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Preventive Medicine for Doctors

by Nathan A. Fishbach, JD

The term preventive medicine now may apply to physicians as well as patients. The Office of the Inspector General for the US Department of Health and Human Services (HHS) recently issued a document that outlines a compliance program for individual and small group physician practices. The adoption of such a program may enhance a practice's operations as well as place it in a better posture when compliance issues arise.

The Compliance Program Guidance for Individual and Small Group Physician Practices (Guidance) is the latest in a series issued by HHS providing information to health care providers for developing compliance programs to prevent fraud. HHS has already issued similar guidance documents focusing on industry sectors such as hospitals, clinical laboratories, durable medical equipment suppliers, third-party billing companies, and hospices.

In the newest Guidance, which

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is addressed specifically to individual and small group physician practices, HHS sets forth steps that these practices should consider in developing a compliance program (see sidebar).

Importantly, the Guidance is not mandatory. In fact, it states that it "focuses on voluntary compliance measures." Why, then, should an individual or small group practice even consider adopting its own compliance program?

Prosecution a high priority

To answer this question, it is necessary to examine the environment within which the Guidance was promulgated. While in the past the government frequently addressed medical fraud matters by negotiating a modest civil fine upon a practice, now the investigation and prosecution of health care fraud is a high priority.

Many law enforcement officials believe that the health care community viewed these minimal civil fines as a "license fee" to do business which has not deterred improper conduct. Accordingly, the government is now aggressively prosecuting health care fraud in the criminal arena, hoping to deter it by obtaining felony convictions, with the possibility of prison always looming.

The net result is this: Even though the Guidance is voluntary, this intense government

scrutiny provides a clear incentive to individual and small group practices to develop a compliance program.

Many factors considered

If a practice adopts a compliance program, will it deter the government from committing its resources to an investigation of that practice? The answer is necessarily unknown, depending on the facts and circumstances of the allegations at issue.

The government considers many factors in evaluating whether a case warrants its investigative attention. For example, it might review the following:

- Did the practice improperly gain funds? If so, what dollar amount?
- What was the nature of the mistake?
- Has the practice had similar problems previously?
- Were the mistakes intentional?
- How effective is the compliance program?

The list goes on.

The difficulty of predicting whether the government will investigate a particular matter is compounded by the fact that it has substantial discretion in determining where it will focus its attention — and each prosecutorial office exercises this discretion differently.

Of course, it is unknown whether the practice's adoption of a compliance program will curb any particular government action. What is known, however,

is that it will probably be easier for a practice with a compliance program to defend its procedures. For example, within the volumes of charts and billing forms that comprise a physician's work, it is inevitable that mistakes will be made. By having a compliance program, a practice places itself in the position of arguing to the government that it is undertaking a good faith effort to comply with the law – and that these mistakes are aberrations and not part of a bigger pattern of misconduct.

Moreover, it is significant that this Guidance is specifically addressed to individual and small group physician practices. By doing so, HHS rejects the common notion that compliance plans are only for “the big boys” — the large institutions that can afford to develop and maintain elaborate compliance structures.

The Guidance recognizes that individual and small group practices confront constraints that do not allow them to establish the large provider-style “full-scale, institutionally structured compliance program.” Rather, it specifically states that the compliance program “...does not have to be costly, resource-intensive, or time-intensive.” Clearly, the Guidance is telling individual and small group practices that they should not view the development of a compliance program as daunting. The Guidance recognizes that each practice's compliance program will necessarily be different, depending upon its specific needs. As it states, “there is no ‘one size fits all’ compliance program.”

Follow-through is key

Finally, developing a compliance program makes good business sense. Having the proper controls in place could have a positive impact on the practice's financial position, by minimizing billing errors and increasing

Compliance Guidelines

- 1) Conducting internal monitoring and auditing through the performance of periodic audits;
- 2) Implementing compliance and practice standards through the development of written standards and procedures;
- 3) Designating a compliance officer or contact(s) to monitor compliance efforts and enforce practice standards;
- 4) Conducting appropriate training and education on practice standards and procedures;
- 5) Responding appropriately to detected violations through the investigation of allegations and the disclosure of incidents to appropriate Government entities;
- 6) Developing open lines of communication, such as (1) discussions at staff meetings regarding how to avoid erroneous or fraudulent conduct; and (2) community bulletin boards, to keep practice employees updated regarding compliance activities; and
- 7) Enforcing disciplinary standards through well-publicized guidelines.

The Guidance can be found at 65 FR 59434 (October 5, 2000) and at www.hhs.gov/oig/oigreg/physician.pdf

office efficiencies. Moreover, such controls could enhance patient care (by improving documentation of patient visits).

It goes without saying that when an individual or small group practice decides to develop a compliance program, it must do so with a firm resolve to take the appropriate steps. A small physician group is not aided by having a compliance plan with flowery language sitting dormant in a desk drawer. A compliance plan that exists only on paper will not help the practice curb abuses or assist the practice in mounting a defense if problems arise.

In fact, having such a useless document in the practice's files could complicate matters when messy billing issues come to light. For example, the government could take the position that the practice was aware that there was a potential for problems. After all, the practice had a compliance plan but did not take the appropriate steps to address problems. Without a doubt, if a practice commits to having a compliance program, it cannot

do so halfheartedly. Rather, the program must be a viable part of the practice – followed and updated to meet problems on an ongoing basis.

Importantly, in developing and/or maintaining a compliance program, the individual or small group practice might become aware of problems that have occurred in the past or that could arise in the future. Accordingly, in preparing and/or implementing a compliance plan, the practice should consult with qualified counsel so that these thorny issues can be addressed in a privileged setting.

The Guidance accurately analogizes developing and maintaining compliance programs as preventive medicine for physicians. That is, by setting up a compliance program, a practice is taking a significant step to address problems before they arise. Although the Guidance is voluntary, it makes good sense for an individual or small group physician practice to consider the Guidance's suggestion to develop and maintain such a program.



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