CHS

Stark and Anti-Kickback Statute Training

Sanford Teplitzky at steplitzky@bakerdonelson.com

Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
Who’s Looking for Fraud?

- Centers for Medicare and Medicaid Services (CMS)
- Office of Inspector General (OIG)
- Federal Bureau of Investigation (FBI)
- Department of Justice (DOJ)
- United States Attorneys’ Offices (USAO)
- State Attorneys General Offices
- State Medicaid Fraud Control Units (MFCUs)
- Medicare Contractors
- Private Insurance Companies
- Private Organizations under Contract with OIG
- Medicare and Medicaid Program Beneficiaries
- Qui Tam Relators, including Employees, Former Employees, and Competitors
Enforcement Remains Aggressive

DOJ/OIG Report for FY 2016

- $3.3 billion in recoveries
- 975 new criminal health care fraud investigations
- Criminal charges filed in 480 cases involving 802 defendants
  - 658 defendants convicted of health care fraud
- 690 new civil health care fraud investigations
- 3,635 individuals and entities excluded
Coordinated Enforcement Efforts

- CMS Opened Program Integrity Command Center in Baltimore in 2012
  - $3.6 million facility equipped with dozens of computer workstations, giant screens and new computerized detection systems.
Growing Use of Data Analytics

- CMS developed Fraud Prevention System
  - Computer program that uses predictive analytics to identify and prevent improper claims
  - In first year, “stopped, prevented or identified” $115 million in fraudulent payments
  - Flags from the system helped to initiate 536 new investigations
Areas of Government Concern in Fraud & Abuse Law

• Additional Cost
• Over, Under, and Mis-Utilization
• Quality of Care
• Access to Care
• Patients’ Freedom of Choice
• Competition
• Exercise of Professional Judgment
Stark Law

- Physicians may not refer:
  - Medicare or Medicaid patients
  - For “designated health services”
  - To an entity with which the physician or
    - An immediate family member has
  - A “financial relationship”
  - Unless the arrangement meets ALL of the elements of an applicable exception
Common Elements of Exceptions

- Arrangement must be in writing and signed by the parties
- Include all identifiable services, space, etc.
- The timeframe for the arrangement is specified
- The compensation is specified and must be set in advance
- Fair market value – objective element
- Commercially reasonable – subjective element
- Compensation cannot be determined in a manner that takes into account the volume or value of referrals or other business generated by the referring physician
Anti-Kickback Statute

• Federal anti-kickback law generally prohibits the provision of any economic benefit in exchange for the referral of patients or business that will be reimbursed under any Federal health care program.
  – 42 U.S.C. § 1320a-7b(b)

• Not just referring patients
  – Recommending or arranging for purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program
Anti-Kickback Statute (cont’d)

- “Two-way Street”
  - Paying a kickback is illegal
  - Accepting a kickback is illegal

- Payment not required
  - Offering a kickback is illegal
  - Soliciting a kickback is illegal
Anti-Kickback Statute (cont’d)

• Violation of the Anti-Kickback Statute is a felony
  – Criminal fines up to $25K; prison up to 5 years
  – ALSO: Civil Money Penalty exposure
  – ALSO: Exclusion from all federal health care programs
    ▪ economic death penalty
False Claims Act

• Prohibits:
  – “Filing, or causing to be filed” false or fraudulent claims
  – Making a false record or statement to get a claim paid
  – Using a false statement to “conceal, avoid or decrease” an obligation to the government (to repay)
False Claims Act (cont’d)

• Violations of Anti-kickback Statute or Stark Law serve as predicate for FCA liability

• Specific “intent to defraud” is not required
  – Actual knowledge, deliberate ignorance, or reckless disregard of claim’s truth or falsity is sufficient
False Claims Act (cont’d)

• Qui Tam Provisions
  – “private attorneys general”
  – Can proceed even if Government declines
  – Can receive up to 30% of recovery

• Liability
  – Treble Damages
  – Used to be: $5,500 to $11,000 per claim
  – Now: $10,957 to $21,916 per claim
Recent Cases and Settlements

• Tuomey Healthcare System
• Halifax Hospital Medical Center
• North Broward Hospital District
• Adventist Health System
• BayCare Health System
Tuomey Healthcare System

- **Whistleblower**: Disgruntled surgeon who refused the hospital’s employment offer

- **Allegation**: Part-time employment of specialists violated the Stark law
  - Paid above fair market value
  - Compensation varied with or took into account the value or volume of referrals

- **Magnitude**: Government alleged over 21,000 tainted referrals and $44,888,651 from Medicare

- **Result**: $237.5 Million in 2013 (litigated); $72 Million 2015 (settlement)
Halifax Hospital Medical Center

- **Whistleblower:** Former compliance employee
- **Allegation:** Nine employed physicians compensated in violation of the Stark law
  - Paid above fair market value
  - Compensation varied with or took into account the value or volume of referrals
- **Magnitude:** Government alleged that the prohibited referrals resulted in the submission of 74,838 claims and overpayment of $105,366,000
- **Result:** $85 Million (settlement)
North Broward Hospital

- **Whistleblower:** Surgeon who was offered employment
- **Allegation:** Compensated violated the Stark law
  - Above fair market value
  - Commercially unreasonable due to practice losses
  - Hospital generated reports that tracked referral profits and was used to “take into account the volume and value of referrals” when establishing compensation
- **Result:** $69.5 Million (settlement)
Adventist Health System

- **Whistleblowers**: Current employees
- **Allegation**: Employed physicians paid for referrals in violation of the Stark law
  - Paid above fair market value
  - Paid doctors’ bonuses based on the number of test and procedures they ordered
  - Improper non-monetary compensation
    - Paid for the leases of a BMW and Mustang for a surgeon
- **Result**: $115 Million (settlement)
Physician Arrangements

- Employment
- Recruitment
- Personal service agreements
- Call coverage
- Office leases
- Non-monetary compensation
- Medical Director agreements
- Hospital-based services
Fraud Alert to Physicians

OIG alleged that compensation paid to physicians under the medical directorship arrangements constituted improper remuneration under the anti-kickback statute

- Payments took into account the physicians’ volume or value of referrals
- Payment did not reflect fair market value for the services to be performed
- Physicians did not actually provide the services called for under the agreements
- Arrangements relieved physicians of financial burden they otherwise would have incurred
DOJ Memorandum on Individual Accountability for Corporate Wrongdoing

- September 9, 2015
- Similar to multiple OIG statements/initiatives
- Why
  - Deters future illegal activity
  - Incentivizes changes in corporate behavior
  - Ensures that proper parties are held responsible
  - Promotes public confidence in judicial system
Examples

• Often, one’s actual intent can be determined from contemporaneous documents/statements
  – Letters/e-mails that include inappropriate (and hopefully unintended) statements/promises regarding referrals
  – Verbal statements accompanied by a wink and a nod

• Remember that actions speak louder than words
  – What you do is the best indication of what you meant
The Real World

• You cannot control how a listener /reader will interpret what you say/write
  – What is said/written may be different that what is heard/read
  – There is no font that adequately identifies humor/sarcasm

• In fact, upon reflection, you may question what you intended to say/write
  – Did I say that out loud?
  – I didn’t really mean what I wrote – or did I?

• In some cases, what you say/write may not be credible
  – Saying things that you don’t mean to people who don’t believe you
Takeaway Points

• Land minds for the unwary

• Providers should formally document all financial relationships with referring physicians in a signed written agreement before any services are provided or any space or equipment is used

• Parties must adhere to the terms of the agreement

• Arrangements with physicians must be for real and meaningful services, leases, equipment
Takeaway Points (cont’d)

• Document purpose and intent of relationship, highlighting non-referral business reasons – answer the “why” question

• Fair market value analysis should be based on the Stark law definition of fair market value

• Document the provision of services

• Long-term arrangements should be reviewed periodically for compliance
Four Certainties

- It is not illegal to covet referrals, it is illegal to pay for them

- There are no secrets in the world

- You cannot hit “delete” enough times to make it go away

- The “e” in e-mail stands for evidence