INVESTIGATION HYDRAS: NAVIGATING COMPLEX ISSUES IN INTERNAL INVESTIGATIONS

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The views expressed in this presentation are the authors' own, and do not necessarily reflect the views of the United States Department of Justice.

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Notes:

Introduction

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Notes:

Overview

- Scope of the Investigation
- Use of Experts
- Quantifying an Overpayment
- Disclosures

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Scope of the Investigation

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Legal Standards: Scope of the Investigation

- DOJ's Evaluation of Corporate Compliance Programs
  - Properly scoped investigations considered during negotiations and charging decisions
  - Triaging complaints
  - Scope based on nature of complaint

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Legal Standards: Disclosure Obligations

- DOJ's Justice Manual § 9-28.720
  - "[M]ust disclose relevant factors of which it has knowledge," including identities of substantially involved individuals
- OIG's Provider Self-Disclosure Protocol
  - Nature and extent of misconduct and response
  - Identities of corporate officials or those that should have been aware of misconduct

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Notes:

Understanding the Client

- Identity of the client (*e.g.*, company itself or certain personnel)
- Corporate structure and information flow
- Relevant decision makers
- Relevant custodians
- Information storage
- Access to relevant information

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Notes:

Understanding the Issues and Objectives

- Triggering events (*e.g.*, whistleblower complaint, government inquiry)
- Relevant concerns/issues
- Efficiency
- End game (*e.g.*, disclosure, corrective actions)

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Common Investigation Scoping Pitfalls

- Scorched earth (too broad)
- Scattershot (too unfocused)
- The trees for the forest (too narrow)

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Best Practices for Scoping Investigations

- Clearly define scope and protocol at outset
- Consider developing “tranches” of review
- Establish clear internal reporting channels
- Actively consider attorney-client privilege and attorney work product protection
- Coordinate information necessary for remediation or disclosure

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Example Scenarios

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Use of Experts

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When To Engage a Consultant

- Subject matter expertise
- Surge capacity
- Time constraints
- Objectivity
- Relationships to key enforcement authorities

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Privilege Considerations

- Experts engage on sensitive subject matters
- Frequently engaged at outset of investigation with only limited insight into issues

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What is attorney-client privilege?

- Communication which is:
  - Made for purpose of obtaining legal advice in legal proceeding
  - Made in confidence
  - Made by client
  - Received by attorney acting as attorney
- Only client can assert

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What is attorney work product doctrine?

- *Qualified* protection from disclosure for certain materials prepared in anticipation of litigation
- Showing of undue hardship may allow discovery

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How do I maintain privilege?

- Retain through counsel
- Clearly define purpose of engagement
- Limit scope of the engagement
- Affirmatively state intent is that work product is privileged
- Funnel communications to/from consultant through attorney
- Supervise and monitor

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Notes:

Is your consultant your next relator?

- Detailed access to sensitive information
- Motivated by potential whistleblower rewards
- Consider adding provisions to contract designed to mitigation risk

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Notes:

Is your consultant your next relator?

- Contract could include:
  - Representations and warranties
  - Covenants
  - Termination and remedies provisions

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Example Scenarios

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Quantifying an Overpayment

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The Patient Protection and Affordable Care Act of 2010 (the ACA)

The ACA codified 42 U.S.C. § 1320a-7k(d):

Which "requires a person who has received an overpayment to report and return the overpayment to the Secretary, the state, an intermediary, a carrier, or a contractor, as appropriate, at the correct address, and to notify the Secretary, state, intermediary, carrier or contractor to whom the overpayment was returned in writing of the reason for the overpayment."

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Overpayment Rule – 60 Days

"A person who has received an overpayment must report and return the overpayment by the later of either of the following:

(i) [t]he date which is 60 days after the date on which the overpayment was identified; [or]

(ii) (ii) [t]he date any corresponding cost report is due, if applicable."

42 U.S.C. § 1320a-7k(d)(4)(B); 42 C.F.R. § 401.303.

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Notes:

What is an overpayment?

"[A]ny funds that a person has received or retained under title XVIII of the [Social Security] Act to which the person, after applicable reconciliation, is not entitled under such title."

42 U.S.C. § 1320a-7k(d)(4)(B); 42 C.F.R. § 401.303.

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When has an overpayment been identified?

When a person "has, or should have through the **exercise of reasonable diligence**, determined that the person has received an overpayment and quantified the amount of the overpayment."

42 C.F.R. § 401.305(a)(2) (emphasis added).

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What is reasonable diligence?

"[B]oth proactive compliance activities conducted in good faith by qualified individuals to monitor for the receipt of overpayments and investigations conducted in good faith and in a timely manner by qualified individuals in response to obtaining credible information of a potential overpayment."

81 Fed. Reg. 7654, 7661.

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What is the lookback period?

The number of years a provider must review data to determine if an overpayment has occurred—known as the "lookback period"—is "within 6 years of the date the overpayment was received.

42 C.F.R. § 401.305(a)(2).

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How much time is permitted to identify an overpayment?

Once a provider receives "credible information" that an overpayment exists, a provider must conduct a "timely investigation," which is "at most 6 months from receipt of the credible information, except in extraordinary circumstances."

81 Fed. Reg., at 7662.

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What are the consequences of retaining an overpayment?

If a provider retains an overpayment "after the deadline for reporting and returning the overpayment," it becomes "an obligation for purposes of 31 U.S.C. 3729."

42 C.F.R. § 401.305(e).

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Example Scenarios

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Disclosures

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Criminal Liability

- 42 U.S.C. § 1320a–7b(a)(3), *Criminal penalties for acts involving Federal health care programs*

  It is criminal offense to "hav[e] knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceal[] or fail[] to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized."

- 18 U.S.C. § 1957

  It is a criminal offense to "knowingly engage[] or attempt[] to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity."

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Criminal Liability, cont'd.

The following requires the government to prove knowledge at the time of the claim, statement, or fraudulent activity:

- 18 U.S.C. § 287, *False, fictitious or fraudulent claims*
- 18 U.S.C. §1035, *False statements relating to health care matters*
- 18 U.S.C. §1347, *Health care fraud*

- 18 U.S.C. § 4, *Misprision of felony*

  "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both."

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Other Consequences

- Corporate Integrity Agreements
- Government Investigations
- Public Image
- Derivative Actions
- Resource Intensive

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Scope and Procedure of Disclosure

- *Overpayment "only" or*
- *More than an overpayment*

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Overpayment Only

- Disclosure to Medicare Administrative Contractor (MAC)
- Appropriate for:
  - *Incorrect coding or other coding errors;*
  - *Insufficient documentation;*
  - *Certain medical necessity errors; and*
  - *Other processing and administrative errors.*
- Payment Options:
  - *Immediate payment;*
  - *Immediate recoupment, which is offset against future payments;*
  - *Standard recoupment, which is offset according to a schedule; and*
  - *Extended repayment schedule, if the provider is unable to repay the overpayment within a required timeframe.*

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More than an overpayment

- OIG Self-Disclosure Protocol;
- CMS Voluntary Self-Referral Disclosure Protocol;
  - *Stark law violations*
- Disclosure directly to DOJ

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Timing of Disclosure

- Prior to government investigation, or
- During government investigation.

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Example Scenarios

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