Bulletin ID: 126

Bulletin Title: Guidance on Federal Fraud Statutes

1. **Purpose**. To provide guidance for Department of Behavioral Health (DBH)-certified providers regarding adherence to Federal fraud and abuse laws.

2. **Applicability**. DBH-certified providers serving individuals enrolled in a Federal Health Care Program.

3. **Contact Person**. Atiya Jackson, Deputy Director, Accountability Administration

4. **Bulletin**.

   This Provider Bulletin clarifies the distinctions between four Federal fraud and abuse laws that apply to health care providers: (1) the False Claims Act (FCA); (2) the Anti-Kickback Statute (AKS); (3) the Physician Self-Referral Law (Stark law); and (4) the Exclusion Authorities. Local and federal government agencies, including DBH, the Department of Health Care Finance (DHCF), the Department of Justice, the Department of Health & Human Services Office of Inspector General (OIG), and the Centers for Medicare & Medicaid Services (CMS), are charged with enforcing these laws.

   It is imperative that all DBH-certified providers adhere to these statutes. All DBH certification regulations, including 22-A DCMR Chapter 25, 22-A DCMR Chapter 30, 22-A DCMR Chapter 34, 22-A DCMR Chapter 37, 22-A DCMR Chapter 39, 22-A DCMR Chapter 63, 22-A DCMR Chapter 80, and DBH Human Care Agreements (HCA) require that providers adhere to all Federal and District laws and regulations, including those listed above. Consequently, DBH may impose additional penalties to any provider found to have violated any of these statutes, including but not limited to suspending referrals, issuing a Notice of Infraction, issuing a Notice to Cure, and/or terminating an HCA or DBH decertification. Providers may be liable for violations of multiple federal statutes simultaneously. Suspected violations of any of these statutes must be reported to DBH pursuant to Policy Number 480.1A as a major unusual incident under the category of false claims. DBH will investigate or refer suspected violations to the DHCF, Division of Program Integrity.

   This Bulletin is intended only as an overview of the major Federal fraud and abuse laws, and is not offered as legal advice to providers as to their obligations under the relevant statutes. Please seek outside legal counsel for questions about the applicability of these statutes to your agency.

1. False Claims Act--31 U.S.C. §§ 3729-3733

The civil False Claims Act (FCA) protects the government from being overcharged or sold shoddy goods or services. It is illegal to submit claims for payment to Medicare or Medicaid that you know or should know are false or fraudulent. Filing false claims may result in fines of up to three times the programs' loss plus $11,000.00 per claim filed. Under the FCA, each instance of an item or a service billed to Medicare or Medicaid counts as a claim, so fines can add up quickly.

No specific intent to defraud is required under the FCA, as "knowing" is defined to include actual knowledge and instances in which the person acted in deliberate ignorance or reckless disregard of the truth or falsity of the information. The FCA contains a whistleblower provision that allows a private individual to file a lawsuit on behalf of the United States and entitles that whistleblower to a percentage of any recoveries.

There also is a criminal FCA (18 U.S.C. § 287). Criminal penalties for submitting false claims include imprisonment and criminal fines. The OIG also may impose administrative civil monetary penalties for false or fraudulent claims.

2. Anti-Kickback Statute 42 U.S.C. § 1320a-7b(b)

The Anti-Kickback Statute (AKS) is a criminal law that prohibits the knowing and willful payment of "remuneration" to induce or reward patient referrals or the generation of business involving any item or service payable by a Federal health care program. A remuneration includes anything of value and can take many forms besides cash (i.e. a gift card in return for an agreement to enroll with a provider, free rent, meals, mutual referral agreements, etc.). The kickback prohibition applies to all sources of referrals, even patients. The AKS covers the payers of kickbacks as well as the recipients of kickbacks--each party's intent is a key element of their liability under the AKS. Relatedly, the Government does not need to prove patient harm or financial loss to the programs to show that a physician violated the AKS. Criminal penalties and administrative sanctions for violating the AKS include fines, jail terms, and exclusion from participation in the Federal health care programs.

Safe harbors protect certain payment and business practices that could otherwise implicate the AKS from criminal and civil prosecution. To be protected by a safe harbor, an arrangement must fit squarely in the safe harbor and satisfy all of its requirements. Some safe harbors address personal services and rental agreements, investments in ambulatory surgical centers, and payments to bona fide employees.

There are evidence-based behavioral health modalities that use “contingency management” to change behavior. These practices seek to reward improved behavior related to treatment goals; however, simply calling something contingency management is not sufficient to ensure that it does not violate the prohibition on providing remuneration or kickbacks to consumers for participating in treatment. DBH encourages providers to seek independent legal advice if planning a contingency management program.

Besides the AKS, the beneficiary inducement statute (42 U.S.C. § 1320a-7a(a)(5)) also imposes civil monetary penalties on physicians who offer remuneration to Medicare and Medicaid beneficiaries to influence them to use their services.

3. Physician Self-Referral Law 42 U.S.C. § 1395nn

The Physician Self-Referral Law, commonly referred to as the Stark law, prohibits physicians from referring patients to receive "designated health services" payable by Medicare or Medicaid from entities with which the physician or an immediate family member has a financial relationship, unless an exception applies. Financial relationships include both ownership/investment interests and compensation arrangements.

"Designated health services" include but are not limited to clinical laboratory services, home health services outpatient prescription drugs and inpatient and outpatient hospital services.

The Stark law is a strict liability statute, which means proof of specific intent to violate the law is not required. The Stark law prohibits the submission, or causing the submission, of claims in violation of the law's restrictions on referrals. Penalties for physicians who violate the Stark law include fines as well as exclusion from participation in the Federal health care programs.

4. Exclusion Statute 42 U.S.C. § 1320a-7

OIG is legally required to exclude from participation in all Federal health care programs individuals and entities convicted of the following types of criminal offenses: (1) Medicare or Medicaid fraud, as well as any other offenses related to the delivery of items or services under Medicare or Medicaid; (2) patient abuse or neglect; (3) felony convictions for other health-care-related fraud, theft, or other financial misconduct; and (4) felony convictions for unlawful manufacture, distribution, prescription, or dispensing of controlled substances. OIG has discretion to exclude individuals and entities on several other grounds, including but not limited to provision of unnecessary or substandard services, submission of false or fraudulent claims to a Federal health care program, and engaging in unlawful kickback arrangements.

If you are excluded by OIG from participation in the Federal health care programs, then Medicare, Medicaid and other Federal health care programs will not pay for items or services that you furnish, order, or prescribe. Excluded practitioners may not bill directly for treating Medicare and Medicaid patients, nor may their services be billed indirectly through an employer or a group practice.

Under both the Federal statues and local certification regulations, you are responsible for ensuring that you do not employ or contract with excluded individuals or entities. This responsibility requires screening all current and prospective employees and contractors against OIG's List of Excluded Individuals and Entities. This online database can be accessed from OIG's Exclusion Web site.

5. **Related Bulletins/Policies/Regulations**.

All DBH provider certification regulations.

Approved By:

Barbara J. Bazron, Ph.D.
Director, DBH

03/23/2021

(Signature) **(Date)**