

STRIVING FOR COMPLIANCE AND ETHICS EXCELLENCE

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Learning Objectives

Upon completion of this program, the participant will be able to:

- ❖ Understand the four components applicable to Compliance and Ethics Program Management
- ❖ Differentiate the relationship between Compliance and Ethics, risk management, and QAPI
- ❖ Discuss "Is the Healthcare Industry Fraudulent?" by participation in a case study

History of Healthcare Compliance and Ethics Programs



- ❖ In November 2024, the OIG issued Industry Segment-Specific Compliance Program Guidance for Skilled Nursing Facilities.

Department of Justice ⁽¹⁾

After the end of the Civil War, the increase in the amount of litigation involving the United States had required the very expensive retention of many private attorneys to handle the workload.

Congress passed the Act to Establish the Department of Justice, creating "an executive department of the government of the United States" with the Attorney General as its head.

Officially coming into existence on July 1, 1870, the DOJ was empowered to handle all criminal prosecutions and civil suits in which the United States had an interest.

To assist the Attorney General, the 1870 Act also created the Office of the Solicitor General, who represents the interests of the United States before the US Supreme Court.

Department of Justice (2)

The 1870 Act remains the foundation for the Department's authority, but the structure of the Department of Justice has changed over the years, with the addition of the offices of Deputy Attorney General, Associate Attorney General, and the formation of various components, offices, boards, and divisions.

Over the years the DOJ has evolved into the world's largest law office and the chief enforcer of federal laws.

Their mission statement says their purpose is to:

- Enforce the law and defend the interests of the United States according to the law
- Ensure public safety against threats foreign and domestic
- Provide federal leadership in preventing and controlling crime
- Seek just punishment for those guilty of unlawful behavior
- Ensure fair and impartial administration of justice for all Americans

Definition of Compliance

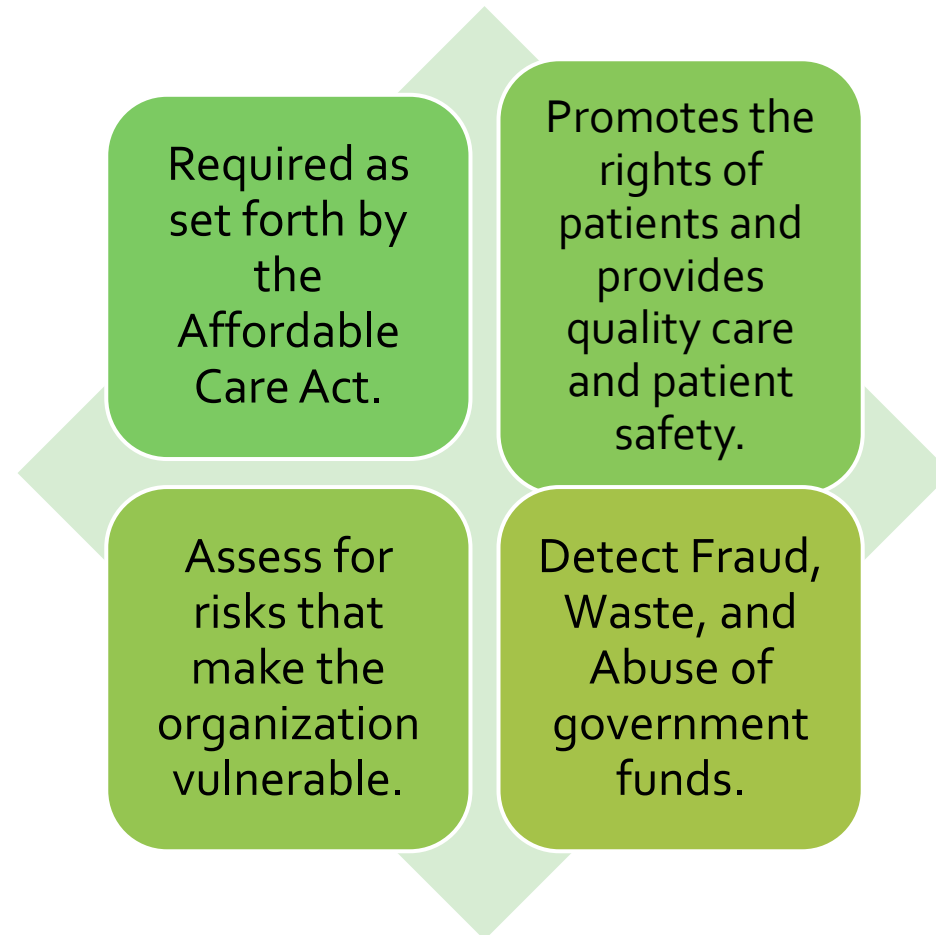
- ❖ The process by which an organization ensures that it observes and complies with the external statutory laws and regulations, including quality of care
- ❖ Compliance is a way of operating in which an organization follows internal policies, procedures, and controls designed to prevent, detect, and mitigate violations of applicable law, regulations, and ethical standards, such as fraud, waste, abuse, and inefficiency
- ❖ A key component to day-to-day operations
- ❖ Applies to all persons associated with the Company
 - Includes employees, executives, members of the Governing Body, appointees, associates, residents, and vendors

Compliance and Ethics

Compliance is driven by the government and relates to following the law.

Ethics is driven by the individual and relates to doing the right thing, even without a law.

Why is it important to have an effective Compliance and Ethics Program in Healthcare?



F895 Compliance and Ethics Program

❖ CMS definition:

- Compliance and ethics program means, with respect to a facility, a program of the operating organization that—
 - §483.85(1) Has been reasonably designed, implemented, and enforced so that it is likely to be effective in preventing and detecting criminal, civil, and administrative violations under the [Social Security] Act, and in promoting quality of care
 - §483.85(2) Includes, at a minimum, the required components specified in paragraph (c) of this section

CMS F895 Required Components of a Compliance and Ethics Program (1)

- ❖ Must have written compliance and ethics standards, policies, and procedures capable of reducing the prospect of criminal, civil, and administrative violations, and promoting quality of care, to include:
 - designation of an appropriate Compliance and Ethics Program contact (Compliance Officer) to which individuals may report suspected violations
 - alternate method of reporting suspected violations anonymously without fear of retribution
 - disciplinary standards that define the consequences for committing violations for the organization's entire staff, contractors, and volunteers, consistent with the volunteers' expected roles

CMS F895 Required Components of a Compliance and Ethics Program (2)

- ❖ Specific individuals within the high-level personnel of the organization with overall responsibility to oversee compliance with the organization's Compliance and Ethics Program's standards, policies, and procedures, such as, but not limited to:
 - The Chief Executive Officer (CEO)
 - Members of the Board of Directors
 - Directors of major divisions in the operating organization
- ❖ Sufficient resources and authority to the specific designated individuals to reasonably ensure compliance with those standards, policies, and procedures
- ❖ Due care not to delegate substantial discretionary authority to individuals who the operating organization knew, or should have known through due diligence, had a propensity to engage in criminal, civil, and administrative violations under the Social Security Act

CMS F895 Required Components of a Compliance and Ethics Program (3)

- ❖ Communicate the standards, policies, and procedures of the Compliance and Ethics Program to the entire staff, contactors, and volunteers, consistent with the volunteers' expected roles
- ❖ Mandatory participation in training or orientation programs, or disseminating information that explains in a practical manner what is required under the program
- ❖ Reasonable steps to achieve compliance with the program's standards, policies, and procedures, to include using monitoring and auditing systems designed to detect criminal, civil, and administrative violations by any staff, contractors, or volunteers
- ❖ Have in place and publicize a system for individuals to report violations by others anonymously without fear of retribution
- ❖ Ensure integrity of any reported data

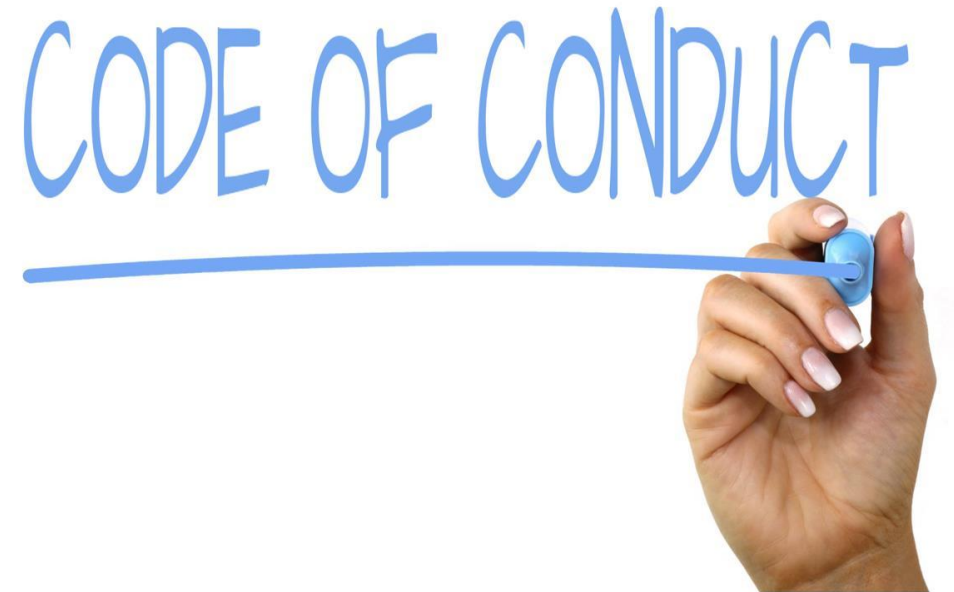
CMS F895 Required Components of a Compliance and Ethics Program (4)

- ❖ Consistent enforcement of company's standards, policies, and procedures through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for failure to detect and report a violation to the Compliance and Ethics Officer
- ❖ After a violation is detected, ensure that all reasonable steps are taken to respond appropriately to the violation and to prevent further similar violations, including any necessary modification to the Compliance and Ethics Program to prevent and detect criminal, civil, and administrative violations

Element 1- Standards, Policies, and Procedures

❖ Written policies and procedures must:

- Describe compliance expectations for fraud, waste, and abuse prevention and detection
- Maintain a Code of Conduct – this is the backbone of the compliance program
- Address non-retaliation, conflict of interest, confidentiality, privacy, anti-kickback, gifts and gratuities, and much more
- Policies and procedures are to be updated periodically



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Element 2 - Compliance Program Administration

- ❖ A designated Compliance and Ethics Officer oversees day-to-day operation of the compliance program and ensures the program includes mechanisms for reporting, monitoring, educating, interviewing, auditing, investigating, tracking, updating, and summarizing these activities
 - The Compliance and Ethics Officer does not have to perform all these duties personally, but must ensure that they are done



Element 2 - Compliance Program Administration (2)

- ❖ A designated Compliance and Ethics Committee assists the Compliance and Ethics Officer, and meets no less than quarterly to review and discuss reports on compliance activities
 - Additional staff may attend meetings when invited based on their expertise and the issue under review
 - Attendance is recorded for those present and absent
- ❖ Compliance and Ethics Committee members must:
 - Sign a confidentiality statement before serving on the Committee
 - Ensure the Program is maintained/improved to reflect the latest state, national, and industry standards
 - Recommend to management any revisions to existing or new policies that may be needed
 - Assist with responding to compliance issues and disciplinary actions

Element 2 - Committee Member Responsibilities

- ❖ Provide support and assistance to the Compliance and Ethics Officer, including:
 - Assist with implementation, coordination, and ongoing support of the Compliance Program.
 - Oversight of compliance activities, investigations, and corrective actions to address issues.
 - Assist with ongoing monitoring, investigating, and ensuring corrective procedures for compliance issues, including disciplinary actions.
 - Provide a compliance report to the Governing Body on a quarterly basis. (F837 – Governing Body)
 - Review and analyze reports of compliance activities and ensure follow-up.
 - Ensure that the facility meets the highest standards of compliance and ethics.
 - Participate in monthly Compliance and Ethics Committee meetings.

Element 3 – Communication, Education, and Training on Compliance Issues

- ❖ Participation in education and training is **MANDATORY** because compliance is everyone's responsibility.
- ❖ The Compliance Program training includes:
 - New hire orientation, including compliance expectations
 - Compliance training **annually** and more often as needed
 - Targeted training to focus on department-specific compliance issues
- ❖ A culture of compliance is to be promoted by all.
- ❖ Records of training must be maintained and should document the date, those in attendance, and the outline or agenda of what is presented.

Element 4 – Screening and Evaluation of Employees, Physicians, Vendors, and other Agents

❖ The facility must:

- Have processes in place to identify conflicts of interest
 - A **conflict of interest** exists when an individual's personal interests or activities may influence his or her judgment in the performance of assigned duties to the Company and its customers.
- Include compliance expectations in all job descriptions
- Include compliance accountability in each employee's annual performance evaluation
- Verify that background checks are conducted, and that appropriate actions are taken to address any negative results
- Conduct compliance-sensitive exit interviews
- Monitor government sanction lists for excluded individuals
- Verify that due-diligence (reasonable care and caution) checks of consultants, vendors, etc., are conducted, and that negative results are appropriately addressed

Element 5 – Enforcing Standards, Consequences, and Incentives

- ❖ Individuals should be disciplined, up to and including termination, for the following:
 - Failure to actively participate in the compliance program
 - Participating in noncompliant behavior
 - Encouraging, directing, facilitating, or permitting noncompliant behavior
 - Failure to report suspected noncompliance or falsely reporting noncompliance
- ❖ Discipline is based on the circumstances of each case and the severity of the issue, and consistently applied for similar offenses committed under similar circumstances, regardless of the level of the person in the organizational structure
- ❖ The range of disciplinary action includes:
 - Oral or written warnings
 - Suspension from employment or service
 - Termination
 - Financial penalties

Element 5 – Enforcing Standards, Consequences, and Incentives (2)

- ❖ Disciplinary actions may be influenced by:
 - Whether the employee promptly reported his or her own violation
 - Whether the report is the facility's first awareness of the violation.
 - Whether the employee cooperates fully in investigating and/or correcting the violation.
- ❖ The Compliance and Ethics Officer and Committee will:
 - Verify that discipline is consistently enforced and monitor for consistent documentation of disciplinary actions.
 - Recommend action for individuals and entities that have been excluded from government programs.
 - Verify that compliance violations are addressed in disciplinary policies.
 - Coordinate with management that timely disciplinary action is taken.
 - Verify that disciplinary action is reported to the governing body when required.

Element 6 – Monitoring, Auditing, and Internal Reporting Systems

Monitoring and Auditing:

- ❖ An annual auditing plan identifies compliance risk areas, promotes self-evaluation of risk areas, and uses **auditing and monitoring** to detect violations. The Compliance and Ethics Officer analyzes results to determine **root cause** of issues. Analysis includes tracking, trending, and benchmarking of results, and this information is used to drive performance improvement efforts.
- ❖ Audit data determines compliance with standards of practice, quality, documentation, billing, reimbursement guidelines, and more. Written audit reports are presented to the Compliance and Ethics Officer/Committee at least quarterly.
- ❖ Audits are conducted by using interviews, questionnaires, exit interviews, audit tools, review of written reports, and QAPI monitoring actions. Areas of potential noncompliance are kept confidential to the greatest extent possible.

Element 6 - Auditing and Monitoring

These terms are not the same and are not interchangeable:

- ❖ **Auditing** includes formal reviews of compliance using a set of standards as baseline measures at one point in time (a snapshot view).
- ❖ **Monitoring** includes *regular* reviews performed as part of normal operations to confirm *ongoing* compliance in day-to-day activities for the area(s) under review, and results in identification of *trends* in performance.
- ❖ Conducting *reactive analytics* such as auditing and monitoring helps facility leadership document, address, and lessen risk exposures by identifying positive and negative trends that can be used to drive improvement activities.

Element 6 – Internal Reporting Systems

- ❖ Staff and other affected individuals must report anything that is or appears to be a violation of law, rule, regulation, or company policy.
- ❖ Internal reporting procedures must be accessible to all facility-associated persons, and reporting may be done anonymously.
- ❖ Reporting actual or potential compliance violations is a mandatory requirement of employment.
- ❖ Affected individuals should make a report even if personally involved in the suspect activity. If someone tries to keep them from reporting, they should report that too.

Element 7 – Responding to Detected Offenses and Developing Corrective Action Initiatives

- ❖ The Compliance and Ethics Officer will:
 - Conduct interviews with persons knowledgeable about potential noncompliance who may be required to provide a signed, dated, written statement of the facts, or the Compliance and Ethics Officer will document, sign, and date a record.
 - Review documentation.
 - Review statutes, regulations, and company policies.
 - Report to the Compliance and Ethics Committee and determine with Committee members if the conduct constitutes non-compliance.
- ❖ Compliance and Ethics Officer and/or the Compliance Committee must complete investigations within 30 days following reasonable suspicion of a violation

Rationale for Developing an Effective Compliance and Ethics Program in Healthcare

Required as set forth by the OIG and the Affordable Care Act.

Promotes the rights of residents and provides for quality care and resident safety.

Assesses for risk exposures that make the organization vulnerable.

Detects fraud, waste, abuse, and inefficient uses of government funds.

Serves as a consultative source for federal courts to apply federal Sentencing Guidelines to address the appropriate form and severity of punishment for offenders convicted of federal crimes.

Supports the prevention and detection of violations of the law.

Benefits of an Effective Compliance and Ethics Program: Protection

What an effective compliance and ethics program PROTECTS YOU and your facility from:

- ❖ Regulatory Protection
- ❖ Financial Protection
- ❖ Prosecutorial Protection
- ❖ Whistleblower Protection
- ❖ Professional Liability Protection
- ❖ Financial Protection

Implementing The Compliance and Ethics Program

- ❖ The Compliance and Ethics Program is designed, implemented, and enforced so that it is likely to be effective in preventing and detecting criminal, civil, and administrative violations under the Social Security Act in promoting quality of care.
- ❖ An effective Program contains at a minimum, the following components:
 - Written compliance and ethics standards, policies, and procedures
 - Assignment of high-level personnel to oversee compliance with The Company's compliance and ethics program's standards, policies, and procedures
 - Sufficient resources and authority to the specific individuals designated to oversee compliance
 - Due care not to delegate substantial discretionary authority to individuals who have a propensity to engage in criminal, civil, and administrative violations
 - Effectively communicates the standards, policies, and procedures in the compliance and ethics program
 - Takes reasonable steps to achieve compliance with the compliance and ethics program's standards, policies, and procedures
 - Consistent enforcement of The Company's standards, policies, and procedures through appropriate disciplinary mechanisms
 - Respond appropriately to the violation and to prevent further similar violations, including any necessary modification to The Company's program to prevent and detect criminal, civil, and administrative violations

Overview

Compliance and Ethics Program

- ❖ **Purpose:** Focus on Fraud, Waste, and Abuse to prevent and detect criminal, civil, and administrative violations, and promote quality of care.
- ❖ Compliance Officer is responsible for day-to-day oversight.
- ❖ Regular meetings of a Compliance and Ethics Committee.

Quality Assurance Performance Improvement (QAPI) Program

- ❖ **Purpose:** Focus on developing, implementing, and maintaining an effective, comprehensive, data-driven program focused on systems and outcomes of care and quality of life.
- ❖ QAPI champion leads in conjunction with top management.
- ❖ Requires regular meetings of QAA/QAPI Committee.

Understanding the Difference Between the Compliance and Ethics Program and QAPI Program

Compliance and Ethics Program

- ❖ **Purpose:** Focus on Fraud, Waste, and Abuse prevention and detection
- ❖ Compliance Officer responsible for day-to-day oversight
- ❖ Regular meetings of a Compliance and Ethics Committee
- ❖ Provides reports to the Governing Body
- ❖ Ensures QAPI Committee identified exposures that impact operations are addressed

Quality Assurance Performance Improvement Program

- ❖ **Purpose:** Focus on developing, implementing, and maintaining an effective, comprehensive, data-driven program dedicated to systems and outcomes of care and quality of life
- ❖ QAPI champion leads in conjunction with top management
- ❖ Requires regular meetings of QAA/QAPI Committee
- ❖ Provides reports to the Governing Body
- ❖ Reports identified operations exposures/risks to the Compliance Committee

Compliance and Ethics Program

- ❖ Reasonably designed, implemented, and enforced so that it is likely to be effective in preventing and detecting criminal, civil, and administrative violations, and in promoting quality of care.
- ❖ Participation is mandatory for all employees.

QAPI Program Requirements

Facilities are to continuously identify and correct quality deficiencies, as well as sustain performance improvement.



F865 Quality Assurance and Performance Improvement (QAPI) Program ⁽¹⁾

- ❖ Maintain and demonstrate evidence of an ongoing QAPI Program that includes but is not limited to systems and reports demonstrating:
 - Systematic identification, reporting, investigation, analysis, and prevention of adverse events
 - Documentation demonstrating the development, implementation, and evaluation of corrective actions or performance activities

F865 Quality Assurance and Performance Improvement (QAPI) Program ⁽²⁾

❖ Program design and scope:

- A facility must design its QAPI program to be ongoing, comprehensive, and to address the full range of care and services provided by the facility. It must:
 - Address all systems of care and management practices
 - Include clinical care, quality of life, and resident choice
 - Utilize the best available evidence to define and measure indicators of quality and facility goals that reflect processes of care and facility operations that have been shown to be predictive of desired outcomes for residents of a SNF or NF
 - Reflect the complexities, unique care, and services that the facility provides

F865 Quality Assurance and Performance Improvement (QAPI) Program (3)

- ❖ Governance and leadership. The governing body and/or executive leadership (or organized group or individual who assumes full legal authority and responsibility for operation of the facility) is responsible and accountable for ensuring that:
 - An ongoing QAPI program is defined, implemented, maintained, and addresses identified priorities
 - The QAPI program is sustained during transitions in leadership and staffing
 - The QAPI program is adequately resourced, including ensuring staff time, equipment, and technical training as needed
 - The QAPI program identifies and prioritizes problems and opportunities that reflect organizational process, functions, and services provided to residents based on performance indicator data, and resident and staff input, and other information
 - Corrective actions address gaps in systems, and are evaluated for effectiveness
 - Clear expectations are set around safety, quality, rights, choice, and respect
 - Disclosure of information. A State or the Secretary may not require disclosure of the records of the committee except when the disclosure is related to the compliance of such committee
 - Sanctions. Good faith attempts by the committee to identify and correct quality deficiencies will not be used as a basis for sanctions

F866 QAPI Program Feedback, Data Systems, and Monitoring

- ❖ A facility must establish and implement written policies and procedures for feedback, data collections systems, and monitoring, including adverse event monitoring, to include:
 - Maintenance of effective systems to obtain and use feedback and input from direct care staff, other staff, residents, and resident representatives, including how the information will be used to identify problems that are high-risk, high-volume, or problem-prone, and opportunities for improvement
 - Maintenance of effective systems to identify, collect, and use data and information from all departments, including the facility assessment required at §483.70(e) and how the information will be used to develop and monitor performance indicators
 - Development, monitoring, and evaluation of performance indicators, including the methodology and frequency for this development, monitoring, and evaluation
 - Adverse event monitoring, including the methods by which the facility will systematically identify, report, track, investigate, analyze, and use data and information from adverse events, and how the data will be used to develop activities to prevent adverse events. “Near miss” events (potential harm that did not reach a resident) must be included

F867 QAPI Program Systematic Analysis and Systemic Action

- ❖ Take actions aimed at performance improvement and, after implementing those actions, measure its success and track performance to ensure that improvements are realized and sustained
- ❖ Develop and implement policies addressing: (i) How staff will use a systematic approach to determine underlying causes of problems impacting larger systems; (ii) How they will develop corrective actions designed to effect change at the systems level to prevent quality of care, quality of life, or safety problems; and (iii) How the facility will monitor the effectiveness of its performance improvement activities to ensure that improvements are sustained
- ❖ Set priorities for performance improvement activities that focus on high-risk, high-volume, or problem-prone areas; consider incidence, prevalence, and severity of problems; and affect health outcomes, resident safety, resident autonomy, resident choice, and quality of care
- ❖ Track medical errors and adverse resident events, analyze causes, and implement preventive actions and mechanisms that include feedback and learning throughout the facility
- ❖ Conduct distinct performance improvement projects, the number and frequency of which must reflect the scope and complexity of the facility's services and available resources, including at least annually a project that focuses on high-risk or problem-prone areas identified through data collection and analysis

F868 Quality Assessment and Assurance

- ❖ Maintain a QAA Committee composed of staff who understand the characteristics and complexities of the care and services delivered by each unit and/or department
- ❖ Be composed of the required committee members who are, at a minimum, the director of nursing, medical director or designee, at least three other staff, one of whom must be the administrator, owner, board member or other individual in a leadership role with knowledge of facility systems and authority to change those systems, and one who must be the infection preventionist
- ❖ Meet at least quarterly, and with enough frequency to conduct required QAA/QAPI activities
- ❖ Determine what performance data will be monitored and the schedule or frequency for monitoring this data
 - Data must be reviewed with enough frequency to enable the committee to know if improvement is needed or if improvement is occurring

Facts to Remember....

- ❖ The OIG mandated requirements for a Compliance and Ethics Program and Committee have been in place since 2010 and are being enforced.
- ❖ The CMS regulations for Compliance and Ethics Programs are similar to the OIG requirements. Facilities must meet the intent of those regulations in order to be ready for review by survey teams.
- ❖ QAPI Plans are to be in writing, given to surveyors upon request, and be fully operational. You can be cited if you do not have a written QAPI Plan.
- ❖ QAA/QAPI are to work together, and the meetings can be one and the same
- ❖ Compliance and Ethics, although it can provide or receive reports to/from QAA/QAPI, is a separate program with a separate focus. It is not part of QAPI. It is a unique program designed to prevent fraud, waste, and abuse of government financial resources

Information Surveyors Will Seek

- ❖ Does the operating organization have written standards, policies and procedures for the compliance and ethics program that are reasonably capable of reducing the possibility of criminal, civil and administrative violations under the Act?
- ❖ Ask high-level personnel designated to oversee the organization's compliance and ethics program about their involvement in the program.
- ❖ Determine:
 - How the facility uses monitoring and auditing systems to detect criminal, civil, and administrative violations by staff
 - If they are aware of a potential violation under investigation and what was the response.



Information Surveyors Will Seek ⁽²⁾

- ❖ When reports or reasonable suspicions of violations are identified, did the organization take prompt action to respond to the violation and prevent future occurrences, including enforcement of program standards, policies and procedures through disciplinary mechanisms, if appropriate?
- ❖ Did the operating organization delegate substantial discretionary authority to an individual it knew or should have known through due diligence, had a propensity to engage in criminal, civil and/or administrative violations?
- ❖ Does the operating organization review the program annually and as needed, in response to organization, facility and/or regulatory changes?



Surveyors Will Ask Staff:

- ❖ If they are aware of the facility's compliance and ethics program
- ❖ If there is a method for staff to anonymously report suspected violations
- ❖ If they are confident in reporting compliance matters without fear of retaliation.



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Is the Healthcare Industry Fraudulent?

- ❖ To hear the OIG speak of it, the entire healthcare industry is corrupt, just waiting for opportunities to rip off the system.
- ❖ The OIG seems to think that healthcare practitioners are spending time and money with their lawyers dreaming up new ways to maneuver around the fraud and abuse laws and regulations in an effort to maintain high profit margins. That is not the case.



Fraud Grows within a Particular Type of Corporate Environment

True fraud, as opposed to accidental mistakes, in the healthcare industry starts and grows within a particular type of corporate environment.

This corporate environment can be found throughout the provider field: physician office, LTC nursing home, sub-acute nursing home, hospital, home healthcare agency, surgicenter, outpatient rehab nursing home, etc.

Illustration: The Successful Long-Term Care Facility

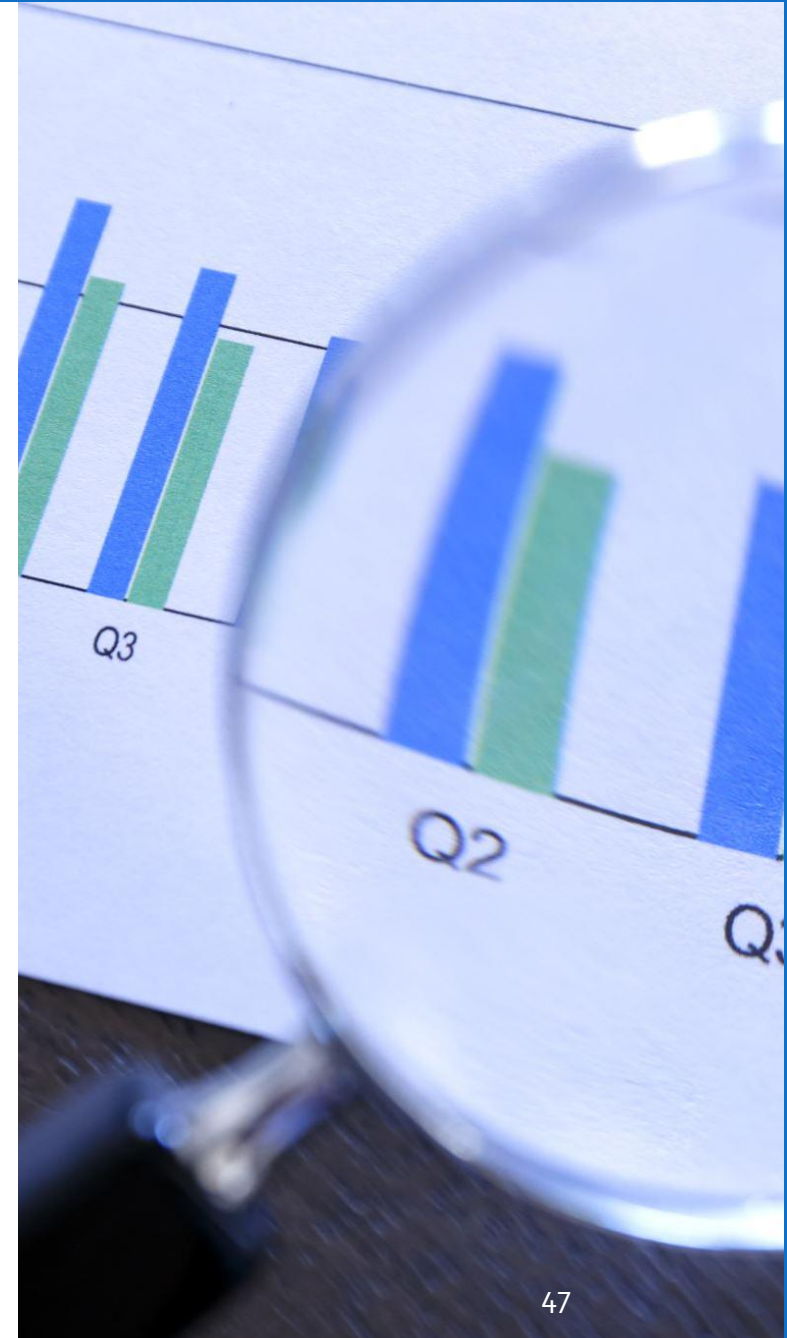
- ❖ To illustrate, let's take an LTC facility in New Jersey.
- ❖ This particular facility has been successfully and quickly growing into diversified areas, including sub-acute and outpatient rehabilitation.
- ❖ All of this was initiated under the original Medicare cost-based reimbursement system and then moved forward under the Resource Utilization Group (RUG) payment methodology.
- ❖ Everything has always been going great for this facility.
- ❖ It even has a history of New Jersey Department of Health deficiency-free surveys for two consecutive years.

The Challenge: Patient Driven Payment Model

- ❖ On October 1, 2019, Medicare implemented its latest reimbursement methodology, Patient Driven Payment Model (PDPM). Our facility is faced with potential reduced income if unprepared for this significant change.
- ❖ The administrator begins to worry because she is ill-prepared. She worries about the impact PDPM, coupled with Medicaid cutbacks, will have on the ability of the facility to sustain cash flow and to continue with its diversification projects.
- ❖ The administrator, however, has difficulty explaining these concerns to the Governing Body. The Governing Body is made up, primarily, of owners who are neither familiar with our sector nor familiar with day-to-day operations.

Mismatched Expectations: Governing Body v. Administrator

- ❖ As a result, there is a mismatch of expectations.
 - The Governing Body continues to expect growth and positive cash flow.
 - The administrator, however, sees that growth and positive cash flow are not likely to continue, at least for a few years.
- ❖ For the first time in years, the administrator is facing the very real possibility of failing to meet the Governing Body's expectations.
- ❖ To make matters worse, the Governing Body has clearly communicated to the administrator that its expectations must be realized. Or else!



Fear of Failure

- ❖ Very experienced administrators in the healthcare sector would recognize that this facility needs to suck in its breath, tighten its belt, dig into cash reserves, and expand its revenue sources to include managed care payors.
- ❖ Experienced administrators would anticipate that Congress's initial overreaction in the Balanced Budget Act of 1997, followed by RUGs and now PDPM, would be met, a year or two down the road, by another overreaction but in the opposite direction in the form of relief (which is exactly what has happened in the past).
- ❖ But this facility does not have an experienced administrator. This administrator is terrified that she will not be able to meet her Governing Body's expectations for continued growth and positive cash flow. The administrator worries about failing.

Corporate Environment: Pressure, Aggressive Targets, and "Must Do" Message

The Governing Body is putting even more pressure on the administrator to grow facility revenues, to add a new wing, and to increase the already positive cash flow.



We now have a corporate environment that includes intense pressure, aggressive targets for growth, and a clear message that the growth targets must be reached.

The Dilemma

- ❖ The administrator, despite her lack of experience, realizes that the growth targets are not going to be reached. No way, no how.
 - The reimbursement from Medicare is simply not going to be there, at least over the next few years.
 - Added competition from assisted living facilities has increased the difficulty in filling beds, and admitting sicker patients costs more to provide care.
 - Staff have already been reduced as much as possible in an effort to maximize profits.
 - Group purchasing opportunities, too, have been maximized.
- ❖ What else can be done?



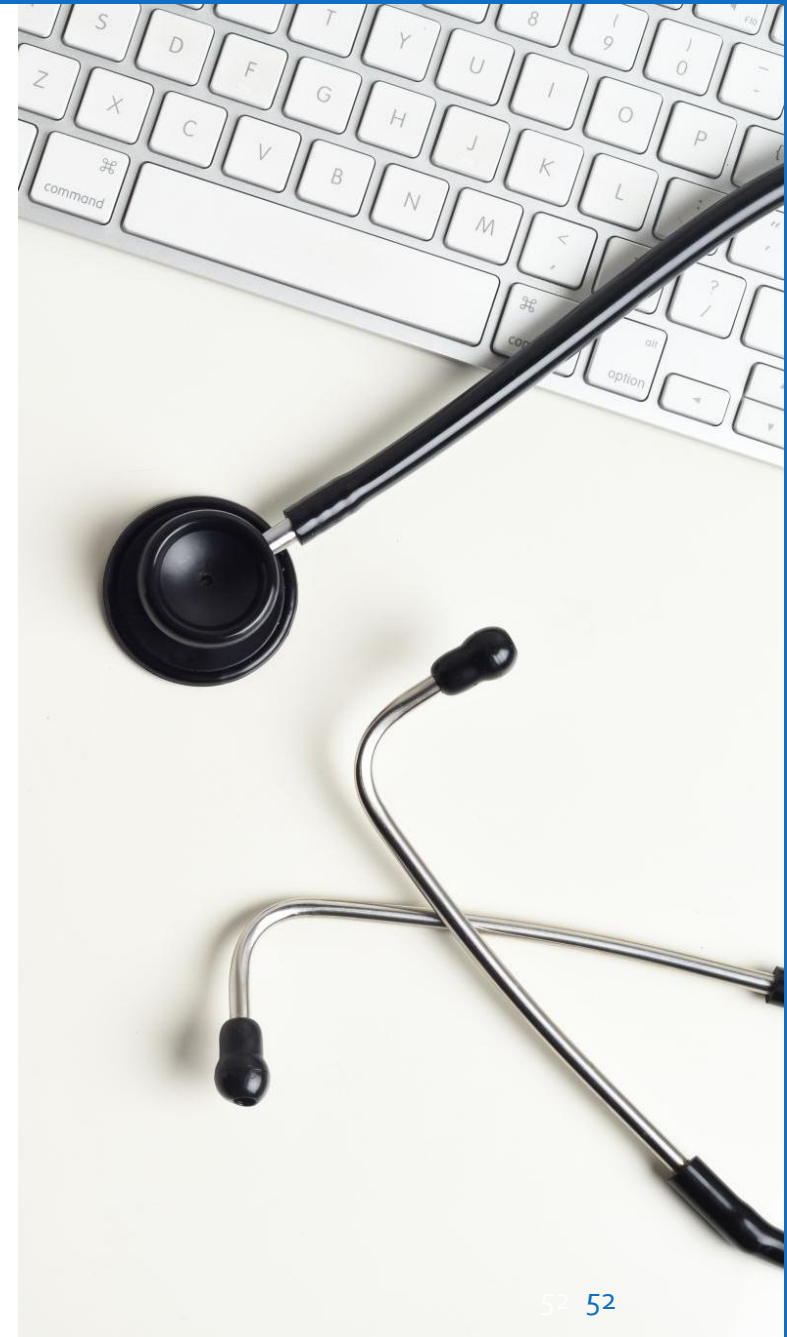
Choices: Notify Governing Body or Fudge the Financials

- ❖ The administrator has two choices:
 1. The first is to notify the Governing Body that she anticipates failing to achieve the clear goals that are demanded of her. This is, of course, totally unpalatable, especially after the success that she has enjoyed the past few years.
 2. The other choice is to fudge the financials just a bit in order to make it look like, for only this first month of PDPM, that the facility is on target to meet its goals.
- ❖ She chooses the latter option.
- ❖ But how does she do this?



Fraud: Increase PDPM Scores (1)

- ❖ She decides to meet with her director of nursing to ensure that the PDPM scores are maximized for billing purposes.
 - After all, doesn't the facility have a group of newly graduated nurses?
 - The previous experienced nurses had left to work with a local competitor.
 - Perhaps these new nurses are not really skillful enough in maximizing legitimate opportunities to bill through the PDPM program.



Fraud: Increase PDPM Scores (2)

- ❖ The director of nursing gets the message loud and clear: if in doubt, maximize reimbursement PDPM, and work out the supporting documentation later, if necessary.
- ❖ This seems to work. Invoices go out with increased charges, and the facility population, when looked at from a PDPM perspective, appears to be getting the amount of care that it deserves.
- ❖ The administrator is pleased because the Governing Body is pleased.



Fraud: Works at First but Then Makes Matters Worse ⁽¹⁾

- ❖ For the first month after PDPM is introduced, this approach appears to work.
- ❖ In fact, what started out as a strategy for the month only has now spread into the second and third months.
- ❖ The administrator found it difficult to rescind her directive to the director of nursing once the increased revenues begin to flow into the facility.
- ❖ The administrator also thought the other strategies, including increasing revenue from managed care payors, would have worked by now. The other strategies have not worked.

Fraud: Works at First but Then Makes Matters Worse (2)

- ❖ Unfortunately, because of PDPM, something beyond the administrator's control, cash flow continues to weaken, albeit at a slower rate of decline had the administrator not taken her extraordinary steps.
- ❖ So, despite the potential increases in PDPM, PDPM continues to have its effect.
- ❖ But now, not only is there the anticipated decreased cash flow problem, there is also a new problem in having inappropriately increased the documentation to support PDPM reimbursement claims.



Fraud: The Problems Become Compounded by PDPM ⁽¹⁾

The administrator begins to worry. How likely is it that the OIG will knock on her door during this, the fourth month? Or ever, for that matter? She did hear, however, that a facility in the northern part of New Jersey was recently visited by the OIG, and the investigation was not pretty.

Nevertheless, she decides that her more immediate concern is meeting the expectations of the Governing Body.

But she is now into the start of the fourth month and her revenues are continuing to drop despite her best efforts and, as she now admits to herself, she has instituted an unlawful strategy for maximizing PDPM reimbursement.

Fraud: The Problems Become Compounded by PDPM ⁽²⁾

- ❖ The administrator also realizes that the outcome of the MDS submissions has shifted from a payment system which rewards higher therapy use (RUGs) to a system that is focused on nursing care.
- ❖ The functional status of each resident is less controllable because nursing is now just as important as rehabilitation was under RUGs.
- ❖ In the past it would have been enough to rely upon the cooperation of the rehabilitation director in upcoding therapy minutes.
- ❖ Now, she needs to rely on both the director of nursing and many professionals in the nursing department to create documentation designed to maximize and even enhance the impact of data recorded in a revised version of the MDS Section GG, Functional Abilities and Goals.

Fraud: The Periodic Behavior Becomes a Consistent Pattern of Behavior

- ❖ The administrator further becomes alarmed by her suspicion that the nurses have stopped struggling with the question of what the proper documentation is to support PDPM and are, instead, automatically adding documentation whether the appropriate additional care was provided or not.
- ❖ She realizes that under the PDPM payment system, functional performance score of each resident influences the level of payment for physical therapy, occupational therapy, and nursing services.
- ❖ She is very concerned that at this point, all departments have impact on database content that produces the qualifying payment levels. She is losing control.

Fraud: The Treadmill Effect

As the fifth month begins after the administrator started "fudging the financials just a bit," she is panicking.

She finds herself facing continued cash flow declines and possible patterns of intentional misrepresentations in the nursing department.

To make matters worse, the outside accounting auditors are coming in shortly to do the periodic financials. Surely, they will see what has happened.

She finds herself instructing her director of nursing to personally change the patient's medical records in order to support the higher PDPM reimbursement.

More and more, the administrator feels as if she is on a treadmill. She has to run faster and faster in order to just stay where she is.

Fraudulent Participation ⁽¹⁾



- ❖ What started out as the administrator's efforts to maximize billing during the first month has spread to include fraudulent participation by the nursing department and, unknowingly, by the accounting department staff who submit the claims.
- ❖ The facility is ripe for a qui tam (whistleblower) action to be filed or, with more immediate and severe consequences, a telephone call to be made directly by an anxious employee to the OIG.

Fraudulent Participation ⁽²⁾

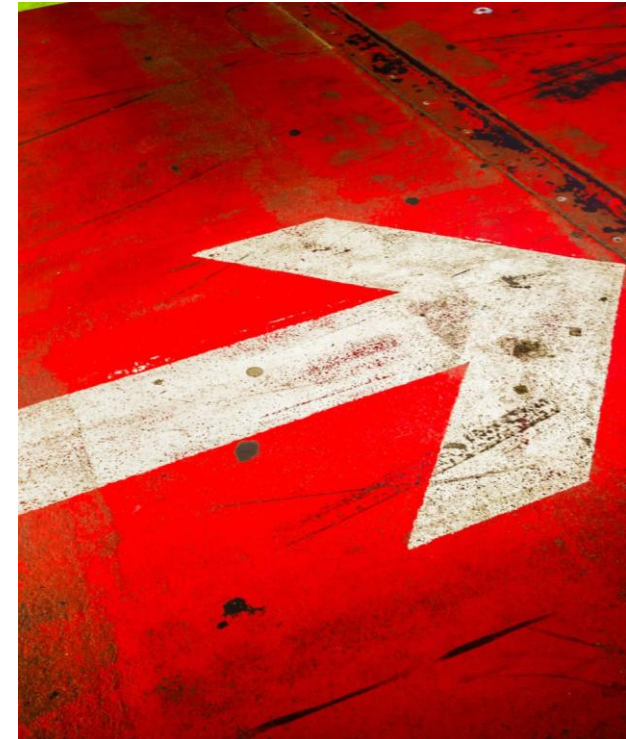
- ❖ The nursing staff, and especially the director of nursing, all know they are doing something wrong.
 - They are all anxious about the pressure they are under to continue their patterns of fraud and yet are even more anxious about getting caught. After all, they have their families and careers to be concerned with.
 - What started out as a way to help the administrator and the facility they care about has turned into serious issues of potential civil and criminal liability.
 - Unfortunately, these employees have now participated in what will clearly be considered fraud. They are all in too far to extricate themselves.

Missing Compliance and Ethics Program

- ❖ This facility does not have an effective compliance and ethics program. If it had such a program, at least two of the seven elements would have prevented, or at least mitigated, the damages of this fraudulent behavior.
 - First, an auditing system would have been in place to review medical records, and compare with the actual care provided, as well as compare to the billing statements.
 - Second, there would be the availability of a Compliance and Ethics Officer to whom these anxious employees could turn with their concerns.
- ❖ Unfortunately, this facility does not have such a program. The Governing Body had earlier declined to put such a plan in place because it believed it had an honest staff of employees.

The Administrator Considers an Exit Strategy

- ❖ Now the administrator is looking for an exit strategy of some sort.
- ❖ In addition to her fear of the inaccurate PDPM and its impact on revenue, she knows that effective November 28, 2019, state surveyors began assessing the implementation and effectiveness of nursing home compliance and ethics programs.



Corporate Compliance and Ethics Plan: Too Late

- ❖ The administrator calls a healthcare attorney who specializes in developing and implementing corporate compliance and ethics programs.
- ❖ She explains briefly and desperately that the facility provides good care for its residents and is run by honest people, but that she nevertheless recognizes the need to have a corporate compliance and ethics program in place should the OIG ever knock on the door, and to also satisfy the state survey team.
- ❖ She confirms with the healthcare attorney that such a compliance and ethics program, if effective, may minimize any civil and criminal penalties should the government impose such penalties on a facility.
- ❖ The healthcare attorney agrees to begin work immediately. However, before the attorney can begin her assignment, the dam breaks.

The OIG: Busted

- ❖ The word gets out to the OIG that something is wrong and that altered documents are about to be destroyed.
- ❖ The administrator is faced early one morning with FBI agents, brandishing guns, holding out search and seizure warrants for all patient data.
 - Computers are loaded into the backs of trucks.
 - Filing cabinets are carted off.
 - Medical records by the cartload are taken away.
 - Anything of questionable value to the investigation is taken.
 - The facility is left in complete financial and clinical shambles.
- ❖ The attorney who was called in to begin a compliance program, having just arrived, is standing at the front door, helpless to intercede and realizing the administrator's effort to initiate a corporate compliance and ethics program was too little, too late.



DOJ Healthcare Fraud Unit

The DOJ Criminal Division, Fraud Section's healthcare Fraud (HCF) Unit is comprised of more than 70 prosecutors whose core mission is to prosecute healthcare fraud-related cases involving: (1) patient harm; and/or (2) large financial loss to the public. The HCF Unit has a recognized and successful Strike Force Model for effectively and efficiently prosecuting cases across the United States.

The HCF Unit's attorneys are well-equipped to pursue significant cases involving medical professionals; corporations and executives; wide-ranging, complicated fraud schemes; and the illegal distribution and diversion of opioids and other prescription medications.

The Solution: Corporate Compliance and Ethics Plans ⁽¹⁾

- ❖ Fraud often starts out with good intentions: to continue to build the organization and to continue to provide jobs for the employees.
 - But the slope is slippery from there.
 - What often begins as a one-person effort eventually involves many people in the organization.
- ❖ A corporate compliance and ethics program, seriously initiated, implemented, and maintained, is the only way to ensure that nascent fraud does not begin and spread throughout an organization.

The Solution: Corporate Compliance and Ethics Plans ⁽²⁾

- ❖ Once fraud begins and spreads throughout an otherwise "honest" organization, without the benefit of a corporate compliance and ethics program in place, the only option often available to the organization is to confess.
- ❖ The organization must seriously consider approaching the OIG before the OIG and/or the Justice Department (on the basis of a qui tam action) approaches the organization.



Federal Compliance-Related Laws ⁽¹⁾

- ❖ The Federal Civil False Claims Act 31 U.S.C. § 3729: Prohibits knowingly filing a false or fraudulent claim for payment or knowingly using a false record or statement to obtain payment for a false or fraudulent claim.
- ❖ The Federal Criminal False Claims Act 18 U.S.C § 286: Prohibits any person from knowingly submitting a false, fictitious, or fraudulent claim for payment by the United States government and any such person may be found guilty of a felony. Additionally, prohibits anyone conspiring with another person to defraud the government by obtaining or helping to obtain payment or allowance of any false, fictitious, or fraudulent claim.
- ❖ The Federal Civil Monetary Penalties Statute 42 U.S.C. § 1320a-7a: Prohibits any person, with the exception of beneficiaries of federal healthcare programs, from knowingly engaging in a broad range of conduct resulting in false or improper claims payable in United States government funds.

Federal Compliance-Related Laws ⁽²⁾

- ❖ The Federal Health Care Fraud Statute 18 U.S.C. § 1347: Prohibits any person or entity from knowingly and willfully defrauding or attempting to defraud any healthcare benefit program, or obtaining through fraud or false pretenses, representations, or promises, any money or property owned or controlled by any healthcare benefit program in connection with the payment or delivery of healthcare benefits, items, and services. This law includes strict penalties for violations that result in serious bodily injury or death. This statute extends liability beyond federal healthcare benefit programs such as Medicare and Medicaid and includes fraud to private health insurance providers and other healthcare benefit programs that fall within the scope of this statute.
- ❖ The Federal False Statements Statute 42 U.S.C. § 1320a-7b(a): Prohibits any person from knowingly and willfully making false statements in connection with the delivery or payment of healthcare benefits, items, or services payable in United States government funds.

Federal Compliance-Related Laws ⁽³⁾

- ❖ The Federal Anti-Kickback Statute 42 U.S.C. § 1320a-7(b): Prohibits soliciting, receiving, or offering to pay any remuneration of any kind (including rebates, kickbacks, or bribes) in exchange for referring or recommending the referral of any individual to the company that are paid for by federal healthcare programs; or offering or granting any benefit to a referring physician or other referral source on the condition that such physician or referral source refer or agree to refer any federal healthcare program business to the company or an associate.
- ❖ The Federal Physician Self-Referral Law (Stark) 42 U.S.C. § 1395nn: Prohibits a physician from referring patients to an entity for certain designated health services if the physician, or an immediate family member of the physician, has a financial relationship with the entity, unless the financial relationship falls within certain exceptions.

Federal Compliance-Related Laws (4)

❖ Criminal and Civil Penalties

- Federal law provides criminal penalties for false statements and illegal remuneration for items or services payable in United States government funds.
- Civil penalties provide for false or improper claims when the service was not provided as claimed or the claim is false and for payments to induce physicians to reduce or limit services to patients eligible for benefits.
- Penalties include exclusion from participation in federal and state healthcare programs, loss of professional license, etc.



Why Bad Things Happen to Good Providers

Fraud does not start with dishonesty.

Fraud starts with pressure.

Fraud starts out one small step at a time.

Fraud starts with areas that might be considered by some to be areas of "gray."

Fraud increases, in its complexity and scope, over a long period of time.

Fraud locks its participants in so that there is no escape.



QUESTIONS?



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