

# WHAT YOUR BOARD NEEDS TO KNOW ABOUT COMPLIANCE NATIONAL MEDICARE RAC SUMMIT 9/13/10

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# RAC, MIC, DATA MINING REVIEWS AND RISKS OF NON-COMPLIANCE

- Common billing systems
- Frequency of reviews
- Information-sharing among organizations
- Published reports (OIG, GAO, state audits)
- Commercial data vendors
- Need to improve compliance systems and address compliance risks

# 10) To whom does the Compliance Officer report?

- Board
- Audit Committee
- CEO
- General Counsel
- CFO



## 9) How independent is your audit committee? Sarbanes-Oxley 301:

- (A) IN GENERAL- Each member of the audit committee shall be a member of the board of directors . . . and shall otherwise be independent.
- (B) CRITERIA- In order to be considered to be independent, a member of an audit committee may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee--
  - (i) accept any consulting, advisory, or other compensatory fee from the (entity); or
  - (ii) be an affiliated person of the (entity) or any subsidiary thereof.

## 8) Who picks and pays your auditors? Sarbanes-Oxley 301

- “the audit committee shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed . . . (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work, and each such registered public accounting firm shall report directly to the audit committee.”



# 7) How often and from whom does your Board receive compliance presentations and training?

- "KPMG Report . . . the system was designed to permit the directors to periodically monitor AmSouth's compliance with BSA and AML regulations.
  - AmSouth's designated BSA Officer "has made annual high-level presentations to the Board of Directors in each of the last five years."
  - the Board's Audit and Community Responsibility Committee (the "Audit Committee") oversaw AmSouth's BSA/AML compliance program on a quarterly basis.
  - "the BSA Officer presents BSA/AML training to the Board of Directors annually,"
  - "Corporate Security training is also presented to the Board of Directors."
  - **Stone v. Ritter** 2006 Del. LEXIS 597 (Del. November 6, 2006).

## 6) When was the last time your organization conducted a compliance risk assessment?

- The U.S. Sentencing Guidelines suggests that organizations “periodically” assess their organization’s risk and “take appropriate steps to design, implement, or modify” their ethics and compliance program.
- Organizational culture
- Risk areas
- Internal controls
- **§8B2.1. Effective Compliance and Ethics Program**



## 5) How long do your compliance officers last?

- According to Health Care Compliance Association, median tenure of current compliance officers is over three years.



## 4) Have your board members and compliance officer looked at your IRS 990 lately? (if a non-profit)

- Part VI, *Governance, Management, and Disclosure* – conflict of interest policies, review of 990
- Schedule H, *Hospitals* (uncompensated care)
- Schedule J, Compensation Information
  - First-class or charter travel
  - Travel for companions
  - Discretionary spending account
  - Housing allowance or residence for personal use
  - Payments for business use of personal residence
  - Health or social club dues or initiation fees
  - Personal services (e.g., maid, chauffeur, cook)

# 2010-THE YEAR DISCLOSURE STOPPED BEING VOLUNTARY

- 3) 2010 Amendments to the Sentencing Guidelines 8B2.1. Effective Compliance and Ethics Program “the organization promptly reported the offense to appropriate governmental authorities . . . .”
- 2) PPACA SECTION 6402 (d) Reporting and Returning of Overpayments
- 1) The Fraud Enforcement and Recovery Act Amendments of 2009 (as applied to overpayments)



## 8B2.1. Effective Compliance and Ethics Program

- The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.
- 2004 Federal Sentencing Guidelines (Effective November 1, 2004)

## 8B2.1. Effective Compliance and Ethics Program

- The organization shall take reasonable steps—
- (A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;
- (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program
- 2004 Federal Sentencing Guidelines (Effective November 1, 2004)



## 8B2.1. Effective Compliance and Ethics Program

- (B) There is a rebuttable presumption, for purposes of subsection(f)(1), that the organization did not have an effective compliance and ethics program if an individual—
  - (i) within high-level personnel of a small organization; or
  - (ii) within substantial authority personnel, but not within high level personnel, of any organization, participated in, condoned, or was willfully ignorant of, the offense.

## 8B2.1. Effective Compliance and Ethics Program

- The individual or individuals with operational responsibility for the compliance and ethics program (see§8B2.1(b)(2)(C)) have direct reporting obligations to the governing authority or an appropriate subgroup thereof (e.g., an audit committee of the board of directors).
- 2010 Amendments to the Sentencing Guidelines



# 8B2.1. Effective Compliance and Ethics Program

- *an individual has "direct reporting obligations" to the governing authority or an appropriate subgroup thereof if the individual has express authority to communicate personally to the governing authority or appropriate subgroup thereof*
- *(A) promptly on any matter involving criminal conduct or potential criminal conduct, and*
- *(B) no less than annually on the implementation and effectiveness of the compliance and ethics program*
- **2010 Amendments to the Sentencing Guidelines**

# THE TWO MOST IMPORTANT MEDICAID INTEGRITY PROVISIONS OF PPACA

- MANDATORY REPORTING AND REPAYMENT OF OVERPAYMENTS BY PROVIDERS
- IMPROPER RETENTION OF OVERPAYMENT IS A FALSE CLAIM (invokes treble damages, penalties, and whistleblower provisions)



# *PPACA SECTION 6402 MEDICARE AND MEDICAID PROGRAM INTEGRITY PROVISIONS*

- *(d) REPORTING AND RETURNING OF OVERPAYMENTS—*
- *(1) IN GENERAL—If a person has received an overpayment, the person shall—*
- *(A) report and return the overpayment to the Secretary, the State, an intermediary, a carrier, or a contractor, as appropriate, at the correct address; and*
- *(B) notify the Secretary, State, intermediary, carrier, or contractor to whom the overpayment was returned in writing of the reason for the overpayment.*

# ***PPACA SECTION 6402 (d) MEDICARE AND MEDICAID PROGRAM INTEGRITY PROVISIONS***

- *“(3) ENFORCEMENT—Any overpayment retained by a person after the deadline for reporting and returning the overpayment under paragraph (2) is an obligation (as defined in section 3729(b)(3) of title 31, United States Code) for purposes of section 3729 of such title. (False Claims Act)*



# WHAT IS AN "OVERPAYMENT?"

- (B) OVERPAYMENT—The term "overpayment" means any **funds** that a **person** receives or retains under title XVIII (Medicare) or XIX (Medicaid) to which the person, after applicable reconciliation, is **not entitled** under such title.
- "**funds**" not "**benefit**"

# WHEN MUST AN OVERPAYMENT BE RETURNED?

- PPACA 6402(d)(2)
- An overpayment must be reported and returned . . .by the later of:
- (A) the date which is 60 days after the date on which the overpayment was identified; or
- (B) the date on which any corresponding cost report is due, if applicable.



# THE OBLIGATION TO RETURN AN IDENTIFIED OVERPAYMENT IS CONTINUING

- CRITICAL DATE: WHEN WAS THE OVERPAYMENT IDENTIFIED
- NOT: WHEN WAS THE OVERPAYMENT RECEIVED
- CONTINUING DUTY TO REPAY IDENTIFIED OVERPAYMENTS FROM PRIOR TIME PERIODS

# SOME REASONS FOR OVERPAYMENTS

- Payment exceeds the usual, customary or reasonable charge for the service.
- Duplicate payments of the same service(s).
- Incorrect provider payee.
- Incorrect claim assignment resulting in incorrect payee.
- Payment for non-covered, non-medically necessary services.
- Services not actually rendered.
- Payment made by a primary insurance.
- Payment for services rendered during a period of non-entitlement (patient's responsibility).



# MORE REASONS FOR OVERPAYMENTS

- Failure to refund credit balances
- Excluded ordering or servicing person
- Patient deceased
- Servicing person lacked required license, certification, or minimum training.
- Ordering provider deceased more than six months prior to date of service
- Billing system error

# MORE REASONS FOR OVERPAYMENTS

- Service induced by false statement of ordering provider
- Service inconsistent with physician order or treatment plan
- Service not documented as required by regulation
- No order for service
- Service by unenrolled provider “billing through” enrolled provider



# GOVERNMENT IS USING DATA TO DETECT OVERPAYMENTS

- RAC AUDITS, STATE MEDICAID AUDITS
- EXCLUDED PERSONS
- DECEASED ENROLLEES
- OUTPATIENT SERVICE DURING INPATIENT STAY
- DECEASED PROVIDERS
- CREDIT BALANCES

# "OVERPAYMENT" INCLUDES:

- PAYMENT RECEIVED OR RETAINED FOR SERVICES ORDERED OR PROVIDED BY EXCLUDED PERSON "no payment will be made by Medicare, Medicaid or any of the other Federal health care programs for any item or service furnished by an excluded individual or entity or at the medical direction or on the prescription of a physician or other authorized individual who is excluded . . ." 42 CFR 1001.1901



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