



Key Concepts for Conducting Internal Investigations

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Key Concepts for Conducting Internal Investigations

- I. Unprecedented increase in Government Investigations
 1. \$2mm returned \$17.3mm
 2. \$4 billion in 2010
 3. Estimated 3 to 10% of governmental expenditures
 4. Increased focus on Physician Relationships
 5. Increased number of qui tam cases
 6. \$2.4 BB qui tam 2009, \$1.6BB in healthcare
 7. Close Colleagues join the DOJ

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- II. Compliance Concepts
 1. If you can't write it, you cannot say it or do it
 2. If the real reason for something is illegal, no amount of dressing it up makes it legal
 3. If you cannot do it in the ASC, you can't do it outside of the ASC
 4. Cannot distribute shares or dollars based on referrals or cases – can't do it outside, i.e., in anesthesia company or relationship
 5. Can't swap streams of revenues, e.g., you get pathology if we get more ownership
 6. The 1%/any purpose test

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III. 12 Key Questions to Assess Relationships

1. Is the relationship truly needed? E.g., is a medical director necessary for the position? What value will this position add? Has the position been manufactured as an excuse to provide compensation to physicians?
2. Is the position and payment wholly unrelated to referrals or the intent to retain business? If any one purpose of a payment is in exchange for referrals, it can be deemed unlawful.
3. How comparable is the position to other positions when it comes to specialties of lower financial value? I.e., is a position only funded because it relates to high value or volume specialties?
4. How comparable is the position to those at competing ASCs and hospitals?
5. Is the payment fair market value? If so, what evidence supports this? Is there a third party valuation or objective, external evidence to defend this value?
6. Has the relationship between the hospital and the physician been approved by internal parties who are unrelated to the outside parties involved? I.e., is the physician who will receive such payment not part of the committee or board receiving such payment?

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III. 12 Key Questions to Assess Relationships

7. Does the relationship meet an anti-kickback safe harbor? Is the relationship set to pay a fixed aggregate amount per year and not vary per the year? Many safe harbors require that aggregate payments be set in advance.
8. Has legal counsel, approved the relationship?
9. Is there a contracting file with legal and valuation approval? Has there been a comprehensive and detailed review of legal concerns?
10. Will the relationship be viewed in the context of an organization that has a culture of compliance?
11. Is there a short memo that supports the true need for the relationship?
12. Can this relationship be considered standard for the system, or is it highly creative and unusual?

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IV. Internal Investigations

1. Plan and subject matter expertise
2. Who to report to: Different constituencies and different vested interests
3. Independence
4. Hold notices
5. Email records
6. Interviews
7. Upjohn warning
8. Policies

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V. False Claims Act

1. The False Claims Act ("FCA") creates liability for persons or entities who submit claims and receive payment from the federal government improperly
2. The FCA applies in the health care context, particularly with regards to Medicare claims
3. FCA claims are on behalf of the federal government but can be brought individuals known as Relators

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VI. Rising Importance of the FCA

1. Recent amendments through the Fraud Enforcement and Recovery Act of 2009 and the Patient Protection and Affordable Care Act of 2010
 - First FCA amendments in several years and help to support whistleblower actions
2. The Department of Justice has requested a large increase in its fiscal year 2011 budget to protect the United States' interest, including the pursuit of financial fraud
 - The increase includes additional funds for economic fraud enforcement and the investigation and litigation of health care fraud cases
3. There has been a substantial increase in FCA filings in recent years

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VII. Whistleblowers

1. Individuals, such as employees, former employees, contractors or patients may file an action on behalf of the United States Government.
2. The lawsuits must initially be filed under seal to permit the Government an opportunity to determine whether to intervene.
3. The results of cases in which the Government intervenes differ from the results of cases in which the Government declines to intervene.
4. Regardless of whether the Government intervenes, the Relator may proceed with the lawsuit.
 - The Relator is entitled to a portion of any recovery regardless of whether the Government intervenes.
 - This provides Relators with a motivation to bring FCA lawsuits.

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VIII. Potential Liability

1. Under the FCA, liability for claims arising before September 29, 1999 is a civil penalty ranging from a minimum of \$5,000 to a maximum of \$10,000 per claim, plus treble damages (based upon the value of the claim).
2. For claims arising after September 29, 1999, liability is a civil penalty ranging from a minimum of \$5,500 to a maximum of \$11,000 per claim, plus treble damages (based upon the value of the claim).
 - Thus, the FCA can give rise to substantial liability.

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IX. Benefits of Internal Investigations

1. Awareness of all conduct that is taking place.
2. Benefits through being in front of any issues.
3. Provides an opportunity for remedial action to be taken.
4. Possible reassurance of whistleblowers.
5. Government may consider the proactive measures in deciding whether to intervene.

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