McGUIREWOODS

Compliance Best Practices for Dental Providers

Recent OIG Activity Highlights Need for Robust Compliance Efforts

GEOFFREY COCKRELL, PARTNER
312.849.8272 | gcockrell@mcguirewoods.com
77 West Wacker Drive, Suite 4100
Chicago, Illinois 60601

BARTON C. WALKER, PARTNER
704.373.8923 | bwalker@mcguirewoods.com
201 North Tryon Street, Suite 3000
Charlotte, NC 28202-2146

AMBER MCGRAW WALSH, PARTNER
312.750.3596 | awalsh@mcguirewoods.com
77 West Wacker Drive, Suite 4100
Chicago, Illinois 60601

HOLLY CARNELL, ASSOCIATE
312.849.3687 | hcarnell@mcguirewoods.com
77 West Wacker Drive, Suite 4100
Chicago, Illinois 60601

JOHN SARAN, ASSOCIATE
312.849.8166 | jsaran@mcguirewoods.com
77 West Wacker Drive, Suite 4100
Chicago, Illinois 60601

JOHN HARIG
Summer Associate, 2014

December 2014

www.mcguirewoods.com

Executive Summary

1. As a result of the actions of a very small minority of the dental industry, dental support organizations (DSOs) have come under increasing governmental scrutiny.
2. The need for DSOs (and dental practices, more generally) to build a "culture of compliance" is more immediate in light of this heightened scrutiny.
3. An effective compliance program begins by implementing policies and procedures that focus on both quality of care and adherence to federal and local laws and regulations.
4. Each DSO should have a chief compliance officer who maintains independence and has authority to effectively implement policies through compliance liaisons at each facility.
5. DSOs should conduct thorough training of staff on policies and procedures, as well as continually review their training and compliance programs to ensure effectiveness.
6. DSOs should respond to and correct compliance issues timely and completely.
7. Compliance programs should be designed to ensure the quality and medical necessity of care, in addition to billing accuracy.
8. Various industry participants have already adopted strong compliance programs. Further, the Association of Dental Support Organizations has developed a model Code of Ethics for its DSO members.

Introduction

In March 2014, OIG excluded CSHM, LLC (which managed and operated the national chain of Small Smiles Dental Centers) from Medicare, Medicaid and all other federal healthcare programs for at least five years because of its alleged material breaches of its corporate integrity agreement (CIA) with OIG. This case exemplifies the government's increasing scrutiny of DSOs, which otherwise have grown substantially in popularity in recent years, thanks largely to increased private equity investment. Private equity firms have bought or backed at least 25 DSOs in the past decade, and these companies now account for over 8 percent of U.S. dentists. The increased interest in DSOs results partly from a large upswing in Medicaid spending for dentistry, which rose 63 percent between 2007 and 2010, to $7.4 billion. Indeed, CSHM primarily served children on Medicaid.[1]

CSHM's corporate predecessor, FORBA Holdings, entered into its CIA in 2010 to resolve a False Claims Act case involving allegations that the company had provided medically unnecessary and substandard dental services to its patients.[2] FORBA also paid $24 million, plus interest, as part of its settlement with the government.[3] In a different case in 2012, the government investigated All Smiles Dental Centers Inc. for alleged fraud in its Medicaid billing and claims. All Smiles settled with the government for $1.2 million and entered into a CIA with OIG in March of that year.[4] These cases

[1] Sydney P. Freedberg, "Dental Abuse Seen Driven by Private Equity Investments," Bloomberg, (May 16, 2012), *available at* http://www.bloomberg.com/news/2012-05-17/dental-abuse-seen-driven-by-private-equity-investments.html.
[2] Press Release, Office of Inspector General, OIG Excludes Pediatric Dental Management Chain from Participation in Federal Health Care Programs, *available at* https://oig.hhs.gov/newsroom/news-releases/2014/cshm.asp.
[3] Press Release, Department of Justice, National Dental Management Company Pays $24 Million to Resolve Fraud Allegations, (Jan. 30, 2010), *available at* http://www.justice.gov/opa/pr/2010/January/10-civ-052.html.
[4] Press Release, Department of Justice, Texas Orthodontic Office and Former Owner Resolve Allegations of False Medicaid Claims, (Mar. 21, 2012), *available at* http://www.justice.gov/usao/txn/PressRelease/2012/MAR2012/mar21Malouf_AllSmiles_Settlement_PR.html.

represent a small minority of the dental industry, but have garnered a disproportionate share of attention due to the nature of the underlying allegations and the severity of the consequences.

This article will discuss what DSOs can learn from government enforcement to strengthen their own compliance efforts and avoid similar issues in the future. Specifically, it will focus on lessons to be gained from OIG's CIAs with CSHM and All Smiles, along with OIG's Compliance Program Guidance for Individual and Small Group Physician Practices and Third Party Billing Companies. Finally, we will highlight some of the industry best practices that are already being implemented in the industry.

Seven Best Practices for Compliance

While exclusion usually is not OIG's first response to reported abuses (CSHM was given multiple opportunities to correct the breaches in the CIA), DSOs should be wary of continued scrutiny on DSO structures along with the heightened suspicion of fraud and abuse in the industry. Over the past year, Congress has expressed concerns about DSOs, calling on HHS to exclude from Medicaid participation any corporate-owned dental clinics using "deceptive practices" that result in unnecessary or substandard care.[5] It should be noted that the OIG only excluded CSHM from participation in Medicare, Medicaid and other Federal healthcare programs; it did not exclude any individual employee or the dental clinics themselves.

OIG's CIAs tend to follow similar structures[6] and, along with OIG's Compliance Guidance, can provide helpful tips and insight into maintaining an effective compliance program. Here are seven lessons to be gained from the CSHM case and a similar CIA involving All Smiles:

1. Establish effective compliance policies and procedures.

The CIAs with CSHM and All Smiles both required the companies to implement written policies and procedures regarding the operations of their compliance programs.[7] The CIAs required the policies to contain measures designed to promote patient safety and appropriate treatment planning, appropriate documentation of dental records, and periodic audits of clinical quality. They also stressed that the policies and procedures should be designed to prevent financial incentives from motivating any staff to engage in improper conduct or to provide excessive or substandard services or items.[8]

While compliance programs are not yet mandatory, DSOs should strongly consider implementing these programs due to the government's increased scrutiny on DSOs. DSOs should develop, implement and maintain written policies, procedures and standards of conduct designed to ensure the quality of dental care provided to patients. These policies and procedures should include measures to ensure compliance with all Medicaid rules and regulations regarding the provision of

[5] Joint Staff Report on the Corporate Practice of Dentistry in the Medicaid Program, S. Rep. No. 113-16; Letter from Michael C. Burgess, Member of Congress and Diane DeGette, Member of Congress to Daniel Levinson, Inspector General, U.S. Dep't of Health and Human Servs., (Feb. 3, 2014).
[6] OIG Press Release (2014), *supra* note 2; OIG Corporate Integrity Agreement with FORBA Holdings, LLC (2010); OIG Corporate Integrity Agreement with All Smiles Dental Centers, Inc. (2012).
[7] FORBA CIA, pg. 12-13; All Smiles CIA, pg. 6.
[8] FORBA CIA, pg. 12-17.

and billing for dental and orthodontic services. DSOs also should regularly assess the effectiveness of these policies and procedures and update them accordingly.

2. Designate an independent compliance officer and compliance committee.

The CIA between OIG and CSHM tasked CSHM's compliance officer with ensuring that CSHM appropriately identified and corrected quality-of-care problems. The CIA also required that CSHM's compliance officer not be subordinate to the general counsel or chief financial officer, and that any job responsibilities of the compliance officer not related to compliance activities be limited and not interfere with the ability to perform compliance duties.[9] Finally, the CIA required compliance liaisons at each facility to assist the compliance officer with implementing policies and procedures and to serve as compliance contacts for the designated facilities.[10]

While each DSO should tailor its compliance program to its own specific needs, companies should consider the emphasis that OIG places on independence and the amount of responsibilities given to compliance officers. OIG sees independence as giving the compliance officer the flexibility to conduct investigations and take appropriate action, as well as the authority to review all relevant documents, including billing and patient records (where appropriate). DSOs that manage larger numbers of clinics also should consider designating compliance liaisons or regional compliance officers who report to the chief compliance officer to improve the effectiveness of day-to-day review of quality of care at their facilities, as this kind of oversight can be difficult without constant communication with each clinic.

3. Train and educate staff on compliance.

OIG's CIA with CSHM required CSHM to conduct specific training related to billing and reimbursement as well as clinical quality.[11] OIG also cited a failure to perform adequate training as a significant reason for excluding CSHM.[12]

DSOs should conduct effective training and education on compliance policies and procedures for all staff, including all managers and dentists, where appropriate. DSOs also should provide regular compliance reminders to their staffs, regularly review and assess the effectiveness of training, and correct the training accordingly. Further, retraining staff periodically is important to ensuring consistent compliance. Such training could help eliminate risks of False Claims Act and Fraud and Abuse violations by preventing improper billing or the provision of medically unnecessary treatment. In the event a problem is identified, staff training can help educate employees on the proper reporting and remedy mechanisms so that any issues are addressed promptly and fully by the appropriate levels of management. DSOs should make every effort to foster a "culture of compliance," and training is an effective way of accomplishing this.

4. Continually review the compliance program.

The CIA required CSHM to create an internal audit program for performing quality audits and reviews. This program included reviewing quality of care, evaluating the implementation of

[9] FORBA CIA, pg. 3.
[10] FORBA CIA, pg. 4.
[11] FORBA CIA, pg. 17-18.
[12] OIG Press Release (2014), *supra* note 2.

compliance policies and procedures, assessing the training of staff, and monitoring whether complaints are properly investigated and violations are reported and corrected.[13]

DSOs should conduct internal monitoring and audits of compliance with policies and procedures. Where the policies and procedures are understood and being followed, DSOs should evaluate the effectiveness of these policies on compliance. If they are not achieving their goals, changes should be made. While DSOs might not necessarily have a formal program like the one OIG requires in its CIAs, larger DSOs should have effective systems in place to make sure their compliance policies and procedures are being implemented in each clinic as the compliance officers intended.

5. Report and respond to issues effectively and completely.

CSHM's and All Smiles' CIAs focused on reportable events such as substantial overpayments and probable violations of criminal, civil or administrative laws applicable to federal healthcare programs.[14] While CSHM was in a unique situation because it had entered into a CIA with OIG, its alleged failure to respond appropriately to OIG requests was a driving factor behind its exclusion. Other DSOs should thus understand the need to respond to the government effectively.[15]

DSOs' compliance officers should identify reportable quality-of-care events and have systems in place whereby any reports of possible improper practices are investigated properly. Compliance officers also should ensure that appropriate corrective action is taken where needed.[16] Finally, DSOs should respond accurately and completely to all government inquiries and certifications. This may mean requiring staff in larger companies to pass along all government inquiries to the appropriate compliance officers or legal in-house counsel.

6. Monitor and correct any quality of care or medical necessity issues.

CSHM's alleged practices of providing patients with services that were either medically unnecessary or performed in a manner that failed to meet professionally recognized standards of care led CSHM to settle with the government and enter into the CIA.[17] In the CIA, OIG required CSHM to perform a review of claims documentation to identify any dentists that had high "pulp-to-crown" utilization.[18] OIG also cited CSHM's failure to take corrective action in quality-deficient events as a main driver for excluding CSHM from participation in federal healthcare programs.[19] Meanwhile, All Smiles was part of a Texas state Medicaid audit finding that 90 percent of Medicaid claims for orthodontic braces were medically unnecessary and thus invalid. Texas' reduction of payments to some of All Smiles' clinics led in part to All Smiles filing for bankruptcy in May 2012.[20]

---

[13] FORBA CIA , pg. 10-11.
[14] FORBA CIA, pg. 33-34; All Smiles CIA, pg. 15.
[15] OIG Press Release (2014), *supra* note 2.
[16] OIG Compliance Guidance for Individual and Small Group Physician Practices, 65 Fed. Reg. 59434, 59442 (Oct. 5, 2000).
[17] DoJ Press Release (2010), *supra* note 3.
[18] Amendment to FORBA CIA, pg. 5 (Mar. 13, 2012).
[19] OIG Press Release (2014), *supra* note 2.
[20] Freedberg, *supra* note 2.

In both its guidance and its CIA with CSHM, OIG has identified the necessity and reasonableness of services as primary risk areas for dental practices.[21] Therefore, DSOs should continually monitor and assess the medical necessity and quality of dental treatments provided to patients. Such efforts should include identifying and investigating specific risk areas for noncompliance. DSOs also should monitor pulp-to-crown ratios as OIG uses these as indicators of the medical necessity of treatments, as seen with CSHM.

7. Ensure accurate billing and coding for services rendered.

Prior to All Smiles entering into a CIA with OIG in 2012, the government alleged that they had submitted improper claims for services that were not furnished or rendered, were unbundled, or were not properly documented.[22] In its Compliance Program Guidance for Third-Party Medical Billing Companies, OIG emphasized the need for proper documentation of services rendered in order to ensure they are billed appropriately.[23]

DSOs need to monitor to ensure services are billed accurately and properly. DSOs also should ensure the services are coded correctly, as OIG has focused on practices such as unbundling and upcoding in its investigations.[24] Obtaining proper and timely documentation of all services prior to billing can help DSOs ensure they are in compliance.

Current Industry Best Practices

As previously mentioned, many participants in the dental industry have already implemented many of these concepts into their compliance efforts. Ultimately, the CIAs discussed in this article focused on a small number of actors in the industry. Nevertheless, they can provide useful guidance to the rest of the industry on how to best ensure a "culture of compliance" that can help insulate organizations from this kind of government scrutiny (whether justified or not).

One example of a compliance initiative in the DSO space is the development by the Association of Dental Support Organizations ("ADSO") of a Code of Ethics (the "Code") which provides standard compliance obligations that each DSO member organization must follow to maintain membership. The Code requires all ADSO members to act with integrity by refraining from actions that may damage the credibility of the DSO community. This integrity principle includes complying with all applicable federal, state and local laws. Other Code provisions focus on how ADSO members should provide administrative services and employee support to dentists and ensure that ADSO members do not interfere with dentists' clinical decisions and treatment of patients. Further, the Code promotes self-regulation by requiring each ADSO member to designate an ADSO Ethics Officer ("DEO") to facilitate compliance with the Code including educating dentists and DSO employees. Each year ADSO members must attest that they have designated a DEO and that they have complied with the Code. Finally, each ADSO member must promptly investigate any internal or external compliant against itself and take corrective action as appropriate.

---

[21] 65 Fed. Reg. at 59439; FORBA CIA, pg. 12-13, 15-16.
[22] Press Release, United States Attorney's Office, Northern District of Texas, Texas Orthodontic Clinic and Former Owner Resolve Allegations of False Medicaid Claims, *available at* http://www.justice.gov/usao/txn/PressRelease/2012/MAR2012/mar21Malouf_AllSmiles_Settlement_PR.html.
[23] OIG Compliance Guidance for Third-Party Medical Billing Companies 63 Fed. Reg. 70138, 70144.
[24] 63 Fed. Reg. at 70142.

ADSO administers and enforces the Code through its Ethics Committee of the Board of Directors (the "Committee"). The Committee reviews complaints and determines all charges against ADSO members, while offering the ADSO members opportunities to be heard on any allegations. Upon exhaustion of due process procedures, the Committee will determine if a violation of the Code has occurred, or whether there were no findings sufficient for taking further action. If the Committee finds a violation, it will recommend actions to the Board of Directors that range from termination of the ADSO member to a requirement that the ADSO member submit a written report attesting to future compliance with the Code including a promise to conduct due diligence to ensure that there will be no recurrence of actions that caused the prior complaint. These types of compliance efforts help create the "culture of compliance" that is encouraged by the OIG and other government agencies.

62419829_3