

New Federal Anti-Fraud Guidance for Participants in the Telehealth Space

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On July 22, 2022, the Office of the Inspector General of the U.S. Department of Health and Human Services (OIG) issued a **Special Fraud Alert** regarding transactions between practitioners and telemedicine companies. Aware that the rise of new technologies for delivery of health services opens new pathways for fraud and abuse against federal health programs, the OIG has made oversight of telehealth one of its strategic priorities. Since 2020, the OIG and Department of Justice (DOJ) have pursued numerous criminal and civil fraud and abuse cases involving self-described telehealth, telemedicine, or telemarketing services companies and other health industry participants. Targets have included not only telemedicine companies, physicians and non-physician clinical practitioners, but also pharmacies, durable medical equipment suppliers and laboratories that bill federal health programs for items and services ordered by those practitioners.

The OIG's Special Fraud Alert urges practitioners to exercise caution when entering into telemedicine-related transactions and alerts them to traits that could result in criminal, civil, or administrative liability under federal and state laws. The OIG describes some patterns commonly found in suspect arrangements:

1. The practitioner does not have a pre-existing relationship with the patients. Instead, the purported patients have been identified or recruited by the telemedicine company via its independent marketing efforts.
2. The practitioner does not have sufficient contact with or information about the purported patients recruited by the telemedicine company to meaningfully assess the medical necessity of the items or services ordered or prescribed with the involvement of the telemedicine company.
3. The telemedicine company compensates the practitioner based, directly or indirectly, on the volume of items or services ordered or prescribed by the practitioner.
4. The telemedicine company only furnishes items and services to patients who are federal health care program beneficiaries and does not accept patients eligible for reimbursement from other classes of third-party payors.
5. The telemedicine company represents that it only furnishes items and services to individuals who are not federal health care program beneficiaries, but the patient base is such that it may in fact bill federal health care programs.
6. The telemedicine company only furnishes or facilitates the furnishing of one product or a single class of products (e.g., durable medical equipment, genetic testing, diabetic supplies, or various prescription creams), potentially restricting the practitioner's treating options to a predetermined course of treatment.
7. The telemedicine company does not expect practitioners to follow up with the patients nor does it provide practitioners with the means to follow up with patients (e.g., to discuss ordered testing results with the patient).

While the Special Fraud Alert is a useful tool, the OIG does not intend for it to provide safe harbor protection from liabilities under federal or state fraud and abuse laws. Consequently, contractual arrangements in the telehealth/telemedicine space may be found to violate federal or state healthcare laws even if the arrangement does not expressly feature any of the above-listed patterns. For example, physicians should always be mindful not only of the Anti-Kickback Statute but also of the Stark Law before investing in a telemedicine company or an entity that is engaged in arrangements with a telemedicine company. Even when the transaction is entirely legal, improper documentation or

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implementation of transactions increases the risk of costly government audits and investigations, reputation loss and business disruption. Finally, even if not fraudulent, transactions of these types may implicate professional and ethical standards of practice, and could impact licensing under state law or the ability to continue in a group practice.

Accordingly, any proposed transaction in the telehealth/telemedicine space should be carefully vetted for compliance with applicable healthcare laws and standards of practice.

If you have any questions about the OIG's Special Fraud Alert, telehealth transactions or healthcare laws in general, please contact the authors of this client update or your Miller Canfield attorney.