"*Overview of Sober Home and Recovery Residence Fraud Enforcement Efforts*"

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National Alliance for Recovery Residences
Community • Standards • Ethics • Education

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Enforcement Overview
Federal

- **September 15, 2022. Deputy Attorney General (DAG) Lisa Monaco issued an update to her previous guidance issued on October 28, 2021. In this guidance, she again reiterated that:**

"The Department's first priority in corporate criminal matters is to hold accountable the individuals who commit and profit from corporate crime.

. . .

Corporations can best deter misconduct if they make clear that all individuals who engage in or contribute to criminal misconduct will be held personally accountable. In assessing a compliance program, prosecutors should consider whether the corporation's compensation agreements, arrangements, and packages (the "compensation systems") incorporate elements such as compensation clawback provisions-that enable penalties to be levied against current or former employees, executives, or directors whose direct supervisory actions or omissions contributed to criminal conduct."

- **As a result, the personal liability of all employees (including employed physicians, NPs and PAs), has greatly increased. *You cannot expect to avoid personal liability by hiding behind your organization's settlement with DOJ and / or the OIG*.**

Legal Overview
Civil False Claims Act

- **Enforcement Efforts are Accelerating Post-COVID. Settlements and judgments from civil cases involving fraud and false claims against the government exceeded $2.2 billion in FY 2022. Of this amount, more than $1.7 billion recovered during FY 2022 is attributable to health care related cases and matters.**

Year	2018	2019	2020	2021	2022
Civil Fraud Recoveries	$2.9 billion	$3.1 billion	$2.2 billion	$5.6 billion	$2.2 billion

- **During FY 2022, 652 whistleblower cases were filed.**
- **Although the total recoveries under the FCA declined from FY 2021, the share of awards given to whistleblowers in FY 2022 nearly doubled.**
- **During FY 2022, DOJ and whistleblowers were party to 351 settlements and judgments, the second-highest number in a single year.**

Legal Overview
Civil False Claims Act

- **Historical Background. The False Claims Act (codified at 31 U.S.C. § 3729) is sometimes referred to as "Lincoln's Law," the statute was first passed in 1863 in response to war profiteering.**

- **Among its provisions were measures intended to encourage the disclosure of fraud by private persons through the filing of a "*qui tam*" suit. The term *qui tam* is taken from a Latin phrase meaning "he who brings a case on behalf of our lord the King, as well as for himself."**

- **Under the *qui tam* (also commonly referred to as *"whistleblower"*) provisions of the statute, a private person (often referred to as a "relator") can bring a False Claims Act lawsuit on behalf of, and in the name of, the United States, and possibly share in any recovery made by the government.**

Legal Overview
Civil False Claims Act

- **Provisions of the False Claims Act? (31 U.S.C. § 3729-3733).** Simply put, the federal civil False Claims Act (FCA) imposes civil monetary penalties and damages on any person who ***knowingly*** submits, or causes to be submitted, a false claim to the government for payment.

  - The term ***"knowingly"*** does not merely mean "***actual knowledge***," the term also includes ***reckless disregard and deliberate ignorance***.

- **Statute of Limitations Under the False Claims Act.** Generally, the False Claims Act has a six-year statute of limitations that can be tolled (under certain circumstances) up to a maximum of ten years from when the government knew, or reasonably should have known, that the violation occurred. **31 U.S.C. § 3731(b).**

- **Damages and Penalties under the False Claims Act.** A person found to have violated this statute may be liable for both civil penalties and treble damages.

  - As of today, the minimum penalty that may be assessed ***PER FALSE CLAIM*** is **$13,508**, and the maximum penalty is **$27,018.**

Legal Overview
Civil False Claims Act

- **Health Care Reform Changes to the False Claims Act.**

  - **The Affordable Care Act included a number of changes to the False Claims Act. Under the statute, the term "*overpayments*" was defined to include *"any funds that a person receives or retains" under Medicare or Medicaid, to which they are not entitled.***

  - **The Affordable Care Act further provides that all overpayments must be reported and refunded *within 60 days of being identified.* The Final Rule permits up to 6 additional months to investigate and determine the magnitude of an overpayment.**

  - **Moreover, the legislation made it clear that a repayment retained by a person after the deadline for reporting and returning the "overpayment" is an "obligation" for purposes of the False Claims Act.**

    The bottom line is clear – should you identify an overpayment, it must be reported and repaid within 60 days (plus up to 6 months to investigate and determine the magnitude of the overpayment) or the provider may be liable under the False Claims Act

Legal Overview
Federal Anti-Kickback Statute

- **Codified at 42 U.S.C. § 1320a–7b(b), the *Federal Anti-Kickback Statute* was first enacted in 1972. Under this statute, it a crime to *knowingly and willfully* solicit, receive, offer, or pay any remuneration in return for: *(1) referring or arranging for services payable by any federal or state health care program*; or *(2) purchasing, leasing, ordering or arranging for any goods, facilities or services that may be paid for in whole or in part by any federal or state health care program* 42 U.S.C. § 1320a–7b(b)(2012). Under § 6402(f)(2) of the Affordable Care Act:**

"*A person need not have actual knowledge of this section or specific intent to commit a violation of this section*."(emphasis added).

- **This change was noteworthy. It effectively lessened the requirements needed for the government to bring a criminal case under the Anti-Kickback Statute.**

- **Increased penalties and imprisonment for kickback violations. Under the Bipartisan Budget Act of 2018 (effective February 9, 2018):**

  - **Criminal penalties for acts involving Federal health care programs under 42 U.S.C. § 1320a–7b, including but not limited to the Anti-Kickback Statute, were increased from *$25,000* to *$100,000*.**

  - **Additionally, the *maximum sentences for felonies* involving Federal health care program fraud and abuse under 42 U.S.C. § 1320a–7b, including but not limited to the Anti-Kickback Statute, were increased from *Five to Ten years.***

Legal Overview
Federal Anti-Kickback Statute

- **The Federal Anti-Kickback Statute and the False Claims Act were long viewed as separate and distinct enforcement tools, with the False Claims Act used in civil enforcement matters and the Anti-Kickback Statute applied in criminal improper inducement cases.**

- **Over the past 20 years, the enforcement landscape has slowly changed. Starting in the early 1990's, whistleblowers began asserting violations of the False Claims Act in cases that would typically be pursued as a criminal Anti-Kickback Statute violation.**

- **These cases often involved fact patterns where a party was alleged to have violated the Anti-Kickback Statute *and*, in the process, billed for services that were allegedly worthless and made a false express and / or implied certification to the Medicare or Medicaid program.**

- **The 2010 passage of the Affordable Care Act obviated the need to bootstrap a violation of the anti-kickback statute into a violation of the False Claims Act.**

Under the ACA, a claim submitted in violation of the Federal Anti-Kickback Statute now automatically constitutes a false claim for purposes of the False Claims Act.

Legal Overview
Federal Anti-Kickback Statute

- **Safe Harbors. As the Anti-Kickback Statute reflects, the scope of potential coverage under the law is extraordinarily broad. In recognition of this fact, over the years Congress has enacted *11 statutory safe harbors*. Additionally, in 1987 Congress authorized HHS-OIG to issue regulatory *"safe harbors"* for certain business arrangements and practices that while potentially a violation of law, would be permitted as long as certain safeguards are put in place to prevent fraud and abuse. There are now *38 regulatory safe harbors*.**

- **Safe harbors are voluntary not mandatory.**

- **While a given arrangement is not necessarily a violation of the Anti-Kickback Statute if one or more of the elements in a safe harbor have not been met, a provider is effectively precluded from relying on a safe harbor as an absolute defense.**

- ***The number of safe harbors to the federal Anti-Kickback Statute is***

Legal Overview
Eliminating Kickbacks in Recovery Act (EKRA)

- ***"Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act."***

- **This bi-partisan legislation was intended to address a number of the fraudulent and abusive business practices currently employed by unscrupulous substance abuse treatment providers in this segment of the market.**

- **This legislation effectively amplifies existing anti-kickback measures to better cover schemes involving private insurance. While the aim of widespread expansion of enforcement is to combat opioid and other substance abuse, the implications of many provisions are far reaching. One particular provision with far reaching consequences is Subtitle J, also known as the:**

  "Eliminating Kickbacks in Recovery Act (EKRA)."

Legal Overview
Eliminating Kickbacks in Recovery Act (EKRA)

- **EKRA was designed to address patient brokering and other kickback schemes involving private payor claims. Under EKRA, the maximum penalties for illegal remunerations paid by recovery homes, clinical treatment facilities, or laboratories in an effort to induce referrals can result in penalties of *$200,000 and 10 years of imprisonment per occurrence*.**

> *"(a) Offense — Except as provided in subsection (b), whoever, with respect to services covered by a health care benefit program, in or affecting interstate or foreign commerce, knowingly and willfully—*
>
> *(1) solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind, in return for referring a patient or patronage to a recovery home, clinical treatment facility, or laboratory; or*
>
> *(2) pays or offers any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—*
>
> *(A) to induce a referral of an individual to a recovery home, clinical treatment facility, or laboratory; or*
>
> *(B) in exchange for an individual using the services of that recovery home, clinical treatment facility, or laboratory..."* **Emphasis Added.**

Legal Overview
Eliminating Kickbacks in Recovery Act (EKRA)

- ***The following Exceptions to EKRA were included in the statute:***

(1) a discount or other reduction in price obtained by a provider of services or other entity under a health care benefit program if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity;

(2) *a payment made by an employer to an employee or independent contractor (who has a bona fide employment or contractual relationship with such employer*) for employment, if the employee's payment is not determined by or does not vary by—

(A*) the number of individuals referred to a* particular recovery home, clinical treatment facility, or *laboratory*;

(B) *the number of tests or procedures performed*; or

(C) *the amount billed to or received from, in part or in whole, the health care benefit program from the individuals referred to a* particular recovery home, clinical treatment facility, or *laboratory*;

(3) a discount in the price of an applicable drug of a manufacturer that is furnished to an applicable beneficiary under the Medicare coverage gap discount program under section 1860D–14A(g) of the Social Security Act (42 U.S.C. 1395w–114a(g));

Legal Overview
Eliminating Kickbacks in Recovery Act (EKRA)

- ***The following Exceptions to EKRA were included in the statute, continued:***

(4) a payment made by a principal to an agent as compensation for the services of the agent under a personal services and management contract that meets the requirements of section 1001.952(d) of title 42, Code of Federal Regulations, as in effect on the date of enactment of this section;

(5) *a waiver or discount (as defined in section 1001.952(h)(5) of title 42, Code of Federal Regulations, or any successor regulation) of any coinsurance or copayment by a health care benefit program if*—

(A) *the waiver or discount is not routinely provided; and*
(B) *the waiver or discount is provided in good faith;*

(6) a remuneration described in section 1128B(b)(3)(I) of the Social Security Act (42 U.S.C. 1320a–7b(b)(3)(I));

(7) a remuneration made pursuant to an alternative payment model (as defined in section 1833(z)(3)(C) of the Social Security Act) or pursuant to a payment arrangement used by a State, health insurance issuer, or group health plan if the Secretary of Health and Human Services has determined that such arrangement is necessary for care coordination or value-based care; or

(8) any other payment, remuneration, discount, or reduction as determined by the Attorney General, in consultation with the Secretary of Health and Human Services, by regulation.

Legal Overview
Eliminating Kickbacks in Recovery Act (EKRA)

- **EKRA specifically targets recovery homes, clinical treatment facilities, and laboratories that participate in illegal remuneration schemes. The definition of each is significant to the applicability of this provision:**

  - **Recovery Home: *"A shared living environment that is, or purports to be, free from alcohol and illicit drug use and centered on peer support and connection to services that promote sustained recovery from substance use disorders."***

  - **Clinical Treatment Facility: *"A medical setting, other than a hospital, that provides detoxification, risk reduction, outpatient treatment and care, residential treatment, or rehabilitation for substance use, pursuant to licensure or certification under State law."***

  - **The definitions of *"Recovery Home"* and *"Clinical Treatment Center"* make sense in the context of this bill's intentions. However, the definition of *"Laboratory"* is not included, but rather cites the definition of a laboratory laid out in 42 U.S.C. § 263a(a):**

  - **Laboratory: *"As used in this section, the term "laboratory" or "clinical laboratory" means a facility for the biological, microbiological, serological, chemical, immuno-hematological, hematological, biophysical, cytological, pathological, or other examination of materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings."***

  - **Unlike the definitions of the terms *"Recovery Home"* and *"Clinical Treatment Facility,"* the definition of *"Laboratory"* is not confined to the provision to opioid or substance-use related matters. As a result, all health care providers, not merely recovery homes and clinical treatment facilities, who utilization or laboratory services need to ensure that their business relationships with laboratories do not violate EKRA. As one study found, *29% of outpatient encounters typically result in the performance or ordering of laboratory tests.***

Legal Overview
State All-Payor Statutes

- **Examples of "All-Payor" State Anti-Kickback Statutes:**

- **Massachusetts.** Under ***M.G.L.c. 175H, §3,*** **it is a felony to solicit or receive any remuneration, directly or indirectly,**

"for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering of any good, facility, service or item for which payment is or may be made in whole or in part by a health care insurer."

- **Texas.** Under ***Tex. Occ. Code 102.001(a):***

"A person commits an offense if the person knowingly offers to pay or agrees to accept, directly or indirectly, overtly or covertly any remuneration in cash or in kind to or from another for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered by a state health care regulatory agency."

Concerns Identified by Law Enforcement

- **As you will recall, in 2020, DOJ arrested more than a dozen defendants in connection with $845 million of alleged fraud committed by sober home physicians, owners, operators and patient recruiters. Commenting on "Sober Home" schemes, Brian Rabbit, Acting Assistant Attorney General for the DOJ's Criminal Division has stated:**

  ". . . defendants are alleged to have preyed upon addicted patients, recruiting them from their hometowns, where they have support networks, and shipping them off to far-away states where they are placed into these so-called 'sober homes.' Once there, these vulnerable patients are often provided with drugs that undercut their ability to recover from the addiction they are trying to kick, and they are often shuffled from facility to facility to boost headcount and maximize billing, instead of being given the care they so desperately need."

In some of the more troubling cases — a great many filed in Florida — some patients were also referred to other healthcare providers who, in return for kickbacks, billed for medically unnecessary tests, medications and services

Concerns Identified by Law Enforcement

- **California. In this case, the CEO of multiple substance abuse treatment facilities was indicted for criminal conspiracy and violations of EKRA in an alleged fraud scheme.**

- ***Defendant paid kickbacks to "patient brokers" working for a marketing company in violation of EKRA.***
- **The substance abuse treatment centers received reimbursement from various Federal and private payor health insurance payors.**
- ***To hide the criminal kickbacks, the defendant entered into a number of sham contracts with the marking company that were intended to conceal the fact that the business arrangement violated EKRA.***
- **For example, they agreed to pay a fixed amount of $30,000 each month for the services of the marketing company.** ***This arrangement was intended to meet EKRA's prohibitions but the government alleges that it was a "sham." The government monitored communications between the parties and the CEO said he'd "rather get admissions" than get money back from the marketing company, thereby undercutting the idea that payments weren't tied to patient volume.***

Concerns Identified by Law Enforcement

- **Massachusetts.** **In this case filed in September 2023, the government intervened in a False Claims Act whistleblower case filed against two drug abuse treatment centers that allegedly paid kickbacks to induce sober home proprietors to refer patients to choose their treatment facilities. As the Complaint alleges:**

- ***Defendants allegedly induced substance abuse recovery patients to enroll in, and attend the defendants' Partial Hospitalization Program*** **(PHP), an outpatient, intensive, substance abuse treatment program by paying for, and offering to pay for sober housing in violation of the Anti-Kickback Statute.**

- ***The defendants knew that many of the patients that the defendants housed in sober homes were insured by federal and state healthcare programs*** **that paid for the defendants' PHP services and the defendants knew that many of these patients could not pay the daily rate for sober housing absent the defendants' payments on their behalf.**

- **The defendants contracted with sober homes operating near the defendants' PHP in Brookline.** ***The contracts set out how much the defendants would pay the sober homeowners and operators to house substance use recovery patients on the condition that the patients regularly attend the defendants' PHP*****.**

Concerns Identified by Law Enforcement

- **Florida.** **In this case, a licensed Florida physician has been charged with health care fraud and wire fraud in an alleged $681 million fraud scheme. Earlier this year, the physician defendant was sentenced to 20 years in prison. The government alleged that the defendant:**

- **Served as *Medical Director for more than 50 addiction treatment facilities and sober homes* for a nominal fee.**
- ***Authorized more than 136 "standing orders" for hundreds of millions of dollars in medically unnecessary urinalysis tests (UAs), which were billed by testing laboratories that sometimes paid kickbacks to the sober homes or addiction treatment facilities;***
- ***In exchange for his signature on these standing orders, he required the facilities to have their patients treated by his practice and his staff, allowing him to bill hundreds of millions of dollars in additional fraudulent treatments*, including unnecessary and expensive UAs, costly blood tests, non-existent therapy sessions, office visits, and other unnecessary services, regardless of whether such treatment and testing were medically necessary and/or actually provided.**
- ***The physician allegedly did not meaningfully review the results of the tests he ordered or use the results of the tests to treat these patients, either at his clinic or at the addiction treatment facilities.***
- **The physician utilized multiple nurse practitioners/medical extenders under his practice to fraudulently bill patients' private insurance.**
- **Finally, *the government alleged that the physician improperly prescribed controlled substances, including large quantities of buprenorphine/Suboxone, frequently exceeding the number of patients he was legally authorized to treat. He provided these drugs to patients who did not need it and ignored evidence of possible diversion*.**

Concerns Identified by Law Enforcement

- **Rhode Island. In this case, the operator of a chain of addiction treatment clinics was charged with health care fraud, aggravated identity theft, money laundering and obstruction. The treatment center and its former supervisory counselor were also charged with health care fraud. According to the government, one or more of the defendants are alleged to have engaged in the following illegal activities:**

- ***Fraudulent Application for Medicare Provider Status.*** **The treatment center and the operator caused a fraudulent application to be submitted to Medicare which, among other things, misrepresented and concealed the role that the operator was playing in the business and failed to disclose his relevant criminal record.**

- ***False Billing for 45 Minute Counseling Sessions.*** **The treatment center, the operator and others fraudulently caused false claims to be submitted for psychotherapy and counseling services that did not occur for the length of time billed, including days on which so many claims were submitted for the same therapist that the billings would be impossible to achieve in a single day.**

- ***Unlicensed Practice of Medicine and Submitting Fraudulent Prescriptions.*** **The Operator purported to practice medicine and wrote and caused to be filled prescriptions using the names and prescriber information, including Drug Enforcement Administration (DEA) numbers, of doctors without their permission.**

Concerns Identified by Law Enforcement

- **Florida.** In this case, ten individuals, including hospital managers, laboratory owners, biller and recruiter were indicted for fraud related to their participated in an elaborate "pass-through billing scheme" using rural hospitals in several states as billing shells to submit fraudulent claims for laboratory testing.

- According to the indictment, these rural hospitals had negotiated contractual rates with private insurers that provided for higher reimbursement than if the tests were billed through an outside laboratory.
- The scheme used the hospitals as a shell to fraudulently bill for such tests. Further, the indictment alleges that the lab tests were often not even medically necessary.
- The conspirators allegedly would obtain urine specimens and other samples for testing through kickbacks paid to recruiters and health care providers, ***often sober homes and substance abuse treatment centers.*** The indictment also alleges that the conspirators engaged in sophisticated money laundering to promote the scheme and to distribute the fraudulent proceeds.

Concerns Identified by Law Enforcement

- **Risk Area # 1: Overutilization. (*Health Care Fraud. 18 U.S.C. § 1347).* In this Virginia case, a physician working at a clinic *ordered that each and every patient undergo weekly drug screening which would be tested at a specific lab.* One question that will likely be examined by prosecutors is whether the drug screens were considered and used to help direct patient care.**

- **Risk Area # 2: Paying More than Fair Market Value. *(Federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b)(1)(A)).* The physician in this Virginia case was paid $1,400 per day, no matter how much work she did or how many patients she saw. *The physician's salary was well above market value and was only justified based on the significant income she generated by ordering ancillary services*. An employee of the lab also worked at the clinic, where she served as *"Office Manager,"* urine drug screen "*Collector*" and "*Receptionist*." (Notably, in other cases, this conduct has also led to charges under the Federal Anti-Kickback Statute as well).**

Concerns Identified by Law Enforcement

- **Risk Issue # 3: Distributing Controlled Substances Without a Legitimate Medical Purpose. (21 U.S.C. § 841(a)(1).** In a Florida case, an internal medicine physician and a licensed mental health counselor have been indicted for ***"knowingly and intentionally distribute and dispense outside the scope of professional practice and not for a legitimate medical purpose, a controlled substance."***

- **Risk Issue #4: Wrongfully Prescribing Controlled Substances After a Medical License has been Suspended. (*Conspiracy to Unlawfully Distribute a Schedule III Controlled Substance. 21 U.S.C. 846).*** In a Florida case, a physician employed as the Medical Director was charged by indictment with one count of conspiracy to distribute controlled substances in relation to his employment at the center. While serving as Medical Director, his medical license was suspended. ***While his medical license was suspended he continued to prescribe controlled substances for patients at the center over a five month period.***

- **Risk Area #5: Unlawful Dispensing and Distributing a Schedule III controlled substance.** ***21 U.S.C. § § 841(a)(1) and 846(b)(1)(E)(i) & 18 U.S.C. § 2.*** In a 2018 case out of the WDPA, it was alleged that an employee of an opioid treatment center ***"filled in and caused to be filled in, pre-signed blank prescriptions," signed by a physician (an independent contractor) but not completed by the physician, without the physician's presence in the office.*** These illegally completed prescriptions were then presented to pharmacies and resulted in Medicaid being wrongfully billed for these prescriptions.

Concerns Identified by Law Enforcement

- **Risk Area #6: Health Care Fraud. *18 U.S.C. § 1347.***

  - **In a case out of the WDPA, two physicians were charged with health care fraud, a violation of *18 U.S.C. § 1347.* Both of the physicians were independent contractors at a addiction treatment center and were alleged to have been alleged to have *pre-signed blank prescriptions for patients and provided them to a non-physician employees at the clinic to be completed. The physicians allegedly took this action knowing that he would not be in the office, would not examine the patients and would not be the person completing the prescriptions.* A number of these fraudulent prescriptions were presented to pharmacies that later billed Medicaid. *Adding insult to injury, the defendant physicians would then sign progress notes, prepared on the date of the patients' visit, after the date of the visit, without ever examining or meeting the patients*.**

  - **In a related indictment against the independent contractor physician charging the defendant with a violation of *18 U.S.C. § 1347*, the government alleged that an *employee at the opioid treatment center paid the defendant physician for "patient visits" in which the pre-signed prescriptions were provided to patients of the opioid treatment center*.**

Concerns Identified by Law Enforcement

- **Risk Area #7: Patient Inducements are Illegal*:* Federal law (42 C.F.R. Part 1003) generally prohibits offering or paying rewards, incentives, discounts, or other items of value to federal beneficiaries, such as Medicare or Medicaid patients, if the offer is likely to influence the beneficiary's choice of services or items that are paid for by insurance**

  - **Overutilization which inappropriately increases federal and state health care program (collectively referred to as "Programs") costs and potentially harms beneficiaries;**
  - **Improperly influencing patient treatment decisions by offering items or services of value;**
  - **Skewing patients' selection of providers by shifting focus to the value of the inducement as opposed the value or quality of the health care services; and**
  - **Creating a competitive disadvantage for providers who cannot afford or choose not to provide beneficiary incentives.**

Concerns Identified by Law Enforcement

- **Risk Area #8: Improperly Using a Patient's Identity.** ***(Aggravated identity theft, 18 U.S.C. § 1028A).*** **Federal prosecutors are increasingly including this case in indictments of health care fraud crimes. Under this statute, whoever during and in relation to any felony enumerated in subsection (c) [*predicate offense*], . . . knowingly transfers, possesses, or uses without lawful authority a means of identification of another person, shall, in addition to the punishment provided for such [*predicate offense*], *be sentenced to a term of imprisonment of 2 years*. . . Examples of the 60 *predicate offenses* include:**

  18 U.S.C. 1001 (relating to false statements or entries generally),
  18 U.S.C. 1035 (relating to false statements relating to health care matters),
  18 U.S.C. 1347 (relating to health care fraud)
  18 U.S.C. 1343 (relating to wire fraud)
  18 U.S.C. 1341 (relating to mail fraud)

- **Risk Area #9: Telemarketing Fraud.** ***Federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b)(1)(A).*** **In an Illinois case brought against a telemarketing company, Federal prosecutors alleged that telemarketing company employees were trained to cold-call Medicare beneficiaries and convince them to accept home health services. If a Medicare beneficiary expressed interest, the telemarketing employees would obtain the beneficiary's personal information, including their Medicare number and provided this information to certain home health agencies that has agreed to pay the telemarketing company for such referrals.**

  - ***The telemarketing company was paid on a "per-patient" basis. As part of the fraud, the written contract between the parties falsely stated that the marketing company was paid on an hourly basis*****. Instead, prosecutors alleged that the defendant merely billed the health care providers for each patient into a made-up number of hours allegedly worked.**

Concerns Identified by Law Enforcement

- **Risk Area #10: Failure to Screen.** **All current providers *must screen their employees and contractors every month to determine whether they are excluded individuals or entities. These screenings are a condition of the provider's enrollment or re-enrollment into state health-care programs.***

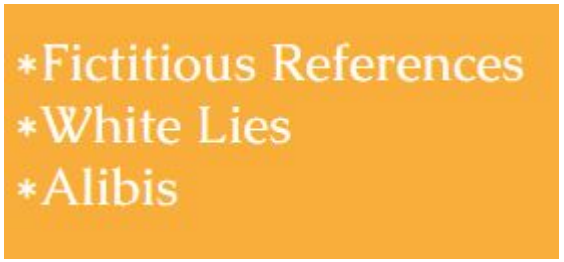
  - ***CFR section 1003.102(a)(2), states that civil monetary penalties may be imposed against Medicaid providers and managed care entities that employ or enter into contracts with excluded individuals or entities …***

  - ***In addition, no Medicaid payments can be made for any items or services directed or prescribed by an excluded physician or other authorized person when the individual or entity furnishing the services either knew or should have known of the exclusion. This prohibition applies even when the Medicaid payment itself is made to another provider, practitioner, or supplier that is not excluded."***

Concerns Identified by Law Enforcement

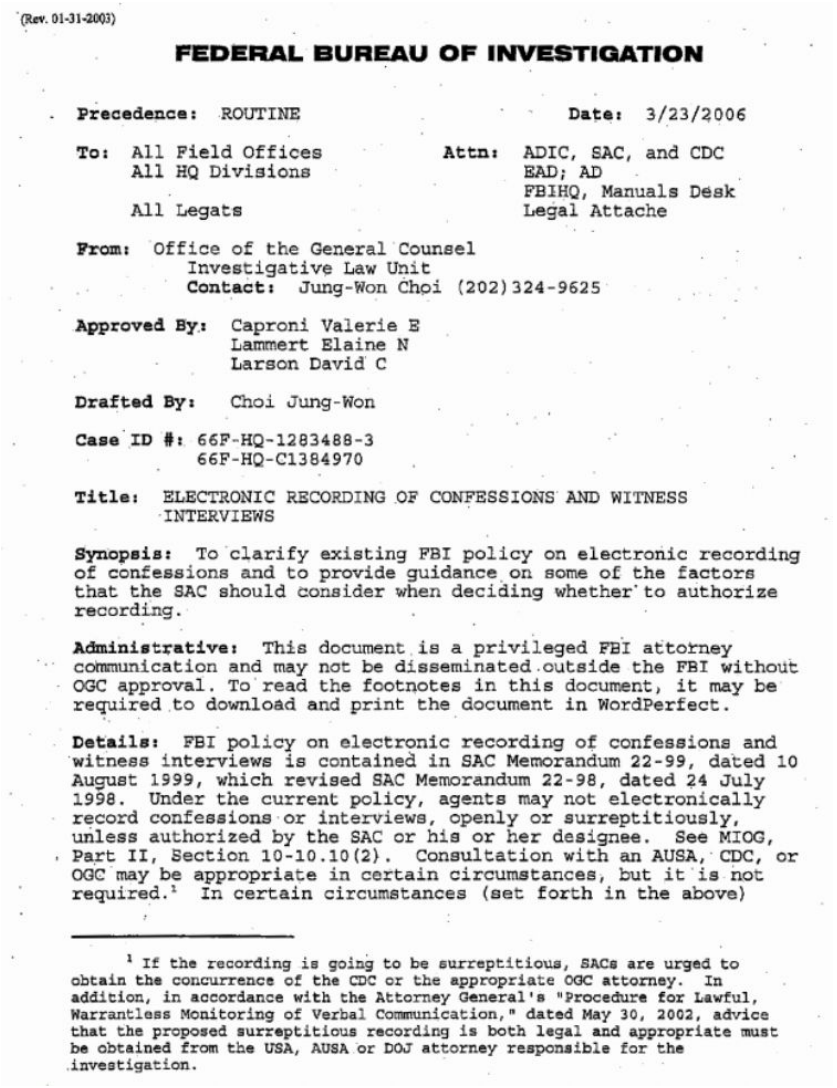
Background Checks Are Not Enough!

- **Risk Area #14: Failure to Screen, *Continued*: Companies can be found online and perform an amazing job of creating a credible (but fake) employment history, references, verification of specific skills, etc. Do you really know the members of your staff?**



- **Call qualified exclusion screening companies (like the folks at *Exclusion Screening)* for additional information on your screening obligations or visit their website www.exclusionscreening.com**

Responding to an Investigation
Half-Truths, Lies and Audiotapes



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FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 3/23/2006

To: All Field Offices
All HQ Divisions
All Legats

Attn: ADIC, SAC, and CDC
EAD; AD
FBIHQ, Manuals Desk
Legal Attache

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Drafted By: Choi Jung-Won

Case ID #: 66F-HQ-1283488-3
66F-HQ-C1384970

Title: ELECTRONIC RECORDING OF CONFESSIONS AND WITNESS INTERVIEWS

Synopsis: To clarify existing FBI policy on electronic recording of confessions and to provide guidance on some of the factors that the SAC should consider when deciding whether to authorize recording.

Administrative: This document is a privileged FBI attorney communication and may not be disseminated outside the FBI without OGC approval. To read the footnotes in this document, it may be required to download and print the document in WordPerfect.

Details: FBI policy on electronic recording of confessions and witness interviews is contained in SAC Memorandum 22-99, dated 10 August 1999, which revised SAC Memorandum 22-98, dated 24 July 1998. Under the current policy, agents may not electronically record confessions or interviews, openly or surreptitiously, unless authorized by the SAC or his or her designee. See MIOG, Part II, Section 10-10.10(2). Consultation with an AUSA, CDC, or OGC may be appropriate in certain circumstances, but it is not required.[1] In certain circumstances (set forth in the above)

[1] If the recording is going to be surreptitious, SACs are urged to obtain the concurrence of the CDC or the appropriate OGC attorney. In addition, in accordance with the Attorney General's "Procedure for Lawful, Warrantless Monitoring of Verbal Communication," dated May 30, 2002, advice that the proposed surreptitious recording is both legal and appropriate must be obtained from the USA, AUSA or DOJ attorney responsible for the investigation.

- **The world of law enforcement may have advanced. . . in at least one way, the FBI hasn't.** In recent years, we have seen a significant increase in the use of ***"body cams"*** by law enforcement in recent years. In some instances, these cameras have been used to exonerate defendants. In other cases, body cams have solidified the government's case against an individual. While street level law enforcement officers have generally accepted body cameras, the FBI has remained steadfast in its commitment to avoid tape recording an interview unless certain requirements are met.
- **Why don't FBI agents tape record an interview?** If you are interviewed by the FBI, in most instances, the agents will not tape record the interview. It is common for FBI agents to work in pairs when they interview a non-custodial suspect or witness. Instead, the FBI agents will take notes of the interview on an ***FBI Form 302***.
- **At trial, juries will give weight to the version of the events documented on the FBI Form 302.** Since FBI agents typically work in pairs (and will readily support each other at trial), it can be difficult to overcome the version of the facts documented in the FBI Form 302.

With these points in mind, what should you do if you are approached by an FBI agent or another federal auditor?

Responding to an Investigation
Half-Truths, Lies and Audiotapes

- **An FBI agent can pose as a member of the news media or a documentary film crew. You may not even know when the government is gathering evidence and / or documenting any statements against interest that you or someone on your staff may make.**

FEDERAL BUREAU OF INVESTIGATION
POLICY NOTICE

0907N

1. Policy Directive Title.	Undercover Activities and Operations – Posing as a Member of the News Media or a Documentary Film Crew
2. Publication Date.	2016-06-08
3. Effective Date.	2016-06-08
4. Review Date.	2018-06-05
5. Date of Last Renewal. 10/6/2017	

6. Authorities:

6.1. *The Attorney General's Guidelines for Domestic FBI Operations* (AGG-Dom)

6.2. *The Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations* (AGG-UCO)

FBI policy governing journalist impersonation, released by Reporters Committee for Freedom of the Press

Responding to an Investigation
Half-Truths, Lies and Audiotapes

- **You CANNOT lie to government agents, investigators, etc. Can they lie to you? *Absolutely*. If the Police, the FBI or an OIG Agent lie to you during questioning, it *DOES NOT* render any statements against interests that you may make, involuntary and inadmissible.**

- **The U.S. Supreme Court has addressed this issue. In the landmark U.S. Supreme Court case *Frazier v. Cupp, 394 U.S. 731, 1969,* a homicide suspect was interrogated by the police and falsely told that an accomplice had already implicated him in the murder. Based on this lie, the suspect confessed to the murder. The U.S. Supreme Court ruled that such use of trickery and deceit can be permissible (depending on the totality of circumstances) provided that it does not shock the conscience of the court or community. Additional Supreme Court cases addressing this point:**

***"Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer."* (Sorrells v. U.S.)**

***"Nor will the mere fact of deceit defeat a prosecution, for there are circumstances when the use of deceit is the only practicable law enforcement technique available."* (U.S. v. Russell)**

- **Examples of conduct that does, in fact, "*shock the conscience*" of the community.**

  - **An investigator lying about his identity and introducing himself as the defendant's court appointed attorney.**

  - **An investigator who poses as a clergyman in an effort to obtain a confession under that guise would constitute behavior that shocks the conscience of the court or community.**

  - **Over the years courts have upheld countless confessions even though the investigator lied to the defendant during an interview. These cases have typically involved situations where the investigator made false statements about certain evidence, eye-witness testimony that the government will be depending on, the presence of fingerprints, etc.**

Responding to an Investigation
Half-Truths, Lies and Audiotapes

- **How should you respond when contacted by an FBI agent?** **The FBI shows up at your door. Can they come in without a warrant?**

  - **Can they come into your home without a warrant?** **Ask for a copy of the agent's business card. Absent an emergency or a search incident to an arrest, the FBI generally cannot come into and search your home unless you invite them in.**

  - **What if the FBI agent forces his way into my home?** **Don't resist. Reiterate the point that you have not given them permission to enter your home. Don't answer any questions.**

  - **Can the FBI agent require you to answer questions?** **No. You don't have to answer any questions. Should you choose to answer questions, step outside, shut your door and then respond (limiting your responses to your personal identification). Tell the FBI agent that you want to exercise your rights under the 6th Amendment and want to speak with your attorney before making a statement.**

    "I want to speak with my attorney before making a statement."

  - **How do you respond if the FBI agent says *"You shouldn't need an attorney if you haven't done anything wrong."*** **Most individuals will be very differential to FBI agents and will want to address any questions that they have. You need to fight this instinct! Exercise your rights under the 5th Amendment to the Constitution:**

    "At this time, I am choosing to exercise my rights to remain silent."

Responding to an Investigation
Half-Truths, Lies and Audiotapes

- **When approached by a federal agent, the agent may indicate that he / she is merely getting some background information. Based on this assertion, you may feel comfortable answering what you initial believe will only be "basic" questions. Let's be clear, when that agent shows up, there is a *VERY GOOD CHANCE* that the agents already knows the answers to any question that is being asked. The government may have already been investigating your case for months or even years.**

- **Federal agents are counting on the fact that health care providers (especially physicians) have a tendency to think that if they can only explain the facts, the case will go away. These agents have received extensive interrogation training at Quantico, FLETC, and the National Advocacy Center. They will use a provider's misplaced believe that he / she can explain away any concerns to build a case against the provider.**

- **Do you really know the "facts"? Although you may think that you remember a case or procedure administered to a patient, your mind isn't a steel trap. You really need to carefully refresh your recollection before going down memory lane with the government.**

Responding to an Investigation
Half-Truths, Lies and Audiotapes

- **Misstatements, hyperbole and exaggerations can result in prosecution. In a recent 2023 case out of Spokane, Washington, the government conducted an investigation of the controlled substance prescribing and billing practices of a licensed, authorized health care provider at a local clinic. As the government noted in its Press Release:**

"When the FBI and HHS-OIG interviewed [health care provider] during its investigation, he falsely stated that "99.99%" of the time he checked the vital signs of a patient before prescribing an opioid medication. In truth and in fact, as the [health care provider] well knew, that statement was materially false, when made, because he did not check the vital signs of a patient "99.99%" of the time before prescribing an opioid medication. Indeed, the rate at which the [Clinic] performed complete physicals was materially lower."

- **Notably, the government did *not* charge the health care provider with any billing related violations.**
- **The government did *not* charge the health care provider with any controlled substance or opioid prescribing violation.**
- **Instead, the government only charged the defendant with *"Making a Materially False Statement to the FBI."* The defendant is facing a potential sentence of 5 years in prison and a fine of $250,000.**

Final Thoughts
Gifts, Business Courtesies and Kickbacks

- **Kickbacks / Disguised Kickbacks and Bribes.**

  - **Be especially careful before you enter into a *business arrangement* with a laboratory, compounding pharmacy, DME company or other 3rd party health care provider or supplier.**
  - **A continuing concern of the government involves *lease arrangements* with actual and / or potential referral sources.**
  - **Serving as a *medical director* to a hospice, home health agency, or nursing home to whom you make patient referrals.**
  - **Serving as a *consultant* to a laboratory, compounding pharmacy or durable medical equipment supplier whose products you prescribe.**
  - **While old school *"dine and dash"* approaches may be gone, bringing *lunch and other goodies* to a practice or office is still commonplace.**
  - **Participating in a *sham loan arrangement* with an entity to whom you make referrals or whose products you prescribe, order or recommend.**
  - **Acquiring or having a *financial interest* in an entity to whom you send referrals (especially if the referral is for DHS services).**
  - **Accepting or soliciting any type of *remuneration (something of value),* such as a *gift card*, *sporting event tickets* or *liquor,* from a laboratory, pharmaceutical representative,**

Final Thoughts
Strengthen Your Compliance Efforts

- **Evaluate Your Financial Relationships with Potential Referral Sources.**

  - **Examine contracts, leases and payment arrangements with physicians and other providers in the community for compliance with EKRA and Anti-Kickback requirements.**

  - **Review your ownership structure to identify any potential Anti-Kickback or EKRA issues. Do you have investors who are sources of referrals or who can influence referrals?**

  - **Review policies, procedures and training for marketing and community liaison staff. You will be much better served if your marketing staff are true, bona fide employees, and as such, you must train and supervise them to ensure they are acting appropriately.**

QUESTIONS

This outline is provided as general information only. It does not constitute legal advice and should not be used as a substitute for seeking legal counsel. Robert W. Liles can be contacted by e-mail at:

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