



DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



**Special Fraud Alert: OIG Alerts Practitioners To Exercise Caution
When Entering Into Arrangements With Purported Telemedicine Companies**

July 20, 2022

I. Introduction

The Office of Inspector General (OIG) has conducted dozens of investigations of fraud schemes involving companies that purported to provide telehealth, telemedicine, or telemarketing services (collectively, Telemedicine Companies) and exploited the growing acceptance and use of telehealth. For example, in some of these fraud schemes Telemedicine Companies intentionally paid physicians and nonphysician practitioners (collectively, Practitioners) kickbacks to generate orders or prescriptions for medically unnecessary durable medical equipment, genetic testing, wound care items, or prescription medications, resulting in submissions of fraudulent claims to Medicare, Medicaid, and other Federal health care programs. These fraud schemes vary in design and operation, and they have involved a wide range of different individuals and types of entities, including international and domestic telemarketing call centers, staffing companies, Practitioners, marketers, brokers, and others.

One common element of these schemes is the way Telemedicine Companies have used kickbacks to aggressively recruit and reward Practitioners to further the fraud schemes. Generally, the Telemedicine Companies arrange with Practitioners to order or prescribe medically unnecessary items and services for individuals (referred to here as “purported patients”) who are solicited and recruited by Telemedicine Companies. In many of these arrangements, Telemedicine Companies pay Practitioners in exchange for ordering or prescribing items or services: (1) for purported patients with whom the Practitioners have limited, if any, interaction; and (2) without regard to medical necessity. Such payments are sometimes described as payment per review, audit, consult, or assessment of medical charts. Telemedicine Companies often tell Practitioners that they do not need to contact the purported patient or that they only need speak to the purported patient by telephone. In addition, Practitioners are not given an opportunity to review the purported patient’s real medical records. Furthermore, the Telemedicine Company may direct Practitioners to order or prescribe a preselected item or service, regardless of medical necessity or clinical appropriateness. In many cases, the Telemedicine Company sells the order or prescription generated by Practitioners to other individuals or entities that then fraudulently bill for the unnecessary items and services.

These schemes raise fraud concerns because of the potential for considerable harm to Federal health care programs and their beneficiaries, which may include: (1) an inappropriate increase in

costs to Federal health care programs for medically unnecessary items and services and, in some instances, items and services a beneficiary never receives; (2) potential to harm beneficiaries by, for example, providing medically unnecessary care, items that could harm a patient, or improperly delaying needed care; and (3) corruption of medical decision-making.

OIG encourages Practitioners to exercise caution and use heightened scrutiny when entering into arrangements with Telemedicine Companies that have one or more of the suspect characteristics described below. This Special Fraud Alert provides information to help Practitioners identify potentially suspect arrangements with Telemedicine Companies.¹

II. Multiple Federal Laws Implicated

The schemes described above may implicate multiple Federal laws, including the Federal anti-kickback statute. The Federal anti-kickback statute is a criminal law that prohibits knowingly and willfully soliciting or receiving (or offering or paying) any remuneration in return for (or to induce), among other things, referrals for, or orders of, items or services reimbursable by a Federal health care program.² One purpose of the Federal anti-kickback statute is to protect patients from improper medical referrals or recommendations by health care professionals and others who may be influenced by financial incentives. When a party knowingly and willfully pays remuneration to induce or reward referrals of items or services payable by a Federal health care program, the Federal anti-kickback statute is violated. By its terms, the statute ascribes liability to parties on both sides of an impermissible kickback transaction. Practitioner arrangements with Telemedicine Companies may also lead to criminal, civil, or administrative liability under other Federal laws including, for example, OIG's exclusion authority related to kickbacks,³ the Civil Monetary Penalties Law provision for kickbacks,⁴ the criminal health care

¹ OIG has previously addressed other potentially suspect arrangements involving Practitioners. See e.g., "OIG Special Fraud Alert: Laboratory Payments to Referring Physicians" (June 2014), https://oig.hhs.gov/documents/special-fraud-alerts/866/OIG_SFA_Laboratory_Payments_06252014.pdf; "OIG Special Fraud Alert: Physician Liability for Certifications in the Provision of Medical Equipment and Supplies and Home Health Services" (Jan. 1999), <https://oig.hhs.gov/documents/special-fraud-alerts/872/dme.htm>; and "OIG Special Fraud Alert: Arrangements for the Provision of Clinical Laboratory Services" (Oct. 1994), <https://oig.hhs.gov/documents/physicians-resources/980/121994.pdf>. All of OIG's Special Fraud Alerts are available at <https://oig.hhs.gov/compliance/alerts>.

² Section 1128B(b) of the Social Security Act (the Act). The Federal anti-kickback statute applies broadly to remuneration to induce or reward referrals of patients as well as the payment of remuneration intended to induce or reward the purchasing, leasing, or ordering of, or arranging for or recommending the purchasing, leasing, or ordering of, any item or service reimbursable by any Federal health care program. In this Special Fraud Alert, we use the term "referral" to include the full range of activities (including ordering or prescribing items) that falls within the scope of the Federal anti-kickback statute. In addition, this Special Fraud Alert uses the term "kickback" to refer to any remuneration prohibited by the Federal anti-kickback statute.

³ Section 1128(b)(7) of the Act.

⁴ Section 1128A(a)(7) of the Act.

fraud statute,⁵ and the False Claims Act.⁶ Practitioners may be personally liable for these types of arrangements, including for submitting or causing the submission of claims if they are involved in ordering or prescribing medically unnecessary items or services.⁷

III. Recent Enforcement Experience

In recent years, OIG and the Department of Justice (DOJ) have investigated numerous criminal, civil, and administrative fraud cases involving kickbacks from Telemedicine Companies to Practitioners who inappropriately ordered or prescribed items or services reimbursable by Federal health care programs in exchange for remuneration. In those cases, Practitioners, Telemedicine Companies, and other participants in schemes have been held civilly, criminally, and administratively liable for:⁸ (1) paying or receiving a payment in violation of the Federal anti-kickback statute, (2) causing a submission of claims in violation of the False Claims Act,⁹ and/or (3) other Federal criminal laws.¹⁰

While the facts and circumstances of each case differed, often they involved at least one Practitioner ordering or prescribing items or services for purported patients they never examined or meaningfully assessed to determine the medical necessity of items or services ordered or prescribed. In addition, Telemedicine Companies commonly paid Practitioners a fee that correlated with the volume of federally reimbursable items or services ordered or prescribed by the Practitioners, which was intended to and did incentivize a Practitioner to order medically unnecessary items or services. These types of volume-based fees not only implicate and potentially violate the Federal anti-kickback statute, but they also may corrupt medical decision-making, drive inappropriate utilization, and result in patient harm.

⁵ 18 U.S.C. § 1347.

⁶ 31 U.S.C. §§ 3729-33.

⁷ We note that other persons may face liability for conduct that contributes to violations of these laws including pharmacies, durable medical equipment suppliers, laboratories, and other providers and suppliers that bill for items and services based on the fraudulent orders or prescriptions.

⁸ For example, each violation of the Federal anti-kickback statute constitutes a felony punishable by a maximum fine of \$100,000, imprisonment up to 10 years, or both. Conviction also will lead to exclusion from Federal health care programs, including Medicare and Medicaid.

⁹ A claim that includes items or services resulting from a violation of the Federal anti-kickback statute constitutes a false or fraudulent claim for purposes of the False Claims Act.

¹⁰ See e.g., U.S. Attorney's Office for the Southern District of Georgia press release, "Georgia nurse practitioner convicted of health care fraud in complex telemedicine fraud scheme" (Feb. 2, 2022), <https://www.justice.gov/usao-sdga/pr/georgia-nurse-practitioner-convicted-health-care-fraud-complex-telemedicine-fraud>; U.S. Attorney's Office for the Western District of Michigan press release, "U.S. Attorney Announces Criminal And Civil Enforcement Actions Against Medical Practitioners For Roles In Telemedicine Fraud Schemes" (Aug. 24, 2021), https://www.justice.gov/usao-wdmi/pr/2021_0824_Happy_Clickers; U.S. Attorney's Office for the District of Montana press release, "Two Montana nurse practitioners admit telemedicine scheme to defraud Medicare of more than \$18 million" (Apr. 21, 2021), <https://www.justice.gov/usao-mt/pr/two-montana-nurse-practitioners-admit-telemedicine-scheme-defraud-medicare-more-18>.

IV. Suspect Characteristics

Based on OIG's and DOJ's enforcement experience, we have developed the below list of suspect characteristics related to Practitioner arrangements with Telemedicine Companies which, taken together or separately, could suggest an arrangement that presents a heightened risk of fraud and abuse. This list is illustrative, not exhaustive, and the presence or absence of any one of these factors is not determinative of whether a particular arrangement with a Telemedicine Company would be grounds for legal sanctions.

- The purported patients for whom the Practitioner orders or prescribes items or services were identified or recruited by the Telemedicine Company, telemarketing company, sales agent, recruiter, call center, health fair, and/or through internet, television, or social media advertising for free or low out-of-pocket cost items or services.
- The Practitioner does not have sufficient contact with or information from the purported patient to meaningfully assess the medical necessity of the items or services ordered or prescribed.¹¹
- The Telemedicine Company compensates the Practitioner based on the volume of items or services ordered or prescribed, which may be characterized to the Practitioner as compensation based on the number of purported medical records that the Practitioner reviewed.
- The Telemedicine Company only furnishes items and services to Federal health care program beneficiaries and does not accept insurance from any other payor.
- The Telemedicine Company claims to only furnish items and services to individuals who are not Federal health care program beneficiaries but may in fact bill Federal health care programs.¹²
- The Telemedicine Company only furnishes one product or a single class of products (e.g., durable medical equipment, genetic testing, diabetic supplies, or various prescription creams), potentially restricting a Practitioner's treating options to a predetermined course of treatment.

¹¹ For example, we have seen instances in which a Telemedicine Company requires the Practitioner to use audio-only technology to facilitate engagement with purported patients, regardless of their preference, and does not provide the Practitioner with other telehealth modalities. Additionally, a Telemedicine Company may provide a Practitioner with purported "medical records" that reflect only cursory patient demographic information or a medical history that appears to be a template but does not provide sufficient clinical information to inform the Practitioner's medical decision-making.

¹² An attempt to carve out Federal health care program beneficiaries from arrangements with Telemedicine Companies may still result in criminal, civil, or administrative liability for a Practitioner's role in any resulting fraudulent activity that involves Federal health care program beneficiaries.

- The Telemedicine Company does not expect Practitioners (or another Practitioner) to follow up with purported patients nor does it provide Practitioners with the information required to follow up with purported patients (e.g., the Telemedicine Company does not require Practitioners to discuss genetic testing results with each purported patient).

Practitioners who enter into arrangements with Telemedicine Companies in which one or more of these suspect characteristics are present should exercise care and may face criminal, civil, or administrative liability depending on the facts and circumstances. This Special Fraud Alert is not intended to discourage legitimate telehealth arrangements.¹³ For example, OIG is aware that many Practitioners have appropriately used telehealth services during the current public health emergency to provide medically necessary care to their patients. However, OIG encourages Practitioners to use heightened scrutiny, exercise caution, and consider the above list of suspect criteria prior to entering into arrangements with Telemedicine Companies. This Special Fraud Alert does not alter any person's obligations under any applicable statutes or regulations, including those governing the billing or submission of Federal health care program claims.

For more information on telehealth-related issues, please visit our website, which includes additional materials relating to the provision of telehealth. If you have information about Practitioners, Telemedicine Companies, or other individuals or entities engaging in any of the activities described above, please contact the OIG Hotline at <https://oig.hhs.gov/fraud/report-fraud> or by phone at 1-800-447-8477 (1-800-HHS-TIPS).

¹³ As OIG has previously noted, “[f]or most, telehealth expansion is viewed positively, offering opportunities to increase access to services, decrease burdens for both patients and providers, and enable better care, including enhanced mental health care.” See “Principal Deputy Inspector General Grimm on Telehealth” (Feb. 26, 2021), <https://oig.hhs.gov/coronavirus/letter-grimm-02262021.asp>.