areas

> False/fraudulent claims
  - Billing for items or services not rendered
    - Upcoding and product substitution
  - Misrepresenting nature of items or services
    - Seeking reimbursement for unallowable costs

> Retention of overpayments
  - Refusal to return erroneous payments

> Improper financial relationships/referrals
  - Sham compliance with safe harbor or exception
  - Excessive payments

> Insufficient documentation of work performed
Sources of Investigative Cases

- Partnering by enforcement agencies
- Data mining
- Initiatives, working groups, and task forces
- Competitor complaints
- Patient/family complaints
- Self-disclosures
- Whistleblowers
- Social media
- Traditional media

Internal Investigation Triggers

- Hotline calls
- Reports to management or compliance
- Vendor communications
- Departing employees
- Industry rumors
- News articles
- Subpoenas or other government requests
- Government interviews of employees or related parties
- Private litigation
Government Investigations

> Parallel proceedings are simultaneous civil/criminal/administrative investigation of same defendants
  - Usually jointly handled
  - Can be federal and state/local or multi-district
> Examples
  - Procurement fraud
  - Financial frauds
  - Healthcare fraud
  - Asset forfeiture actions
  - Drug diversion
  - SEC and antitrust investigation

U.S. v. Jacques Roy: Dallas Doctor Guilty of Nation’s Biggest Home Health Care Fraud Scheme

> Roy certified around 11,000 Medicare patients as part of a nearly $400 million home health care scam
  - Alleged “swapping” to certify so he could see homebound patients
  - Largest medical necessity case in Texas
> Roy recruited some patients — including some of Dallas’ homeless to submit fraudulent health care claims
> In April 2016, Roy convicted of:
  - 8 counts health care fraud
  - 2 counts for making false statements to law enforcement
  - 1 count obstruction of justice
  - 1 count conspiracy to commit healthcare fraud
Investigations, continued

> Surveillance
> Consensual monitoring
> Qui tams
> Data analytics
> Interviews
> Search warrants
> CIDs
> Subpoenas
  - Grand jury
  - Inspector General
  - AID (HIPAA)
> Requests for information

Investigations, continued

> Obtain information
  - Claims/contracts/payments
  - Interview
> Issue warrant, subpoena, or request
  - Internal/external correspondence/e-mails
  - Policies/practices
  - Specific claims/patient files
> Review information gathered
  - What is knowledge/intent?
> Determine how to proceed
  - Civil/criminal/administrative or parallel
What to Do When facing an Investigation

Preliminary Assessment

> Have an initial discussion of the issues with the point of contact and other relevant individuals
> Goals should be to get information on the background and context of the issue, the identity of individuals with relevant information, and the business concerns of the client
> Recognize that the information received likely is incomplete and inaccurate
> Scope should be dynamic dependent upon findings, needs to be consistently reassessed
Corrective Action

> Critical step
> Disciplinary actions
> Training
> Policy revisions
> Corrective communications
> Culture adjustments
> Monitoring and implementation
> Evidence of the Above?

Leading Practices 101

> Tracking all reports/assessments
> Documenting investigation plan
> Preservation of information
> Protections to ensure confidentiality
> Conducting investigation
> Determining scope of disclosure
> Reporting of conclusions/findings to appropriate parties
> Corrective actions for responsible persons/departments
> Discipline of bad actors
> Non-retaliation reinforcement
> Taking remedial measures (repayment or disclosure)
Repayment and Disclosure

> FIRST fix any problems
> Federal law requires repayment of known overpayments within 60 days
  - CMS issued final rule at 77 Fed. Reg. 9179 (Feb. 16, 2016)
> Disclosure to DOJ
  - Possible non-prosecution of business entity
    - See USAM § 9-28.000, et seq.
    - Limited civil FCA multiplier
      - See False Claims Act § 3729
> HHS-OIG Self-Disclosure Protocol
  - Lower damages/no integrity obligations
> CMS Voluntary Self-Referral Disclosure Protocol
  - Do not disclose both to CMS and OIG
  - Use OIG protocol if implicates other laws

Resources for Enforcement Information

> Advisory opinions
> Published cases
> OIG Compliance program guidance publications
> State and federal work plans/audits/evaluations
> Settlement/integrity agreements
> Press releases
> GAO reports
> Comments/preambles to safe harbors/exceptions
Outcomes and Remedies

Possible Outcomes of an Investigation

> Suspension of payments
> Termination from gov't programs
> Civil recoveries from responsible parties
> Criminal convictions and restitution
> Exclusion/debarment/revocation
> Licensing board action
> Compliance or integrity obligations
> *Cost of responding*
> *Loss of business/goodwill/morale*
Criminal Resolution of Investigations

- Indictment/information and conviction:
  - Public allegations and trial
  - All questionable past statements/actions raised
  - Billed, not paid, amount drives loss
  - Special enhancements for fraud
  - "Relevant conduct" increases sentence/fine
  - Automatic exclusion/debarment
  - Collateral estoppel under FCA
  - State and private liability

Civil or Administrative Resolution

- Civil action and fraud judgment:
  - Mandatory trebling/penalties
  - Most evidence admissible
  - To avoid self-incrimination = increase risk/liability
  - State and private liability
  - Agencies usually seek permissive exclusion/debarment

- Administrative proceedings and adverse finding
  - Multiple programs/agencies
  - Rules of evidence not applicable
  - Negative impact on civil/criminal case
Outcome - U.S. v. Jacques Roy

> Sentencing
- Roy lost medical license and faces more than 80 years in prison
- Each conspiracy and fraud count has statutory penalty of 10 years in federal prison and $250,000 fine
- Obstruction of justice and each false statement have a maximum penalty of five years in federal prison and $250,000 fine

> Raising suspicion
- OIG said Roy came to the agency’s attention following a data analysis targeting suspicious billing.
- Most physicians to refer fewer than 100 patients for home health services but Roy had “by far” submitted the most Medicare claims in the nation for home health services
- This type of data analytics is routinely used to find outliers
- Large majority of “innocent” home health agencies were suspended due to association with Roy.
  - Most out of business now

Concluding Thoughts
Takeaways

> Implement an effective compliance program
> Assess status - target, witness or subject
> Get ahead of government's investigation
> What is scope of representation
  - Does anyone need separate counsel (Yates Memo)
  - Has anyone talked to the Government
  - Invoke insurance coverage
> Evaluate ALL liability - criminal, civil, admin, state, licensure, and private
> Strategy has implications for parallel case

Remember Compliance Matters

> If an organization is found guilty of a violation of state or federal laws, the government may offer a reduction in penalties if an effective compliance program is in place
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