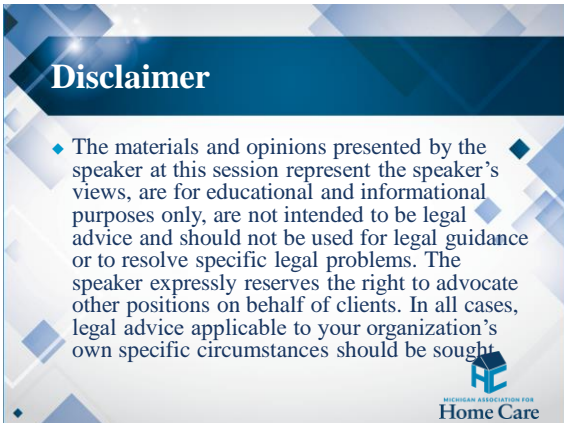




1



2



3

Why Compliance is Important

- ◆ Enforcement is increasing across home health and hospice:
 - ◆ Audits and Government Investigations
 - RCD, RACs, TPE, SMRC, TPE...
 - ◆ Civil suits and Qui Tam actions
 - Continues to be primary fraud enforcement tool
 - ◆ Criminal prosecutions
 - DOJ guidance and memos, task forces, etc.



4

Why Compliance is Important

Homecare is heavily regulated:

- ◆ 1. Conditions of Participation and licensure requirements.
- ◆ 2. Medicare, Medicaid and other payer requirements.
- ◆ 3. State and federal fraud and abuse laws
- ◆ 4. Patient privacy – HIPAA, state privacy laws, etc.

This means there are many potential opportunities for non-compliance and this list only covers health care laws.



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Why Compliance is Important


- ◆ Even unintentional non-compliance can lead to recoupments, extrapolations, payment suspensions, FCA lawsuits and criminal prosecutions.
- ◆ Paying back money places a significant strain on companies.
- ◆ The costs of challenging these matters can be expensive and take years.
- ◆ Payment suspensions can bankrupt a company.



6

Why Have a Compliance Program?


- ◆ U.S. Sentencing Guidelines – it is a mitigating factor
- ◆ Government expects you to have one.
- ◆ Avoiding issues through compliance costs less than non-compliance.
- ◆ An effective corporate compliance program may allow you to avoid a corporate integrity agreement.
- ◆ An effective corporate compliance program can lead to reduced penalties.
- ◆ Avoid whistleblowers – have concerned employees come to you first.



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Why Compliance is Important

- ◆ Government activity intended to identify fraud, waste and abuse as well as to recover overpayments has been increasing steadily.
- ◆ With the increasing number of auditors, investigators, relators and others, it is increasingly likely that non-compliance will be detected.



8

Increasing Enforcement



9

Enforcement Environment


- ◆ Home health has been under intense scrutiny for many years. That scrutiny has continued.

Owner of Home Health Company Convicted of \$2.8M Medicare Fraud Scheme – DOJ press release, September 2023

"Home health company with Southwest Virginia clients charged with fraud" – Roanoke Times, January 9, 2024

"South Carolina home care employees submit fake timecards, cheat Medicaid system, AG says", WYFF, Greenville, SC December 2023

"Massachusetts home care company indicted for alleged \$1.6M Medicare fraud", WWLP.Com, November 20, 2023.



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Enforcement Environment

- ◆ Home health has been under intense scrutiny for many years. That scrutiny has continued.

NY's \$6 billion consumer home care Medicaid program in Gov. Hochul's crosshairs after years of fraud and abuse.
NY Post, February 16, 2024

Review Choice Demonstration – part of CMS' effort to move away from pay and chase.

DOJ Strikeforces – result of home health fraud in Florida. Have expanded and continued in force.



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Enforcement Environment is Changing


- ◆ In the past, Hospice was considered a "good" industry. Relatively low suspicion from government and public. THIS IS CHANGING.

"Missed Visits, Uncontrolled Pain And Fraud: Report Says Hospice Lacks Oversight"
- Washington Post, July 2018

"Large Scale Fraud" and lax oversight plague California's hospice industry, audit finds" – Los Angeles Times, March 29, 2022

"Man Pleads Guilty to \$3.1 Million Medicare Fraud Scheme" – DOJ, April 2023 (hospice)


"Texas Hospice Medical Director Sentenced for \$150 Million Hospice Fraud Scheme" – DOJ, September 2023



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Enforcement Environment is Changing


- ◆ According to CMS data, 69% of hospices that were certified in 2023 were located in Arizona, California, Nevada and Texas.
- ◆ This activity seems to be an indicator of fraud. For example, there are numerous cases of multiple hospices allegedly being located at the same location.
- ◆ This continues a trend, especially in California.
- ◆ CMS has taken a number of actions in response.



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Enforcement Environment is Changing


- ◆ MedPAC has noted that in 2017, the overall Medicare outlay for hospice was \$17.9 Billion. However, for patients whose LOS was >180 day, Medicare spent \$10.1 Billion, or *more than half of the total Medicare Hospice Spend.*
- ◆ The trend of Medicare spending a significant portion of the overall hospice spend on beneficiaries with an LOS > 180 days has been consistent over the past several years.
- ◆ LOS is a significant area of auditor/investigator focus.



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Enforcement Environment is Changing


- ◆ The result is that OIG and MedPAC are more concerned about Hospice. This has resulted in an increase in the scrutiny of Hospice. Because hospice is growing in terms of beneficiaries, for-profit agencies and total Medicare spend, it has drawn more attention to itself.
- ◆ Hospices can no longer rely on the deferential treatment hospice providers used to receive.
- ◆ Hospice providers must treat fraud and abuse/compliance seriously.



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Basic Federal Fraud and Abuse Laws


- ◆ There are several federal laws that address “fraud and abuse”. It is important to be aware of these laws. Violating these laws can lead to significant penalties, false claims act liability and even criminal convictions.
- ◆ These laws can impact your billing practices, marketing practices, contractual relationships, and other aspects of your operations.
- ◆ It is important to understand these laws and what they prohibit.



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Basic Federal Fraud and Abuse Laws


- ◆ Brief overview of the following laws:
- ◆ The Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b);
- ◆ Physician Self-Referral Law (Stark), 42 U.S.C. § 1395nn;
- ◆ The Civil Monetary Penalties Statute, 42 U.S.C. § 1320a-7a; and,
- ◆ The False Claims Act 31 U.S.C. §§ 3729, et. seq.



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Anti-Kickback Statute


- ◆ The Anti-Kickback Statute prohibits offering, accepting, soliciting or giving any remuneration as an inducement to refer or a reward for referring federally reimbursable health care business.
- ◆ Although commonly referred to as the “Anti-Kickback Statute”, the statute prohibits more than what is commonly considered a kickback.



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Anti-Kickback Statute


- ◆ Violation of this statute is a **FELONY** punishable by fine of up to \$25,000 and/or imprisonment for up to five years.
- ◆ Both sides of the “transaction” are committing a felony.
- ◆ Reimbursement for referrals that violate the AKS are subject to recovery under the Federal False Claims Act.
- ◆ AKS is the most common claim for health care FCA cases.



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Anti-Kickback Statute


- ◆ One Purpose Test – remuneration may have many purposes, but if one is to induce or reward referrals, that is enough.
- ◆ Specific Intent Not Required – don’t have to know you are violating statute.
- ◆ Safe Harbors – affirmative defenses.



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The Physician Self Referral (Stark) Law

- ◆ The Stark Law prohibits physician referrals of **designated health services** to entities with which the physician has a financial relationship.
- ◆ Home Health services **are** designated health services.
- ◆ Hospice services **are not** designated health services.
42 CFR 411.351



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The Stark Law and Regulations


- ◆ Stark law – payment prohibition, not criminal. Includes significant civil penalties
- ◆ Stark law – strict liability, *no intent required*
- ◆ Exception – similar to Safe Harbors. Key difference – intent does not matter. **Meet all elements or no protection.**



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Civil Monetary Penalties Statute


- ◆ Allows the Federal Government to impose monetary penalties on providers for a number of activities:
 - ◆ Anti-Kickback violations
 - ◆ Stark violations
 - ◆ Beneficiary inducements – similar to AKS, but only for remuneration to beneficiaries



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Definition of Remuneration


- ◆ Under the CMP statute, remuneration “includes the waiver of coinsurance and deductible amounts (or any part thereof), and transfers of items or services for free or for other than fair market value.”
 - ◆ 42 U.S.C. § 1320a-7a(i)(6)
- ◆ OIG has interpreted remuneration to exclude items or services of “nominal value.” Nominal value is \$15 per item per person up to \$75 per person annually.



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False Claims Act


- ◆ The False Claims Act is the main fraud enforcement tool for healthcare Fraud and Abuse violations. It allows the government and/or private citizens acting on behalf of the government to bring actions to recover "false claims".
- ◆ Claims do not have to be actually false. False claims includes a number of types of claims.
- ◆ Government/Relator can recover reimbursement paid, attorneys fees and "liquidated damages." Relator keeps a percentage.



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False Claims Act


- ◆ False in the FCA:
 - ◆ Factually false – billed for services you did not provide.
 - ◆ False representations – service provided as billed, but provided in way that did not comply with regulatory requirements.
- ◆ Materiality is key in these cases.



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False Claims Act (cont'd)


- ◆ The False Claims Act applies to a number of inappropriate activities. Reimbursement received for referrals that violated the AKS or Stark laws can be the basis for a False Claims Act. FCA has a much lower burden of proof.
- ◆ This is important when thinking about financial relationships with referral sources. Improper financial relationships can lead to False Claims Act liability. Any gains from such an improper relationship will be far outweighed by the losses from a FCA lawsuit.



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Exclusion from Participation

- ◆ Another remedy available to the government is exclusion from participation in federal programs. Certain fraud and abuse matters can lead to the government seeking to exclude the provider (and individual owners, executives, etc.) from participation in federal health care programs.
- ◆ Exclusion will end your career in health care




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Fraud and Abuse Laws

Each of these laws has a key element in common – exchanging remuneration – with referral sources and beneficiaries.

This can impact a number of areas of operations:


- ◆ Leases (when referral source owns office space)
- ◆ Medical director relationships
- ◆ Staffing agreements (with referral sources)
- ◆ Marketing – referral bonuses, discounts, marketing materials, etc.
- ◆ Relationships with referral sources – professional courtesy, etc.



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Freebies, giveaways and other “traditional marketing”

- ◆ Traditional marketing can be very risky for Medicare/Medicaid/Waiver providers



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Freebies, giveaways, and other stuff


- ◆ In many, many, industries, free stuff, discounts, coupons, gifts and other giveaways are quite common:
 - ◆ 1. Buy one get one free
 - ◆ 2. Black Friday
 - ◆ 3. Free Disney+ with phone contract
 - ◆ 4. Airline and Hotel Points
 - ◆ 5. Credit cards with points, miles, cashback, etc.
 - ◆ 5. Amazon Prime – free shipping, free Prime Video, etc.
- ◆ Each perk or reward is designed to get you to use their product(s).



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Freebies, giveaways, and other stuff

- ◆ In the world of Federal healthcare reimbursement this is **ILLEGAL**.
- ◆ The Anti-Kickback Statute specifically prohibits offering anything of value as an inducement to refer or a reward for referring. The one purpose test makes this extremely broad.
- ◆ CMP statute applies the same analysis to beneficiaries.
- ◆ Home health providers cannot employ giveaways, discounts, etc. without significant risk.




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Freebies, giveaways, and other stuff

This applies to a number of areas in homecare marketing:

- ◆ 1. Meals provided to referral sources.
- ◆ 2. Gifts to beneficiaries
- ◆ 3. “Professional Courtesy”
- ◆ 4. Staff “helping out” at facilities
- ◆ 5. Raffles and contests with giveaways.


Anytime you think of providing something of value to potential referrals sources, you must think about Kickbacks and compliance.



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Freebies, giveaways, and other stuff

- ◆ One applicable safe harbor: Minimal Value.◆
- ◆ OIG has stated that it will not pursue matters involving remuneration to referral sources or to beneficiaries that involve “minimal value.”
- ◆ Minimal value is defined as \$15/per item up to a maximum of \$75/per person/per year.




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Freebies, giveaways, and other stuff

Agencies that rely upon this safe harbor must keep track of expenditures. You will need to prove later that you stayed within the limits.

Where minimal value can apply:


- ◆ 1. bringing food to a meeting with referral sources.
- ◆ 2. giving away mugs, pens, calendars
- ◆ 3. certain “health fair” or other educational endeavors.



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Freebies, giveaways, and other stuff

- ◆ When serving food as part of a presentation to a referral source or to residents of a facility, need to document expenses. **KEEP ALL RECEIPTS.**
- ◆ Agency will need to prove later that food costs were less than \$15/person.
- ◆ If you have more than one meeting with the referral source or facility, will need to track each one to show total expenditure was less than \$75/person/year.




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Freebies, giveaways, and other stuff

Compliance Program:


- ◆ 1. Require marketing team to obtain approval before providing anything of value to a referral source/beneficiary.
- ◆ 2. Require marketers track expenses **and submit receipts.**
- ◆ 3. Require marketers track attendance at event.
- ◆ 4. Set a budget for these types of expenses.
- ◆ 5. Compliance keeps copies of all expense reports, receipts, etc.



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Freebies, giveaways, and other stuff


- ◆ Giveaways and freebies may involve “services”.
- ◆ For more than 20 years, OIG has stated that offering free services to beneficiaries as an inducement to choose a provider or switch providers is illegal.
- ◆ When assessing the value of a “service,” need to consider both the objective value of the service and the subjective value of any service to the beneficiaries.



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Free Services


- ◆ **IMPORTANT:** OIG has relied upon not only objective value, but the beneficiary’s subjective perception of value to determine value was not minimal.
- ◆ **YOUR COST TO PROVIDE THE SERVICE MAY NOT BE DECISIVE!**
- ◆ Beneficiary perception is relevant to OIG analysis.



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Free “Staffing”


- ◆ Your staff providing care in a facility (ALF, ILF, SNF) can become a significant source of remuneration. This comes from your staff doing things around the facility that should be done by facility staff. They may call this a professional courtesy or helping out, but it is not your staff’s role.



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Free “Staffing”


- ◆ This issue can come up in HHA/Private Duty relationships with ALFs and ILFs. It can also come up in hospice relationships with ALFs and SNFs.
- ◆ It can also occur with your staff at hospitals and physicians’ offices.
- ◆ Your staff may feel pressure to “help out” in order to keep a referral source happy.



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Free “Staffing”

- ◆ Example: ALF asks Home Health agency to be its “preferred provider.” As part of its role, ALF suggests HHA should keep a nurse at the facility 24/7 hours due to the large number of HHA patients in the ALF.
- ◆ ALF then advertises nurses’ availability.
- ◆ Issues: Is ALF now a SNF? HHA RN is benefiting ALF, but ALF incurs no costs. This is remuneration.
- ◆ OIG will see this as being done to induce or reward referrals.



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Free "Staffing"

- ◆ Example: Agency staff on hospital campus to gather documents needed to admit patients. The agency staff may be asked to meet with patients to answer questions about home health. Staff may be asked to assist with discharge planning or meet with patients prior to discharge to discuss home health as an option.
- ◆ This can be extremely problematic.



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Free "Staffing" - Compliance

- There are several steps agencies can take to protect against this issue: ◆
- ◆ 1. Monitor your staff in facilities. Make sure that they are only doing their jobs.
 - ◆ 2. Make the limits clear to your staff. For example, providing a dos and don'ts list.
 - ◆ 3. Educate facility on limits and risks.



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Other Freebies

- ◆ Example: Agency providing physicians or other referral sources with cell phones, fax machines, etc. in order to ensure "care coordination."
- ◆ Problem: If the communication device is capable of being used for more than communicating with the facility, then providing it is remuneration.




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Other Freebies

BOTTOM LINE


- ◆ Any effort to induce or reward referrals that involves providing anything of value needs to be carefully considered before it is put into place.
- ◆ Referrals that result from a tainted relationship – kickbacks – are false claims under the FCA



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Leasing space in facility


- ◆ Facilities will, upon occasion, ask the agency to lease space in their facilities. They will suggest this as a benefit to the agency, due to the volume of business.
- ◆ They will suggest it as an office for your staff to use. They may even suggest it as a branch office.



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Leasing space in facility


- ◆ Leasing space from a referral source creates a financial relationship with a referral source. If even one purpose of a lease payment is to induce or reward referrals, then it is a kickback.
- ◆ This means you need to carefully consider this relationship.
 - ◆ Why this space?
 - ◆ Why this location in service area?
 - ◆ Relationship to parent/branches?
 - ◆ Referrals?



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Leasing space in facility


- ◆ Lease MUST fit into the safe harbor for leasing space. ◆
- ◆ Two Key issues:
 - ◆ 1. Is the lease commercially reasonable, without any consideration of the volume or value of referrals from the facility?
 - ◆ 2. Is rental amount fair market value? If ALF is offering a residence, FMV is FMV for similar quality office space in same area, not for living space.



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Leasing space in facility


- ◆ Lease safe harbor has other elements.
- ◆ Best practice is to consult with counsel. Have counsel:
- ◆ Verify relationship fits into safe harbor
- ◆ Prepare contract that meets the elements
- ◆ BE CAUTIOUS. BE PREPARED TO SAY NO.



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Marketing Bonus Programs and Compliance


- ◆ Be careful! You get what you pay for. ◆



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Marketer Bonuses and Compliance


- ◆ Many homecare providers pay bonuses to marketers. These bonuses need to be paid in a manner that complies with state and federal wage and hour laws.
- ◆ More importantly, they must comply with federal fraud and abuse laws.



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Marketer Bonuses and Compliance


- ◆ Providers don't often think of it like this, but a marketer paid to generate referrals of Medicare business.
- ◆ Overlook this aspect, because paying salespersons commissions is common throughout the U.S.
- ◆ Marketing bonuses are compensation that is directly tied to the volume or value of Medicare/Medicaid business that the marketer generates. This means you must consider compliance.



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Marketer Bonuses and Compliance


- ◆ Marketers can be either employees or contractors.
- ◆ How they are classified is extremely important to whether or not your bonus program is compliant.



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Marketer Bonuses and Compliance

- ◆ **OIG has repeatedly stated that independent contractors cannot be paid commissions.**
- ◆ **YOU CANNOT PAY INDEPENDENT CONTRACTORS ANY FORM OF REFERRAL BONUS.**
- ◆ **Marketer performance bonuses are only an option for bonafide employees!!!!**




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Marketer Bonuses and Compliance

Bonafide Employee Safe Harbor

- ◆ For AKS purposes, the term remuneration “does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs.”




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Marketer Bonuses and Compliance

Bonafide Employee Safe Harbor

- ◆ **OIG uses the IRS test to identify bonafide employees.**
- ◆ **If you employ your marketers (they are employees for IRS purposes), this safe harbor allows you to pay them bonuses for generating referrals.**
- ◆ **OIG recently issued an opinion that relied upon this safe harbor.**



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Marketer Bonuses and Compliance

IMPORTANT: You need to consider how your bonus program is structured.

- ◆ What incentives does it create for your marketers?

CLINICIANS MUST TOTALLY CONTROL ADMISSION DECISIONS.

- ◆ Clinicians may feel pressure to admit so that marketers make their goals. **AGENCY MUST PREVENT THIS.**




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Marketer Bonuses and Compliance

Also need to consider wage and hour issues related to bonuses:

- ◆ 1. Marketers exempt or non-exempt?
- ◆ 2. If non-exempt, properly applying bonuses to overtime.



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MEDICAL DIRECTORS AND OTHER PHISICIAN RELATIONSHIPS



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Homecare and Physicians


- ◆ A home health agency may opt to have a medical director
- ◆ Hospices are required to have one.
- ◆ The medical director will usually have a separate practice and be in a position to refer patients to the home health agency.
- ◆ These physicians will expect to be compensated for their efforts. This is a financial relationship with a referral source.



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Medical Directors


- ◆ Need to ensure relationship fits into an AKS safe harbor AND (for home health) a Stark Exception. Safe harbor overlaps with a stark exception.
- ◆ Two applicable safe harbors:
 - ◆ Bonafide Employee Safe Harbor (DISCUSSED ABOVE)
 - ◆ Personal Services and Management Contracts Safe Harbor



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Homecare and Physicians


- ◆ Personal Services Safe Harbor/Stark:
 - ◆ The safe harbor and Stark exception can be utilized when addressing contractual relationships with referral sources.
- ◆ REMEMBER: Must meet all of the elements for safe harbor or exception to apply.



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Homecare and Physicians

- ◆ Personal Services Safe Harbor elements:
 - ◆ (1) Written agreement signed by both parties.
 - ◆ (2) Agreement covers all of the services for the term of the agreement and specifies the services to be provided.
 - ◆ (3) If services are intermittent agreement specifies schedule.
 - ◆ (4) Agreement for at least one year.
 - ◆ (5) Compensation set in advance, fair market value and does not take into account referrals.
 - ◆ (6) Services do not involve the counselling or promotion of illegal activity.
 - ◆ (7) Services are commercially reasonable.




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Homecare and Physicians

Stark exception is similar, but there are a couple of important differences. ◆

- ◆ 1. Because Stark is a strict liability statute, **CLOSE DOES NOT COUNT.**
- ◆ 2. This means that missing signatures are fatal to compliance with the Stark exception.


Stark does not require intent.



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Homecare and Physicians


- ◆ For medical director relationships, common issues:
 - ◆ 1. Fair market value of physician's fee.
 - ◆ a. Hourly rate above FMV – used OR rate, not admin. rate.
 - ◆ b. Monthly flat fee (stipend) without true up.
 - ◆ c. Failure to record hours worked.
 - ◆ d. Failure to document work performed.
 - ◆ 2. Commercial reasonableness.
 - ◆ a. Multiple medical directors.



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Homecare and Physicians


- ◆ Having the contract in place is not enough. Relationship must operate in compliance with contract. You must be prepared to prove compliance.
- ◆ **DOCUMENT. DOCUMENT. DOCUMENT.**
- ◆ Q: Can you prove what physician is doing, other than referring patients, to justify payments?



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Joint Ventures


- ◆ A joint venture is an arrangement where two entities come together to achieve a common business goal. Often one party has specific knowledge or experience and the other party has the necessary capital.
- ◆ In healthcare, the JV may be an effort between an entity in a position to make referrals to the JV and an entity that would, otherwise, compete with the JV.



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Joint Ventures

- ◆ When considering a JV between parties who can make or influence referrals to the JV or otherwise generate business for the JV, need to consider the AKS and (if physicians are involved) Stark.
- ◆ OIG has issued numerous bulletins and guidance documents over the years regarding JVs.
- ◆ OIG recognizes that JVs can be legitimate ways to provide needed healthcare services, but has also repeatedly raised concerns that the ROI from a JV can simply be a disguised kickback.




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Joint Ventures

OIG has identified several “red flags” for joint venture. Any of the following are a problem.

- ◆ 1. Party is expanding into a related business wholly dependent on referrals from party’s current business;
- ◆ 2. Party neither operates nor commits substantial resources;
- ◆ 3. Absent the JV, the contracting entity would be a competitor;
- ◆ 4. Payments to the party are based on referrals (Major Issue)



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Joint Ventures

Two JV models: contractual and ownership

- ◆ Contractual owner “creates” entity and contracts with manager to operate entity.
- ◆ Ownership. Entities come together to start entity. Each party has some ownership.




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Joint Ventures

Contractual JV, key considerations

- ◆ 1. Owner must really be an owner. Needs to have committed resources. OIG refers to this as having legitimate business risk.
- ◆ 2. Management agreement should fit into appropriate safe harbors. Meet all elements related to contractual relationships.
 - ◆ a. FMV compensation – formal opinion may be needed.
 - ◆ b. Commercially reasonable

Once established monitor operations to verify ongoing compliance.




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Joint Ventures

Ownership JV. There is a specific AKS safe harbor for ownership JVs. Ownership under Stark is more limited. This means many physician JVs may not be possible.


- ◆ AKS Small investment interest safe harbor.
 - ◆ Eight elements.
 - ◆ Need third party investor, to meet all eight elements.
 - ◆ That may not be fatal, if the other elements are met.
 - ◆ Key consideration – NO consideration of volume or value of referrals from investors.



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Joint Ventures


- ◆ When considering JV's with other providers, need to involve counsel early. Many issues to consider:
 - ◆ 1. Fraud/Abuse
 - ◆ 2. Legal Structure
 - ◆ 3. Governance...
- ◆ Involving counsel early will help to ensure JV does not violate applicable statutory or regulatory requirements.



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Joint Ventures


- ◆ Maintaining compliance during operation of the JV very important.
- ◆ When you establish the entity in light of statutory and regulatory requirements, as well as OIG guidance, you make it clear to OIG, DOJ, Relators, etc., that you know the correct way to operate.
- ◆ This is significant, because when entity drifts out of compliance, you cannot claim ignorance.
- ◆ JV must have ongoing compliance program. Need to identify and respond to non-compliance quickly.



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Fraud and Abuse in LTC Relationships


- ◆ OIG has issued a number of bulletins outlining its concerns about the risks in home health and hospice relationships with facilities. Concerns focus on risk agencies will offer inducements to “gain access.” Same concern applies to private duty.
- ◆ OIG concerned that homecare providers are willing to “bend the rules” to admit patients in order to gain or maintain access to facilities.



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Fraud and Abuse in LTC Relationships


- ◆ Risk areas:
 1. Facility asking HHA to admit ineligible patients.
 2. Facility requesting HHA provide a service that is covered by the facility’s reimbursement.
 3. Facility requesting HHA provide extra, medically unnecessary services.
 4. Facility requesting HHA use facility staff or related entity for staffing and provide excess services.
 5. Facility requesting HHA maintain a staffing presence on-site.



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Fraud and Abuse in LTC Relationships


- ◆ Example:
 - ◆ Home health agency providing services to residents of an ALF that receives Medicaid Waiver reimbursement. The reimbursement covers specific services. ALF requests that HHA provide services to residents that are covered by the Waiver per-diem.
- ◆ Problem: Appears that HHA and ALF are billing two different payers for overlapping services.



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Fraud and Abuse in LTC Relationships


- ◆ Other Examples:
- ◆ Facility requests HHA provide exercise class(es) to residents.
- ◆ Facility requests HHA provide excessive supplies for patients. Facility uses HHA supplies for other residents.
- ◆ Facility requests HHA staff to “help out” with other facility residents. This may sometimes be referred to as a professional courtesy.



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Fraud and Abuse in LTC Relationships

- ◆ Staff need to be clear on limits imposed by Fraud and Abuse law and HIPAA.
- ◆ Should not be looking at PHI of individuals who are not patients.
- ◆ Should be prepared to say no to improper facility requests. Staff should know agency will back them up.



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AVOIDING PROBLEMS



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Avoiding Problems


- ◆ TRAINING. Train, train, and retrain your marketing personnel. The pressure to go compete in home health and to “successfully” market, can lead marketing personnel to try to keep up with competitors. This can lead you into violations of federal laws.
- ◆ Training is key to compliance. If staff doesn’t know risk areas, policies & procedures, etc., how can they achieve compliance?



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Avoiding Problems


- ◆ For marketing compliance, your marketers, and certain clinical staff, are most likely to see or to be approached about suspect arrangements.
- ◆ They need to know where the lines are at to avoid crossing them. They need to know penalties for crossing lines.
- ◆ They need to know that your competitors probably have not vetted arrangements with their counsel



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Avoiding Problems

- ◆ Marketer training will focus on fraud and abuse. They need to really understand why marketing Medicare services is completely unlike marketing in other industries.
- ◆ They also need to understand your compliance program and to whom they should report concerns.
- ◆ Training is not a one-time in-service. It will be ongoing, at least annually, perhaps more.




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Avoiding Problems

- ◆ Make sure you have compliance oversight of new marketing categories and efforts.
- ◆ This allows compliance to intervene before a questionable marketing effort is implemented.

- ◆ If there are doubts about a plan, compliance may need to seek legal advice. Better to seek advice before, than to find out you were not compliant after.




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Avoiding Problems

- ◆ Make sure you have compliance oversight of new marketing categories and efforts.


- ◆ Compliance should have oversight of marketing materials. Your marketing materials should make requirements for eligibility clear. They should also make the services you can provide clear.



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Avoiding Problems

- ◆ Ensure arrangements meet applicable safe harbors **on paper and in practice**. Requires auditing of relationships.
- ◆ Safe Harbor/Exception dependent upon a contract?
- ◆ Verify appropriate contract in place.
- ◆ All elements present (especially for Stark law)?
- ◆ Is it signed by all parties?
- ◆ Fair market value.
- ◆ Commercially reasonable (space leased appropriate?)
- ◆ Documentation of payments AND services? Invoices, receipts, documentation of work performed, etc.




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Avoiding Problems

- ◆ **IMPORTANT:** If a contract is required for compliance, does contract expire? If so, you need to log expiration dates to be sure that you do not have a contract lapse. Lack of a written contract will take you out of compliance.


- ◆ **Best Practice:** auto renewing contracts. Contracts for Fraud and Abuse compliance are generally written to automatically renew each year. This avoids accidental non-compliance due to contracts expiring.



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Avoiding Problems


- ◆ Ensure arrangements meet applicable safe harbors on paper and in practice. Requires auditing of relationships.
- ◆ Minimal Value: Audit to verify compliance with the \$15/\$75 threshold.
 - ◆ Track expenditures.
 - ◆ Keep receipts, etc. Burden of proof is on HHA.
 - ◆ Process to stop marketers when the approach threshold
- ◆ Same process for Stark Non-Monetary Compensation Exception.



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Avoiding Problems


- ◆ Ensure arrangements meet applicable safe harbors on paper and in practice. Requires auditing of relationships.
- ◆ It is important to track and strictly apply the limits. Expenditures easy to prove.
- ◆ Review the expense logs at least quarterly. (Preferably more often.)
- ◆ Physicians – if you go over physician limit, have to ask physician to return money.



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Avoiding Problems

- ◆ Ensure arrangements meet applicable safe harbors on paper and in practice. Requires auditing of relationships.
- ◆ Remember: The burden will be on you to prove compliance with the safe harbor/exception. Your compliance efforts should be designed to generate this documentation.




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Avoiding Problems

When in doubt about a potential marketing practice or joint venture, seek the advice of counsel.


- ◆ Need counsel that understands fraud and abuse laws.
- ◆ When given advice, follow it. Consider obtaining a written opinion from counsel.
- ◆ If you don't like opinion, don't go looking for a "better opinion."



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Avoiding Problems

- ◆ Be careful when setting goals for staff/agency. Your marketing staff will focus on what gets bonuses. "Bad" goals can lead to compliance issues:
 - ◆ Admission bonuses to employees
 - ◆ Length of stay bonuses to employees
 - ◆ Readmission bonuses, etc.
- ◆ Need to set goals that lead to appropriate growth. Focus on agency performance, not just admission.




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Avoiding Problems

- ◆ Be careful when setting goals for staff/agency. ◆

IMPORTANT: WHENEVER NUMBER OF REFERRALS IS USED AS A METRIC TO DETERMINE BONUSSES, CLINICIANS MUST HAVE FINAL SAY ON ADMISSIONS.

CLINICIANS SHOULD NOT BE PRESSURED TO ADMIT PATIENTS!!!




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Avoiding Problems

- ◆ Addressing Competitors.
- ◆ Because of the competition in the homecare marketplace, your marketing staff may feel a great deal of pressure to keep up with your competitors. This can lead them to “innovate.”
- ◆ You must make sure your marketing staff (and maybe HR) understands the boundaries of competition and know when and where to go for guidance.

COMPLIANCE MUST BE INVOLVED IN NEW PLANS.




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Avoiding Problems

- ◆ Addressing Competitors.
- ◆ When approached by a referral source with a potentially violating arrangement **DO NOT HESITATE TO SAY NO.**


Educate the referral source about the potential problems and the penalties for the violation.
Explain that what they are proposing is illegal



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Avoiding Problems


- ◆ Addressing Competitors
- ◆ Make sure they understand that both parties to a violation of the AKS are committing a crime.
- ◆ If they tell you an arrangement is acceptable, request to see the opinion from their attorney.
- ◆ **REMEMBER: EVERYONE ELSE IS DOING IT IS NOT A DEFENSE!!**



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Questions to Ask About Arrangements


- ◆ Is one purpose of the arrangement to induce referral to either the practice or to another provider? (May be one among many purposes.)
- ◆ Is something being offered, directly or indirectly, to induce or reward referrals?
- ◆ Is what is being offered, or its amount, dependent in any way on the number of referrals or the volume of business generated?



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Questions to Ask About Arrangements


- ◆ Is there a safe harbor/exception for this proposal? Are we planning to follow the safe harbor/exception?
- ◆ If we are contracting, are we paying FMV? Are we contracting for a commercially reasonable amount? How do we know that?
- ◆ Remember: Many arrangements that are completely acceptable in the business world are illegal for a healthcare provider who accepts federal funds.



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Conclusion

- ◆ Marketing is an important component of a home health agency's operations. As the industry grows, it is becoming more and more competitive. This can result in pressure to cut corners.
- ◆ Despite that pressure, compliance is extremely important, because the referrals you may gain through a bad arrangement are far outweighed by the penalties that will result when you get caught.



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The End



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