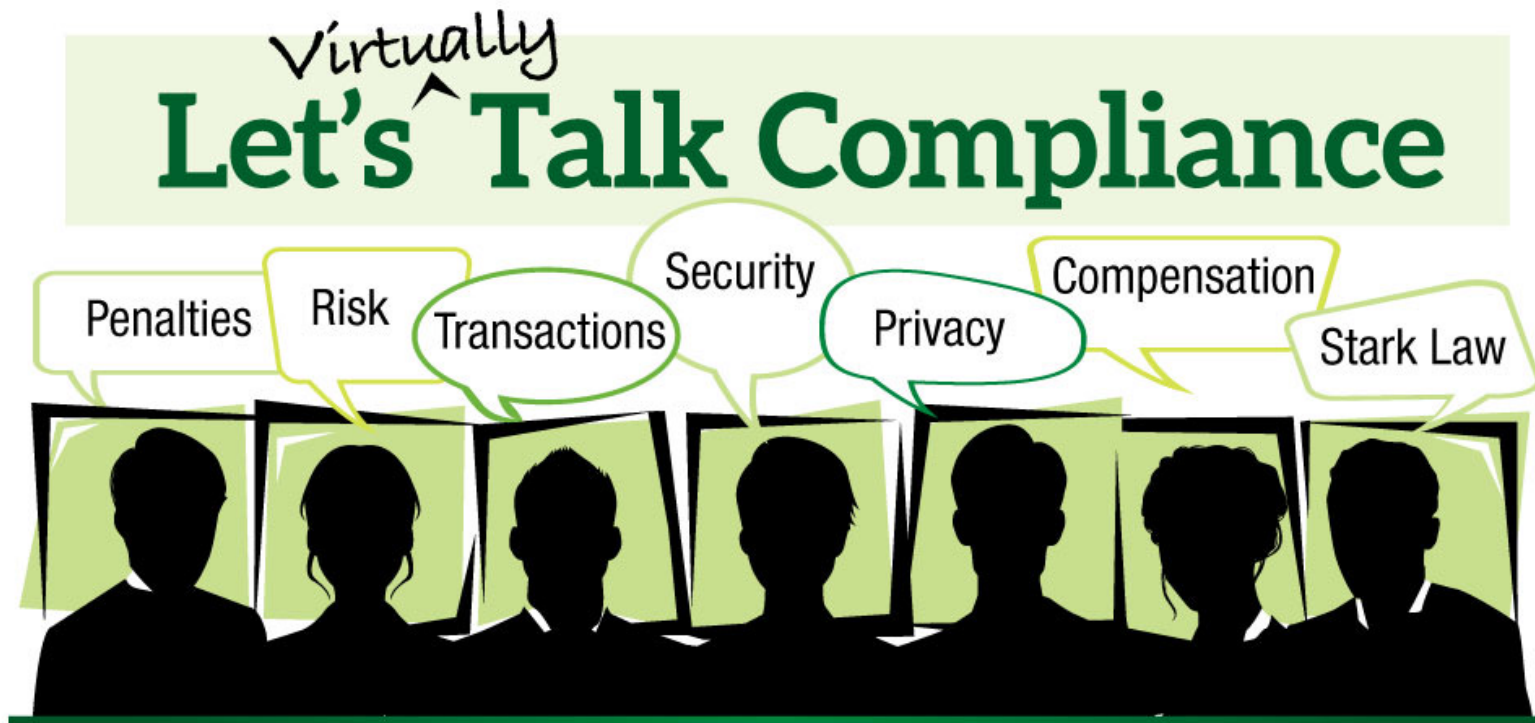


Let's Talk Compliance

One-Day Compliance Master Class





SESSION #1

Fraud & Abuse: Recent Cases Settled Summary

Olivia King & Shannon Sumner

January 19, 2022

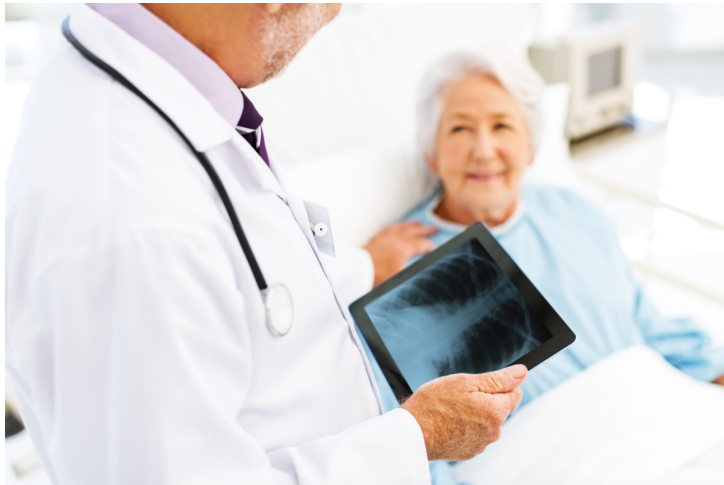
Roadmap of Presentation

- Overview of Important Health Care Fraud & Abuse Decisions and Enforcement Actions from 2021
 - *Care Alternatives v. U.S.*
 - COVID-19 Relief Funds: Enforcement
 - DOJ 2021 Health Care Takedown: Telemedicine Fraud
 - OIG Self Disclosure Settlement: Remuneration above FMV, Free Services & Free Space
- Lessons Learned: Compliance Work Plan Considerations
- Enforcement Trends for 2022



Care Alternatives v. U.S.

- Supreme Court declined to hear a case involving the False Claims Act (FCA) issue of objective falsity
- May a health care provider's medical judgment be considered "false" for the purpose of the FCA?



Compliance Work Plan Considerations

- Hospice continues to be an active OIG work plan item.
- Compliance Work Plan should include audits targeted at specific OIG findings related to:
 - Ineffective policies and procedures
 - Hospice election statements not signed before period covered
 - Inappropriate level of care was billed
 - Clinical documentation did not support beneficiary's terminal prognosis



Enforcement: COVID-19 Relief Funds

- DOJ:

- “It is clear to me and my colleagues in the Civil Division – and I am sure to all of you – **that the False Claims Act will play a significant role in the coming years as the government grapples with the consequences of this pandemic . . .** Unfortunately, however, some individuals and businesses applied for – and received – payments to which they were not entitled. The circumstances of the current pandemic may be novel, but the inevitable fraud schemes it will produce will in many cases resemble misconduct that the False Claims Act has long been used to address. These schemes will likely include **false representations regarding eligibility, misuse of program funds, and false certifications pertaining to loan forgiveness.**”

- *Acting Assistant Attorney General Brian M. Boynton – Federal Bar Association Qui Tam Conference (Feb. 17, 2021).*



Enforcement: COVID-19 Relief Funds

- **OIG:**

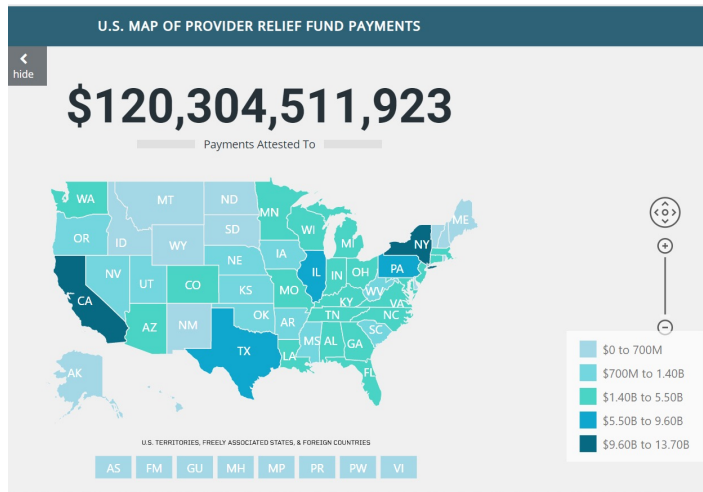
- “Ensuring accurate payment in accordance with program requirements is a longstanding HHS management challenge, and OIG’s work will address contracts, grants, program payments, and other payment mechanisms . . . Prevent, detect, and remedy waste or misspending of COVID-19 response and recovery funds . . . **Audit fund recipients** to assess whether they met use, reporting, and other requirements, and, where appropriate, recommend recovery of misspent funds . . . Fight fraud and abuse that diverts COVID-19 funding from intended purposes or exploits emergency flexibilities granted to health and human services providers . . . **Identify and investigate suspected fraud**, in coordination with Federal, State, local, and Tribal law enforcement partners, and exercise OIG’s administrative enforcement authorities when appropriate.”

- *OIG Strategic Plan: Oversight of COVID-19 Response and Recovery (May 2020)*

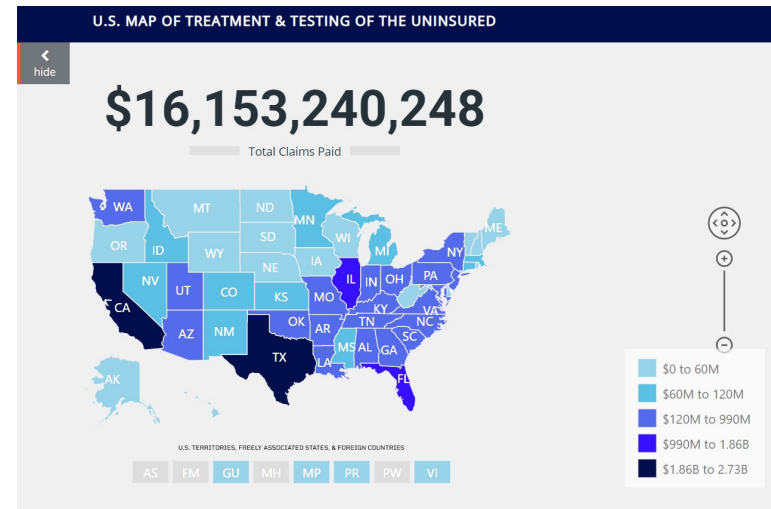


Enforcement: COVID-19 Relief Funds

- Provider Relief Fund:



- HRSA Uninsured Program:



- Paycheck Protection Program:

- \$790,921,572,358 (as of 1/2/2022)



Enforcement: COVID-19 Relief Funds



Compliance Work Plan Considerations

- Creation of a COVID audit “task force” with knowledge of the following:
 - COVID related attestations, responses, disclosures, contracting (Finance, Compliance, Legal, Revenue Cycle, Supply Chain)
 - Documentation of COVID waivers utilized and plan for unwinding arrangements when the PHE ends
 - Internal audits of COVID related claims including follow-up on issues identified and timely response (including whether implicates self-disclosure)
 - State of current policies and procedures including gap analysis of missing policies as regulations continue to change



Compliance Work Plan Considerations

- COVID Contracting: Assess whether COVID related contracts are clearly noted in the contract management system and can be retrieved/cancelled when needed
- Disaster Recovery: Continue to refine the organization's disaster recovery planning for lessons learned and conduct table-top exercises to test protocols
- EMTALA: Audits should be considered for the compliance work plan to evaluate appropriateness of patient transfers, medical screening exams
- Information Technology: HIPAA compliant new platforms (telehealth, patient monitoring systems)

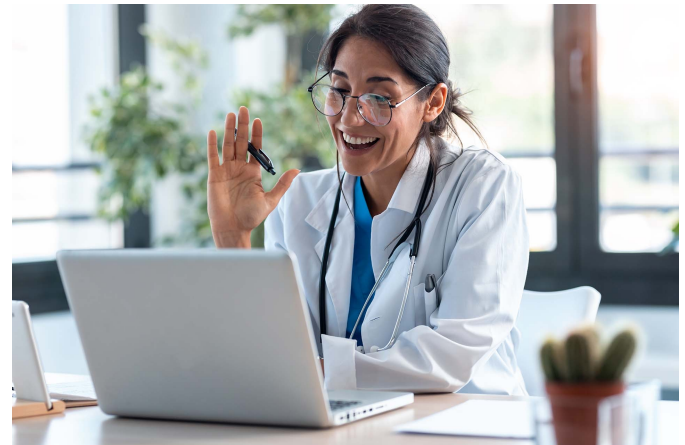
2021 Health Care Takedown

- 138 defendants, including 42 licensed medical professionals, in 31 federal districts
- \$1.4 Billion in alleged losses
- Enforcement areas:
 - COVID-19 Fraud
 - Sober Homes
 - Prescriptions
 - **Telehealth**



Telehealth Fraud Schemes

- Telehealth practice has become increasingly complex
- OIG audits of telehealth practice during PHE
- Recent example:
 - 4 defendants indicted in international telemedicine fraud scheme alleged to have caused \$37M in losses



Compliance Work Plan Considerations

- Assess telehealth platform security controls to include configuration settings and supporting infrastructure. Assess HIPAA risk and content of training/education for workforce.
- Ongoing education regarding documentation requirements for telehealth services (verbal consent for visit, use of video or audio, virtual check in versus e-visit, start/stop time, location of patient and provider, prescribing of controlled substances)
- Compliance with Florida statute standards of practice for telehealth services (patient evaluation, record-keeping and controlled substance prescribing).
- Understand diverse payer requirements for CPT codes, modifiers, place of service



Remuneration Inconsistent with Fair Market Value, Free Services & Space

- April 30, 2021: OIG settlement arising from self-disclosure
- Hospitals agreed to pay \$20.9 Million for violating the Civil Monetary Penalties Law
 - Payment above FMV
 - Remuneration in the form of free services and office space
- From April 1 – September 30, 2021, OIG self-disclosure cases accounted for \$41.2 M in HHS receivables



Compliance Work Plan Considerations

- Real Estate: Walk the space at least annually, validate payments and related rent escalators are collected, and confirm lease transactions are within current FMV rates. Confirm market analysis is current.
- Medical Director Timesheets: Assess whether the timesheets are completed, duties align with contractual requirements and work-product or deliverables, and services are commercially reasonable
- Call Coverage: Scrutinize significant call pay to specialists who are infrequently called into the ER (e.g. oncologists, ENTs), assess how the call panel is determined, impact of telemedicine on call coverage arrangements, minimum number of gratis call coverage hours prior to on-call eligibility and whether on-call pay is disproportionately high compared with regular practice income (FMV).



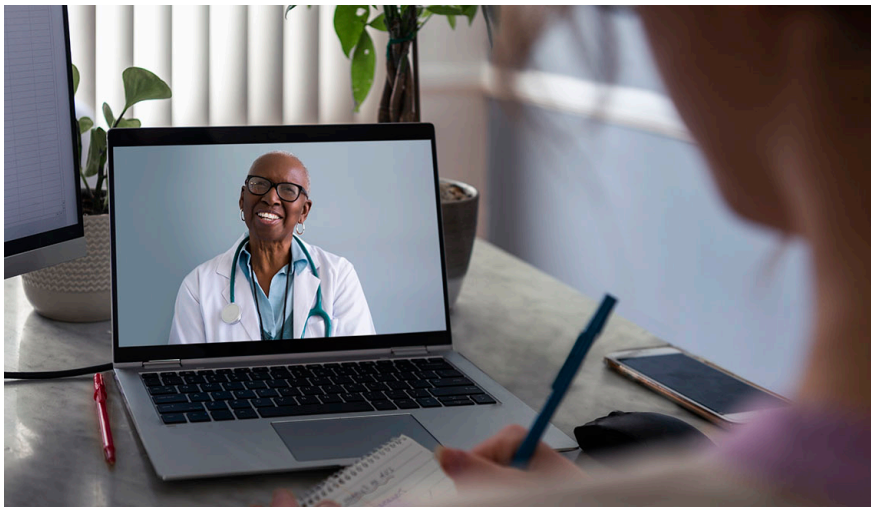
Compliance Work Plan Considerations

- Relationships with Referral Sources: Pull payments made to (payroll and A/P systems) and payments received from (cash ledger) referral sources using data analytics and compare to the contract database. Utilized in many organizations to assess whether payments are supported by written agreements (where applicable). Audit criteria based upon Independent Review Organization (IRO) testing steps in Corporate Integrity Agreements (CIAs).
 - ✓ Contract present in contract management system
 - ✓ Business rationale documented
 - ✓ Remuneration appropriate, within FMV and consistent with terms of the agreement
 - ✓ Administrative services are documented (time logs, reporting)



Predictions for Enforcement in 2022

1. COVID-19 Relief Funds
2. COVID-19 Waivers & Expiration of the PHE
3. Telehealth



Thank you.

Olivia King
Associate
Foley & Lardner LLP
617.226.3165
oking@foley.com

Shannon Sumner
Chief Compliance Officer & Principal
PYA, P.C.
800.270.9629
ssumner@pyapc.com

ATTORNEY ADVERTISEMENT. The contents of this document, current at the date of publication, are for reference purposes only and do not constitute legal advice. Where previous cases are included, prior results do not guarantee a similar outcome. Images of people may not be Foley personnel.
© 2022 Foley & Lardner LLP

