MID-SOUTH MGMA
COMPLIANCE CHALLENGE AHEAD
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Denise D. Burke
901-680-7321
Denise.burke@butlersnow.com

Fraud and Abuse Trends

Historically
- FRAUD = Intentional conduct, billing for services not provided

Last Decade
- FRAUD = Intentional improper billing/payment

Currently
- FRAUD = Failure to return an overpayment within 60 days

Near Future
- FRAUD = Failure to ensure compliance systems

Methods of Government Detecting Fraud

Historically
- Informants, Whistleblowers, Hotlines

Last Decade
- Risk of random review, error rate measurement, quality assessment

Currently
- Data integration, mining, analysis

Near Future
- All of above + Beneficiary Bounty Hunters

Players For Detecting Fraud

Historically
- FIs – Fiscal Intermediaries (Medicare Part A)
- Carriers (Medicare Part B)
- PROs – Peer Review Organizations
- GIOs – Quality Improvement Organizations

Players For Detecting Fraud

Currently
- OIG – HHS Office of Inspector General
- FBI – Federal Bureau of Investigation
- DOJ – Department of Justice
- MFCU – Medicaid Fraud Control Units
- State Agencies
- Administrative Contractors
  - MACs – Medicare Administrative Contractors
  - PSCs – Program Safeguard Contractors
  - ZPICs – Zone program Integrity Contractors
  - RACs – Recovery Audit Contractors
  - MEDICA – Medicare Drug Integrity Contractors
  - RVGs – Recovery Audit Validation Contractors
  - QICs – Qualified Independent Contractors
  - MRCs – Medicaid Integrity Contractors
  - HHS – Federal Medicaid Integrity Group (engages MRCs)

Enforcement Options

- Criminal Actions
- Jail, $,
- Exclusion (corporate death sentence)
- DPA
- Civil Actions
- Intent based: Federal anti-kickback law
- Strict liability: The Stark Law
- Civil Monetary Penalties ($): up to 3x amount claimed or $10,000 for each item or service improperly claimed
- Exclusion = Death Sentence
- CIA
- Administrative Actions
- Suspension
- Pre-payment review
- Post-payment review
- Recoupment
**Results of Increased Enforcement**

- OIG Simi-annual report to Congress (Oct. 2012-March 2013)
  - 14,663 providers and suppliers excluded from Medicare over the past two years (2.5 times previous 2 years)
  - First half of FY 2013, OIG reported recoveries of about $3.8 billion (over 4x expected amount)

**Warning**

- Physician Payment Sunshine Act
  - Mandatory disclosure and publishing of payments between manufacturers and physicians
- Mandatory overpayment refund rule
  - Implementing 60-day overpayment refund law
- 10 year Lookback Revised!
- Mandatory compliance programs for providers
- HIPAA
  - Modification of Breach definition
**HIPAA**

**Consequences of Noncompliance Under the Modified Enforcement Rule**

<table>
<thead>
<tr>
<th>Violation Category</th>
<th>Each Violation</th>
<th>All Such Violations of an Identical Provision in Calendar Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did Not Know</td>
<td>$100-$50,000</td>
<td>$1.5 million</td>
</tr>
<tr>
<td>Reasonable Cause</td>
<td>$1,000-$50,000</td>
<td>$1.5 million</td>
</tr>
<tr>
<td>Willful Neglect*, Corrected within 30 Days</td>
<td>$10,000-$50,000</td>
<td>$1.5 million</td>
</tr>
<tr>
<td>Willful Neglect*, Not Corrected within 30 Days</td>
<td>$50,000</td>
<td>$1.5 million</td>
</tr>
</tbody>
</table>

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**Settlement Trends – HIPAA**

- Increase in cases and settlement amounts:
  - BCBS Tenn: $1.5M (loss of 57 hard drives)
  - A Phoenix cardiology practice: $100,000
  - South Shore Hospital: $750,000 (lost back-up tapes)
  - Alaska Medicaid: $1.7M (stolen USB drive)
  - Accretive Health: $2.5M (laptop theft)
  - Anthem BC: $150,000 (lost data)

- First security rule settlement: Hospice of No. Idaho: $50,000 for lack of computer security process

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**Increased Focus on Individuals**

We intend to “alter the cost-benefit calculus of the corporate executives who run these companies. By excluding the individuals who are responsible for the fraud, either directly or because of their positions of responsibility in the company.”

We have “the authority to exclude every officer and managing employee of a sanctioned entity.”

-- OIG

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**Increased Focus on Individuals**

- Criminal Prosecution of Enron/Arthur Anderson
- Innocent people lost jobs and pensions
- Settlement Agreements
  - CIAs/DPAs allow companies to continue to operate (with large $ settlement): saves jobs
- Does it deter misconduct?
- Individual Liability/Responsible Corporate Officer Doctrine
Increased Focus on Individuals

- **Responsible Corporate Officer Doctrine/The Park Doctrine:** United States v. Park (1975)
  - Criminal Liability under Food, Drug & Cosmetic Act
  - "Responsible Corporate Officer"
  - Power to Prevent Improper Conduct
  - Failure to Prevent
  - Neither Knowledge or Negligence Needed
  - Assumption that Misconduct Cannot Occur Without Individual Involvement

Who is a “Responsible” Corporate Officer?

1. US Supreme Court held the FFDCA imposes strict liability on corporations and individual defendants.
2. The government is not legally required to show that an individual defendant knowingly committed the violations.
3. Decisions regarding who is the “responsible corporate officer” are left to “the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries.”

Aggressive Enforcement Actions Demand Strong Compliance Infrastructure

- Prevent
- Correct
- Audit

OIG's Historical Seven Elements of an Effective Compliance Program

- Implementing written policies, procedures and standard of conduct;
- Designating a compliance officer and compliance committee;
- Conducting effective training and education;
- Developing effective lines of communication;
- Enforcing standards through well-publicized disciplinary guidelines;
- Conducting internal monitoring and auditing;
- Responding promptly to detected offenses and developing corrective action.

Evidence of Expanding Compliance Obligations (Beyond the Original OIG Seven Elements)

- OIG Guidance and Statements Regarding Individual Responsibility
- OIG Guidance to Directors
- Responsible Corporate Doctrine Expansion
- PPACA
  - Nursing Facilities Must have established Compliance Programs by March 23, 2013
  - DHS failed to issue guidance as required by 2012, however statutory implementation deadline has not changed
  - New a Condition of Participation in Medicare – not voluntary
  - Apply at the enrolled ‘entity’ level
- CIAs/DPIs
- Mandatory Compliance Programs

Evidence of Expanding Compliance Obligations For Boards (Beyond the Original OIG Seven Elements)

- CIA BOD Certifications: The Board of Directors (or authorized subcommittee thereof) has made a reasonable inquiry into the operations of Company Compliance Program. Based on its inquiry and review, the Board has concluded that, to the best of its knowledge, Company has implemented an effective Compliance Program to meet Federal health care program requirements, FDA requirements, and the obligations of the CMA, Cephalon (2008), Bayer (2008), Lilly (2009), Aventis (amended 2009), Golden Living Center 2012.
  - Require Boards to arrange for the performance of a review on the effectiveness of Compliance Program.
  - Require Boards to hire external Compliance Consultants
Evidence of Expanding Compliance Obligations For Boards (Beyond the Original OIG Seven Elements)

- "Reasonable oversight" includes remaining informed about:
  - compliance program outcomes;
  - governmental compliance enforcement activity such as Notices of Non-Compliance and more formal sanctions;
  - results of internal and external audits;
  - open/closed corrective action plans (track and review);
  - corrective action appropriately and timely implemented and tested for effectiveness

Evidence of Expanding Compliance Obligations

OIG Element: Implement Written Policies, Procedures and Standard of Conduct

PPACA Clarification: Must have established standards and procedures to be followed by employees and other agents ... reasonably capable of reducing violations

OIG Element: Delegate a Compliance Officer and Compliance Committee

PPACA Emphasis: High-level personnel assigned responsibility must have sufficient resources and authority

Evidence of Expanding Compliance Obligations

OIG Element: Conduct Effective Training and Education

PPACA Emphasis: Must communicate effectively its standards and procedures to all employees and agents such as by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required

Practical Steps:
- Individuals at all levels and subcontractors must be trained
- Adherence with Training Schedule must be reported to the BOD
- Failure to complete training should impact employee/manager performance review

Evidence of Expanding Compliance Obligations

OIG Element: Developing Effective Lines of Communication

PPACA Emphasis: Must have in place and publicize a reporting system where employees and other agents can report violations without fear of retribution

Practical Application:
- Ensure well-publicized non-retaliation policy
- Board should receive reports on hotline reports

Evidence of Expanding Compliance Obligations

OIG Element: Enforcing Standards through Well-Publicized Disciplinary Enforcement

PPACA Emphasis: Standards must have been consistently enforced through appropriate disciplinary mechanisms, including discipline of responsible individuals for failure to detect an offense

Practical Application:
- Database of all compliance related disciplinary actions?
- Can you query the database?
- Consequences for repeat offenders?
- Queried prior to promotions and intercompany transfers?
- Performance evaluations:
  - Is discipline consistent with violations?
  - Does a committee review disciplinary action?
  - Is aggregate action reported to Board?

Evidence of Expanding Compliance Obligations

OIG Element: Conducting Internal Monitoring and Auditing

PPACA Emphasis: Must have taken reasonable steps by using monitoring and auditing systems reasonably designed to detect violations by employees and agents

Practical Application: Are Audits and Internal Review Results Available and Reported to the BODs?
- Are reviews proactive or exclusively reactive?
- Are there corrective Action Plans? Have they been successful?
- Are background checks performed and exclusion lists queried?
**Evidence of Expanding Compliance Obligations**

**OIG Element:** Responding Promptly to Detected Offenses and Developing Corrective Action

**PPACA Emphasis:** Must have taken all reasonable steps to respond appropriately and to prevent similar offenses, including necessary modifications to the Compliance Program

**Practical Application:**
- After each problem, assess if a change could have prevented it
- Are resources appropriately allocated
- Provide information to the Board in the format that makes it easiest to process
- Periodic external evaluation

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**Action Item: Training for All BOD and Management**

- **Government Will Hold Executives Responsible**
- **Tone at the Top is Important**
  - Make sure BOD and Top Management are Trained
  - Make Sure BOD/Management Commitment is Documented, Communicated and Reflected
  - Emphasize Responsibility to Each Person who Reports
- Boards/Management Need Information on Effectiveness
  - Dashboards
  - Metrics
  - Compliance Consultant
  - Executive Session with CCO

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**Action Item For The BOD: Always Include an Executive Session with the Compliance Officer (See OIG Toolkit for BOD)**

- Do you believe that the Company’s Compliance Program is operating effectively?
- Do you have the necessary resources to implement appropriate compliance measures?
- Do you believe that there is an appropriate “tone at the top” regarding the Company’s commitment to compliance?
- Do you agree with the resolution of any compliance hotline reports resolved since the last Board meeting?
- Has anyone attempted to influence the information that you provide to this committee or to the Board?

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**SVMIC is Your Friend**

- Financial Assistance with Audits/Investigations

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**Q & A**