



Why Compliance? Navigating a Fraud Investigation

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What we intend to cover

1. Staying Ahead of the Curve: Creating an internal disclosure program
2. How a strong compliance program can strengthen your defense
3. Benefits of parallel internal investigation

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Internal Disclosure Program



Key Elements of Success

Buy-in of senior management;

Training of all employees;

Clear policies and procedures; and

Documentation of all compliance activities.



Disclosure Program Structure

Multiple reporting streams

- Toll-free compliance telephone line
- Private email or intranet-based mailbox
- Directly to Compliance Department
- Within and outside the chain of command

Do you use an independent contractor/intermediary?

Do you collect additional information?

Do you inform individuals when their report has been closed?



Duty to Report

May report: any identified issues or questions associated with the Provider's policies, conduct, practices, or procedures.

Expected to report: suspected violations of any Federal health care program requirements

- What about near-misses?

How do you know all communications reach the Compliance Department?



Publicize the Disclosure Program

Appropriately publicize the existence of the disclosure mechanism (e.g., via periodic e-mails to employees or by posting the information in prominent common areas)

- What about patients? Vendors?

Emphasize a nonretribution, nonretaliation policy

- Is non-retaliation embraced at all levels?

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Investigation

Make sure the report is as clear and complete as possible.

- Gather all relevant information from the disclosing individual
- Make a preliminary, good faith inquiry into the allegations

Conduct an internal review for any disclosure that is sufficiently specific so that it reasonably:

- (1) Permits a determination of the appropriateness of the alleged improper practice; and
- (2) Provides an opportunity for taking corrective action

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Corrective Action

PEOPLE

- Talk with human resources
 - Education and training
 - Note on employment record
 - Impact bonus pay
 - Probation, supervision
 - Demotion
 - Termination
- Avoid scapegoating

PROCESSES

- Root cause analysis
- Engage business leaders in designing solutions
- Confirm the solution works
- Is there an overpayment?
 - If yes, timely quantification.
- Should the Provider self-disclose?

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Self-Disclosure

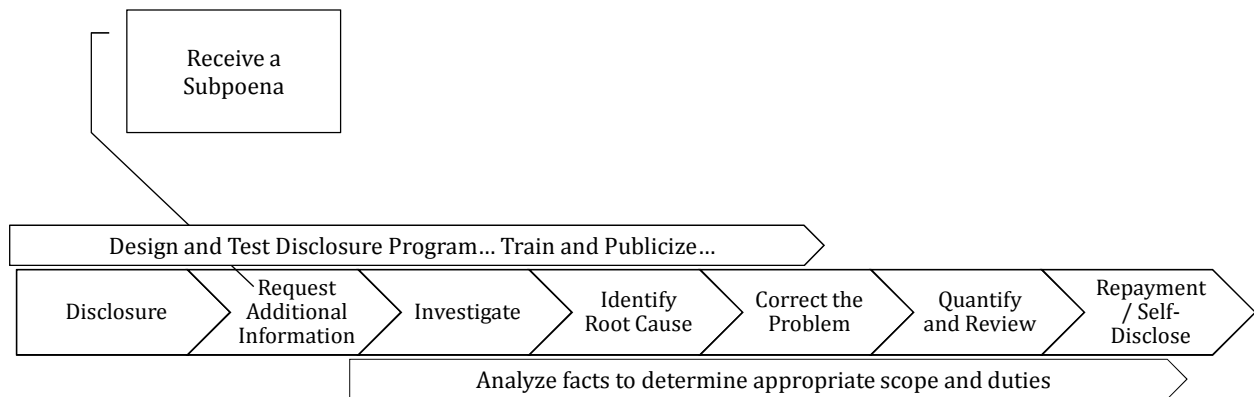
- Benchmark 1.5 multiplier
 - Claims Calculation
 - All claims or statistical sample of 100 claims minimum
 - Use point estimate (not lower bound)
 - Excluded persons – salary and benefits-based proxy for damages
 - AKS – remuneration-based
- Presumption of no CIA
- Six-year statute of limitations
- Tolling of the 60-day period after submission



New DOJ Cooperation Memo



Risk Mitigation





Formal DOJ Considerations

Effectiveness of reporting mechanism– Does the company use information gathered in the internal reporting system?

Properly scoped investigation by qualified personnel – Independent and comprehensive investigation.

Any response to the investigation by the company – Does the company incorporate findings in to actions and policies and procedures?



How a strong compliance program can strengthen your defense



What is a strong compliance program?

Based on the Seven Elements and OIG Compliance Program Guidance

- | | |
|---|--|
| <ol style="list-style-type: none">1. Written policies, procedures and standards of conduct.2. Designating a compliance officer and compliance committee.3. Training and education.4. Effective lines of communication.5. Internal monitoring and auditing.6. Enforcing standards through well-publicized disciplinary guidelines.7. Responding promptly to detected offenses and undertaking corrective action. | <p>Nursing facilities
Hospitals
Pharmaceutical manufacturers
Ambulance suppliers
Hospices
Durable medical equipment
Third-party billing companies
Clinical laboratories
Home health agencies</p> |
|---|--|



Benefits of Robust Corporate Compliance Program

1. Detect Noncompliance Early
2. Lesser Criminal Penalties for an Organization under the Federal Sentencing Guidelines
3. Potentially Mitigates Corporate Liability, Resulting in Reduced Civil Penalties Imposed by OIG or DOJ
4. Evidence that the Board is Meeting its Fiduciary Duty (Reducing Risk of Personal Liability for Board Members)



Sentencing Guidelines

Provides for a reduction in criminal fines in cases where:

- the organization has an effective program to prevent and detect violations of the law
- the organization reported the violation promptly
- the organization cooperated with the government
- the organization accepted responsibility for the violation

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Remediation of Underlying Conduct

Conduct a root cause analysis – what was the underlying cause of the conduct at issue?

Early indications – were there any missed opportunities prior to the detection of the fraud?

Remediation – did the company undertake robust remediation measures after the fraud was detected?

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Key Compliance Considerations

Compliance culture – Has the company traditionally taken compliance concerns seriously.

Stature of compliance – How senior a role is the compliance function? Is compliance key to strategic and operational decision-making? Is compliance input valued?

Compliance experience – Has the company invested in hiring an experienced and well-qualified compliance officer?

Autonomy – Does compliance have the room to raise issues with the board or senior management?

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Key Compliance Considerations

Empowerment – Has compliance traditionally been able to modify company behavior in response to compliance concerns?

Funding and resources – Has compliance had sufficient resources to implement a meaningful program?

Outsource compliance functions – Was compliance outsourced in a way that made meaningful compliance challenging?

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Benefits Of Parallel Investigation

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Worst Settlement Question

How were we supposed to know?

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Where to begin?

First, analyze any records requests.

If you have a disclosure log, go back and check that.

- Has anyone reported retaliation for identifying a problem to human resources?

Ask your employees to report anything that might be relevant.

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Steps to Internal Investigation

Review key records;

- Policies, procedures, billing records, emails.

Speak with potential fact witnesses;

- Don't overlook any potential witness

Review decision-making processes; and

Summarize findings in document.

- Identify ways to prevent issues in the future.

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Thanks for the tall tale.



Picture courtesy of the National Parks Department.

Pictured: the Bemidji, Minnesota Paul Bunyan and Babe the Blue Ox statues (National Register of Historic Places)

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FOR IMMEDIATE RELEASE

Wednesday, November 1, 2017

Mercy Hospital Pays \$1,514,000 to Settle False Claims Act Allegations

“Mercy cooperated with the investigation. In addition, Mercy and EMHS implemented enhanced internal compliance measures in response to the overbilling issue. Federal and state authorities encourage health care providers to cooperate with its investigations of the possible submission of improper claims to federal and state programs.”

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Five Defendants Pay Over \$8 Million To Resolve Civil Fraud Allegations That They Billed Medicare And Medicaid For Unlicensed And Unnecessary Inpatient Detoxification Services

STIPULATION AND ORDER OF SETTLEMENT WITH BENEDICTINE HOSPITAL

Benedictine offered its complete cooperation to the United States and the State of New York with respect to its disclosure to some of the information related to this matter before Benedictine became aware of Civil Actions I and II (which at the time were under seal) or of any investigation into this matter by the United States or the State of New York.

Benedictine has disclosed to the United States and the State of New York the factual information uncovered in its investigation into this matter and responded to inquiries of the United States and the State of New York concerning this matter.



DOJ Resources

US Department of Justice, Evaluation of Corporate Compliance Programs (February 2017), *available at* <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

US Department of Justice, Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual (May 7, 2019), *available at* <https://www.justice.gov/opa/pr/department-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual>.