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Dealing with an even more aggressive year of enforcement

- » Using the ten response control group rules will walk the organization through the who, what, where, when, and how steps in a quick and organized way.
- » These ten steps should be developed, documented, and incorporated into the compliance program of the organization before an event occurs.
- » The ten steps will assist the organization and management to efficiently handle responses and to mitigate some of the stresses that they create.
- » The steps need to be incorporated into the operations units they affect, such as Compliance, Audit, Legal, Finance, and the executive leadership team.
- » The process and procedures should be revisited every three years to maintain currency.

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Headlines:

- ▶ On April 24, 2013, *Bloomberg News* reported that the Department of Health and Human Services (HHS) released a proposed rule calling for an increase in the reward for “tips that uncover Medicare fraud” from \$1,000 to as much as \$10 million. In a statement explaining the move, HHS said that “the action to raise the potential payments, modeled after an Internal Revenue Service program, may increase antifraud rewards to Medicare beneficiaries to 149 a year on average, compared with a total of 18 from 2000 to 2012.”¹
- ▶ On April 24, 2013, *Modern Healthcare* reported upping the reward so “dramatically” it would “transform the existing incentive reward program for Medicare beneficiaries into a system akin to the False Claims Act system, which gives

whistle-blowers a percentage of any money recouped from fraud schemes.”²

- ▶ On April 25, 2013, the *LA Weekly* carried a nearly 5,000-word report on how Medicare fraud “became the nation’s most lucrative crime.” The article profiles several instances of fraud, which pulled in billions of dollars, before looking into the way “the feds say they’re finally trying to crack down.”³
- ▶ On December 4, 2012, HHS and the Department of Justice (DOJ) announced new record healthcare recoveries that topped \$4 billion for 2012.⁴

The public record makes it clear the regulators at the state and federal level are investigating more aggressively than ever. Providers should have a compliance program and a compliance response plan for inquiries, reviews, audits, and investigations. The Patient Protection and Affordable Care Act (PPACA) has a new provision that I believe will make the programs mandatory across the board by 2014. The Texas Health and Human Services Commission recently changed the



Flood

Texas Administrative Code in October of 2012 and made compliance programs mandatory for participation in any Texas Medicaid program.

The realities of the headlines, government actions, and the market today mandate this as a prudent planning action, especially in light of the stark reality of being contacted by regulators. It is a best practice to have a basic framework established for a response team in advance. Trying to establish the team and their framework to respond to an event at the same time the government is standing on the doorstep and asking questions is not a prudent way to mitigate risk. Some basic steps in the plan would include deciding who is going to get the first series of calls that the government has begun an inquiry. The second step should be deciding who is going to be in the response control group that will help coordinate the organization's efforts to respond to the inquiry in a coordinated and thoughtful way.

To that end, the organization should consider these "control group rules" that they may operate under during an inquiry by regulators:

1. The organization's response should be conducted under and with the guidance of proper legal counsel. Counsel must be brought in at the beginning to properly affect a privilege to the event response and to aid in assembling the issues.
2. Members of the response control group should be selected in advance, based on their likely need to know and their need to help coordinate necessary expertise in the organization. Their roles should be discussed in advance to avoid conflict. This will help place the organization in the best possible response position during the project.
3. All relevant communications within the response control group should be maintained as highly confidential and under the attorney-client privilege.
4. Members of the response control group should keep their discussions between/ among group members confidential. That includes if members of the group discuss the response project among themselves without counsel present; that discussion should still be held as confidential because it pertains to the response activities and should not be shared outside of the response control group.
5. The organization should expect that only the finalized project deliverables will be reduced to final writings. Other drafts may be destroyed in the course of business, based on your established destruction policies. Discussion of the issues creating the draft and final deliverables should be in person or by telephone and not by incomplete communications, including texts or email.
6. The response control group should not communicate in furtherance of their activities under the response protocol by texting or by multiple email conversations that could be taken out of context or be incomplete.
7. The response control group should work to review and then resolve any issues that arise from the response project. A final written remediation and response plan should be created under the advice and input of counsel.
8. Each member of the response control group should create a confidential file in their computer and in their email system to store materials and communications for the project. The files must be marked confidential and privileged. Project members should not commingle any non-essential communications in the folder.
9. If an email correspondence is necessary, it should also be marked as privileged and confidential when sent, when stored, or when destroyed in the regular course of business.

10. Documents should be stored in their confidential file and then the business operations should follow a process to close the project by collecting and storing the protected material appropriately in accordance with document management policy.

Try to remember that this is a team exercise. The compliance program is an integral piece of the puzzle, but it is also a member of the ship's crew. These steps need to be carefully discussed long before an event occurs so that process owners can have input, make recommendations, and have buy-in with how they will work. You don't want to be arguing this during the event that you need to use them for. Remember to delegate roles in advance so you can minimize turf and to ensure you have a leader when you need one. Be sure to document the roles in the response

control group and with the process owners and leadership in advance so that people know what is expected of them and what is not. Be sure that you have discussed with legal how this will be handled (in-house versus external counsel) and know what implications that has on privileged communications and protecting the work product. Finally, be sure to revisit these procedures every three years, so they are relevant to the business and helpful when you need them. 

1. Alex Wayne: "Medicare-Fraud Tip Rewards Boosted to \$10 Million by U.S." *Bloomberg News*, April 24, 2013. Available at <http://www.bloomberg.com/news/2013-04-24/medicare-fraud-tip-rewards-boosted-to-10-million-by-u-s-1-.html>
2. Joe Carlson: "CMS proposes offering patients up to \$10M for fraud tips." *Modern Healthcare*, April 24, 2013. Available at <http://www.modernhealthcare.com/article/20130424/NEWS/304249966>
3. Chris Parker: "How Medicare Fraud Became the Nation's Most Lucrative Crime." *LA Weekly*, April 25, 2013. Available at <http://www.laweekly.com/2013-04-25/news/medicare-fraud-heat-task-force>
4. U.S. Department of Health and Human Services: "Departments of Justice and Health and Human Services announce record-breaking recoveries resulting from joint efforts to combat health care fraud." Press release, December 4, 2012. Available at <http://www.hhs.gov/news/press/2013pres/02/20130211a.html>