



EDUCATIONAL RESOURCES

# DOS AND DON'TS FOR SUPPLIERS RESPONDING TO STATE MEDICAID AUDITS AND INVESTIGATIONS

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# INTRODUCTION

# OVERVIEW OF MEDICAID

- All states, the District of Columbia, and U.S. territories have Medicaid programs designed to provide health coverage for low-income individuals. Although the federal government establishes certain parameters for all states to follow, each state administers their Medicaid program differently, resulting in variations in Medicaid coverage across the country.
- Beginning in 2014, the Affordable Care Act provides states the authority to expand Medicaid eligibility to individuals under age 65 in families with incomes below 133 percent of the Federal Poverty Level (FPL) and standardizes the rules for determining eligibility and providing benefits through Medicaid, CHIP, and the health insurance marketplace.
- Medicaid is jointly funded by both the states and federal government but is administered by the states according to federal requirements.
- Because of these circumstances, when dealing with Medicaid, medical providers and suppliers must make sure that they are considering both the overarching, general federal requirements as well as the specific requirements for the state(s) they are operating in.

# MEDICAID ENFORCEMENT AGENCIES

- Unlike Medicare enforcement, which is conducted by the combination of Centers for Medicare & Medicaid Services (CMS), the Office of Inspector General (OIG), the Department of Justice (DOJ), and the Federal Bureau of Investigation (FBI), Medicaid oversight and enforcement is conducted by each respective state.
- Each state has designated which of its agencies will be tasked with Medicaid enforcement. It is common for this role to be carried out by a combination of that state's Health and Human Services Department, Inspector General, and Attorney General's Office.



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# PRIMARY AREAS OF MEDICAID ENFORCEMENT

# APPLICABLE LAW AND REGULATIONS

- As a program that involves a combination of both federal and state oversight, Medicaid compliance involves compliance with both federal laws and regulations as well as the laws and regulations of the specific state jurisdictions a medical provider or supplier is operating in.
- Key federal laws and regulations:
  - Civil False Claims Act (“FCA”)
  - Anti-Kickback Statute (“AKS”)
  - Physician Self-Referral Law (“Stark Law”)
- Common key state laws and regulations
  - State anti-fraud laws (including specific anti-kickback statutes)
- The primary objective of Medicaid audits and investigations is to look into and prosecute fraud, waste, and abuse (“FWA”).

# FRAUD, WASTE, AND ABUSE INVESTIGATION

- Fraud typically includes any of the following:
  - Knowingly submitting, or causing to be submitted, false claims or making misrepresentations of fact to obtain a federal health care payment for which no entitlement would otherwise exist;
  - Knowingly soliciting, receiving, offering, or paying remuneration (e.g., kickbacks, bribes, or rebates) to induce or reward referrals for items or services reimbursed by federal health care programs; and/or
  - Making prohibited referrals for certain designated health services .
- Examples of health care fraud include:
  - Knowingly billing for services at a level of complexity higher than services actually provided or documented in the medical records;
  - Knowingly billing for services not furnished, supplies not provided, or both, including falsifying records to show delivery of such items;
  - Knowingly ordering medically unnecessary items or services for patients;
  - Paying for referrals of federal health care program beneficiaries; or
  - Billing Medicare for appointments patients fail to keep.
- Health care fraud exposes individuals or entities to potential criminal, civil, and administrative liability and may lead to imprisonment, fines, and penalties.

# FRAUD, WASTE, AND ABUSE INVESTIGATION

- Abuse describes practices that may directly or indirectly result in unnecessary costs to a federal health care program such as Medicaid. Abuse includes any practice that does not provide patients with medically necessary services or meets professionally recognized standards of care.
- The difference between “fraud” and “abuse” depends on specific facts, circumstances, intent, and knowledge.
- Examples of abuse include:
  - Billing for unnecessary medical services;
  - Charging excessively for services or supplies;
  - Misusing codes on a claim, such as upcoding or unbundling codes.
- As with fraud, abuse can lead to potential civil and/or criminal liability.
- Waste involves the thoughtless or careless expenditure, mismanagement, or abuse of resources to the detriment (or potential detriment) of the U.S. government. Waste also includes incurring unnecessary costs resulting from inefficient or ineffective practices, systems, or controls.



# FALSE CLAIMS ACT (FCA)

- The FCA imposes civil liability on any person who knowingly submits, or causes the submission of, a false or fraudulent claim to the federal government, including claims submitted to a Medicaid program. (31 United States Code (U.S.C.) Sections 3729–3733)
- The terms “knowing” and “knowingly” mean a person has actual knowledge of the information or acts in deliberate ignorance or reckless disregard of the truth or falsity of the information related to the claim. However, no specific intent to defraud is required to violate the FCA.
- The penalty for each violation of the FCA can be 3x the amount of damages suffered by the government plus a penalty for each false claim between \$11,665 and \$23,331 (for 2020).

# FEDERAL ANTI-KICKBACK STATUTE (AKS)

- It is a federal crime to knowingly and willfully offer, pay, solicit, or receive any remuneration, directly or indirectly, to induce or reward patient referrals or the generation of business involving any item or service reimbursable by a federal health care program. (42 U.S.C. Section 1320a-7b(b))
- When a provider offers, pays, solicits, or receives unlawful remuneration, the provider violates the AKS.
- A remuneration is anything of value.
- The penalty for each violation of the AKS can be 3x the amount of damages suffered by the government plus a penalty for each false claim.
- Claims resulting from an arrangement involving an illegal kickback scheme are considered false claims for purposes of the FCA even if the claim was medically necessary and appropriate in all other respects.

# PHYSICIAN SELF-REFERRAL STATUTE (STARK LAW)

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- The Stark Law prohibits a physician from referring patients to receive “designated health services” payable by Medicare or Medicaid to an entity with which the physician or a member of the physician’s immediate family has a financial relationship.
- The penalty for each violation of the Stark Law can include fines and exclusion from participation in federal health care programs.
- Claims resulting from an arrangement involving a Stark violation are considered false claims for purposes of the FCA even if the claim was medically necessary and appropriate in all other respects.

# STATE ANTI-FRAUD STATUTES

- Each state has an anti-kickback statute that is similar to the federal AKS. Some state anti-kickback statutes apply only when the payor is the state Medicaid program. Other state anti-kickback statutes apply regardless of who the payor is. The following are examples of some specific anti-kickback statutes:
  - Fla. Stat. Ann. § 817.505(1)(a)-(c) (criminal liability for offering/paying or soliciting/receiving any benefit for referral of a patient); Fla. Stat. Ann. § 395.0185 (professional liability for kickback for referral of patients to a licensed facility)
  - Cal. Welf. & Inst. Code § 14107.2(a)-(b) (criminal liability for paying for referral of claims reimbursable by state health care system); Cal. Health & Safety Code § 445 (criminal liability for referring patient to health care facility for profit)
  - Tex. Occ. Code Ann. § 102.001(a) (criminal liability for soliciting/accepting or offering/paying for the referral of patients)
- Each state has statutes and regulations specific to the state's Medicaid program. These include statutes/regulations specific to fraud.



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# REASON FOR MEDICAID AUDITS AND INVESTIGATIONS

# WHY ME?

- The most common sources of investigations:
  - Data analytics
  - Spike in claims
  - Report to a state respective Medicaid Fraud Control Unit (“MFCU”) which is typically a part of the state’s Health & Human Services Department or Attorney General’s Office; most states have hotline numbers and/or online reporting systems to allow for anonymous reporting.
    - Complaint by patient or family member
    - Complaint by competitor regarding unfair business practices
  - Filing of a qui-tam lawsuit by a whistleblower.

# QUI-TAM (WHISTLEBLOWER) LAWSUIT

- An insider (whistleblower), typically an employee with a medical provider or supplier, files a federal lawsuit that goes under seal while the Department of Justice (and sometimes a state attorney general's office) investigates the allegations in the lawsuit.
- The government then has the opportunity to “intervene” and take over the lawsuit. There may be a parallel criminal investigation.

# DATA ANALYTICS

- Federal health care programs, including Medicaid, have begun to review and analyze claims and related data to detect aberrant trends, outliers, and unusual billing patterns.
- When this is done and there appears to be indications of fraud, waste, or abuse, the matter can be referred for further investigation.
- In many states, a majority of audits and investigations are initiated based upon findings made through data mining and analysis rather than from direct complaints.





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# HOW MEDICAID INVESTIGATIONS AND AUDITS ARE STARTED/MAJOR PARTS OF THE REVIEW PROCESS

# INITIAL NOTIFICATION OF AUDIT/INVESTIGATION

- When the government initiates an investigation or an audit, it already has some information about the target and scope of the investigation or audit.
  - Some providers and suppliers involved in investigations do not start off as the target of that investigation, never become the target of the investigation, and are witnesses only.
  - However, as the investigation proceeds and the government obtains more information, the targets can change, and the scope of the investigation can shift and expand.
- If you are contacted by the government as part of an investigation or audit, assume the government already has information about you.
- What information the government already has will often determine how the government initiates its initial contact with you.
- Primary ways the government initiates contact are:
  - Written notification of audit or investigation;
  - Subpoena for the production of records; or
  - Inspection to execute a warrant.

# TIP (AFTER INITIAL NOTICE)

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- Do not merely respond to subpoena and assume you are finished.
  - Typically a company receiving a subpoena/production request is also being investigated as a “co-conspirator” or at least as a subject of the investigation.
  - Learn all you can about your involvement prior to your production.
  - Direct your counsel to maintain regular communication with the investigation team.

# GENERAL FOCUS OF AUDITS AND INVESTIGATIONS

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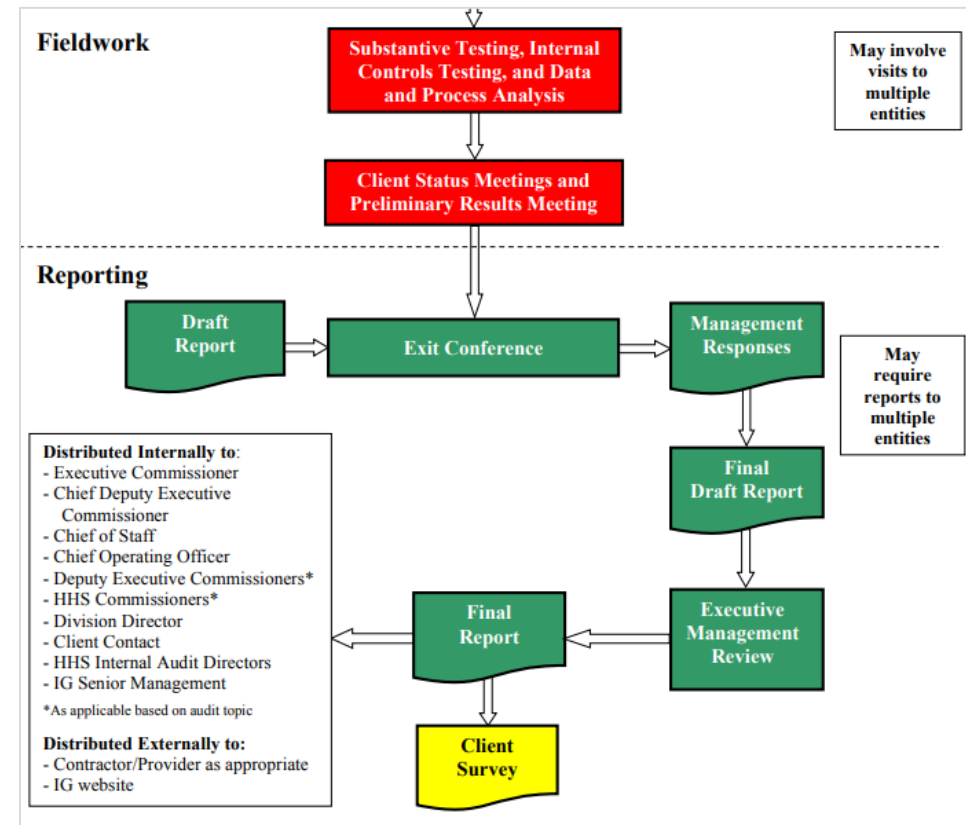
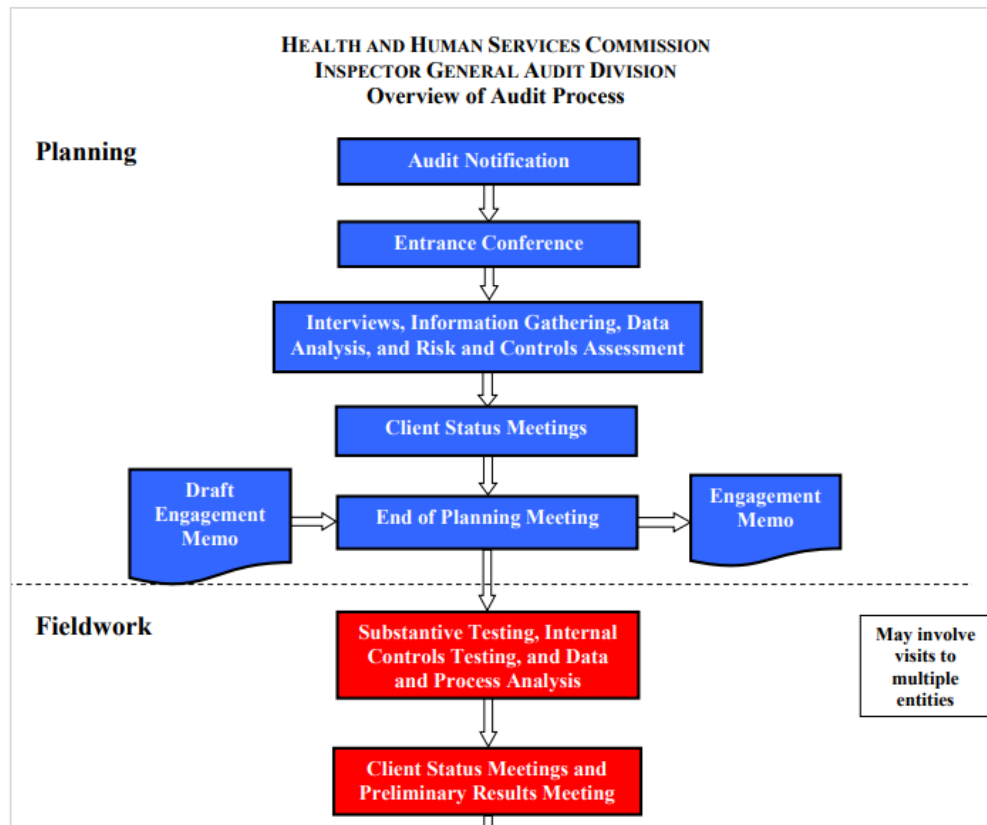
- Audits
  - Focus is on compliance and are conducted in accordance with generally accepted government auditing standards.
- Investigations
  - Focus is on alleged abusive, wasteful, or fraudulent practices. Addresses allegations of recipient and provider fraud, waste, and abuse and issues with employees at state supported living centers and state hospitals.

# WHO IS THE INVESTIGATION ABOUT?

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- Target, subject, and witness distinctions.
- Witnesses can become subjects and subjects often become targets.
- Manufacturers, marketers, labs, billing companies, and other ancillary providers may pull you into their investigations.
- Learn all you can to evaluate the case and determine your exit strategy.

# EXAMPLE OF STATE MEDICAID AUDIT PROCESS (TEX.)



# INVESTIGATION PROCESS

- First Notice of Investigation
  - This can be through a written notice or subpoena mailed to the provider or supplier.
  - First notice of an investigation can also be by an unannounced inspection or execution of a warrant.
- Information gathering by government
  - This will always involve the request/collection of records by the government.
  - Depending on your degree of involvement in the investigation, the government might also wish to interview various people at your company.
- Resolution of the investigation
  - If your company is not the target of the investigation, further involvement by you beyond this point will generally be very limited.
  - If the government has determined that you have committed any violation, it will generally notify you of this position and start the process to resolve these alleged violations.

**FAILURE TO RESOLVE = LITIGATION**

# INTERVIEWS OF PARTIES AND WITNESSES

- As part of the investigation process, after the initial production has taken place, the government will typically want to interview various individuals in the company/organization.
- Witnesses you can control:
  - Self
  - Owners
  - High-level managers
- Witnesses you may not be able to control:
  - All other employees
- Tips for witness prep



# RESOLUTION OF ALLEGED VIOLATIONS

- Depending on the nature of the alleged violations, civil and/or criminal liability will need to be resolved.
- The state will generally attempt to resolve the allegations through a settlement of any civil claims and a plea agreement for any criminal claims.
  - How this process goes can be greatly influenced by how a provider/supplier conducts itself during the investigation process.
  - Providers/suppliers who are cooperative, helpful, and proactive in addressing issues will generally receive better treatment and more leniency from the government in these negotiations.
- If the allegations cannot be resolved by agreement, the government will resolve the allegation through a lawsuit and/or criminal proceedings.

**FAILURE TO RESOLVE = LITIGATION**

# CRIMINAL INVESTIGATIONS ARE DIFFERENT

- Some investigations are conducted jointly by the state's criminal and civil division.
- **You must ALWAYS have health care counsel if you are a party to or the subject of a criminal investigation.**
- Health care counsel may need to tag team with purely criminal defense counsel depending on the circumstances of a case.
- The negotiation strategy in a criminal investigation is different from a purely civil or administrative investigation/audit.



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# KEY DOS AND DON'TS

# THE INITIAL CONTACT WITH THE STATE

- First thing, obtain the investigator's business cards. If they have none, ask them to write down this information as your first thing!
- **DO** affirm to the government your intention to cooperate and be of assistance; **DON'T** make specific promises or claims.
- If possible, **DO** contact and consult with your attorney before communicating with any government representative.
  - If the initial contact is part of an unannounced inspection or execution of a warrant, this will not be possible. However, do contact your attorney as soon as possible.
- **DON'T** agree to be interviewed or to give a statement without having counsel present.
- **DO** pay attention to what is said and done at any inspection or search and provide that information to your counsel.

# “KNOCK AND TALKS”

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- What is it? – Government delivers the subpoena and asks to come into your home or to meet at a quiet place to discuss the investigation.
- It is rarely ever a good idea to participate in a “knock and talk.”
- Tips for addressing this government strategy without running afoul of any laws.

# TRAIN YOUR TEAM IN ADVANCE

- Whether on purpose or by unhappy chance, it seems that investigators will always arrive when you are out of town on vacation.
- When you are not available, always have your second-in-charge present.
- Always train your second-in-charge to be able to handle such a notice and investigation as well as you.
- While training employees, advise them of their rights during an investigation (to the extent you are able to do so).

# HEALTH LAW COUNSEL

- When you first receive notice of the inspection or audit, DO retain the services of a health law attorney who specializes in government audits and inspections.
  - Attorneys with experience in these areas will often know the government attorneys and agents in charge of the investigation.
  - Additionally, investigations and audits are often part of a larger, industry scope investigation that attorneys in these areas might have past experience in or knowledge about.

# INFORMATION COLLECTION AND INDEPENDENT SELF-INVESTIGATION

- **DO** immediately put a hold on your documents and begin to collect information that has been specifically requested as well as any other key/useful information.
- **DO** cooperate with requests for documents and interviews to the extent you can. However, **DO** raise any specific issues of concern in this process with your counsel to evaluate for potential civil and criminal liability.
- **DO** conduct an internal, independent, self-audit/investigation to evaluate your potential liability and exposure. But, take steps to ensure it is privileged! Consult with counsel to discuss options.



# INFORMATION COLLECTION AND INDEPENDENT SELF-INVESTIGATION

- **DON'T** provide the results of this internal audit/investigation to the government without consulting with your attorney first.
- **DO** consider what proactive/remedial measures and changes can be implemented to address areas of concern and potential liability.
  - Be careful in discussing any such changes/measures with the government to avoid it appearing to be an admission of guilt.
  - However, these steps can be beneficial in potential future settlement discussions as they demonstrate a policy of compliance and cooperation.



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# QUESTIONS?

Email us at [auweb@achcu.com](mailto:auweb@achcu.com)



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# THANK YOU

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