

Montana Fraud and Abuse Laws: Common Problems



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Disclaimer

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Overview



- Relevant statutes
 - Federal
 - State
- Applying the statutes to common situations
 - Patients
 - Referring providers
 - Other referral sources
- Action items

Written Materials



- .Ppt slides
- OIG Compliance Program Guidance
- OIG, *Avoiding Fraud and Abuse*
- Articles on various issues available at <https://www.hhhealthlawblog.com/>.

From HHS Report to Congress (4/18)

For FY2017:

- \$49.1 million in CMPs
- \$4.7 billion in recoveries from audits and investigations
- \$14 to \$1 return on investment



HHS OIG | 2018 Fraud Takedown

Recent Cases	Penalty/Settlement
Tenet and subsidiaries allegedly paid kickbacks to prenatal care clinics for referral of undocumented illegal aliens to deliver at hospitals	\$513,000,000; guilty pleas
Vibra allegedly bills for medically unnecessary services	\$32,700,00
North American Health Care allegedly bills for unnecessary rehab therapy services	\$28,500,000
Beth Israel Medical Center allegedly delays repaying \$800,000 in Medicare overpayments	\$2,950,000
Adventist Health allegedly pays physicians compensation above FMV, based on referrals	\$115,000,000
North Broward Hospital allegedly pays physicians above FMV, based on referrals	\$69,500,000
Citizens Medical Center allegedly pays excessive compensation to cardiologists based on formula that considers referrals	\$21,750,000
Halifax Hospital allegedly paid physicians above FMV and bonus based on drugs ordered by physicians	\$85,000,000
Tuomey Healthcare allegedly entered long term, part-time employment contracts that exceeded FMV and required referrals	\$74,000,000

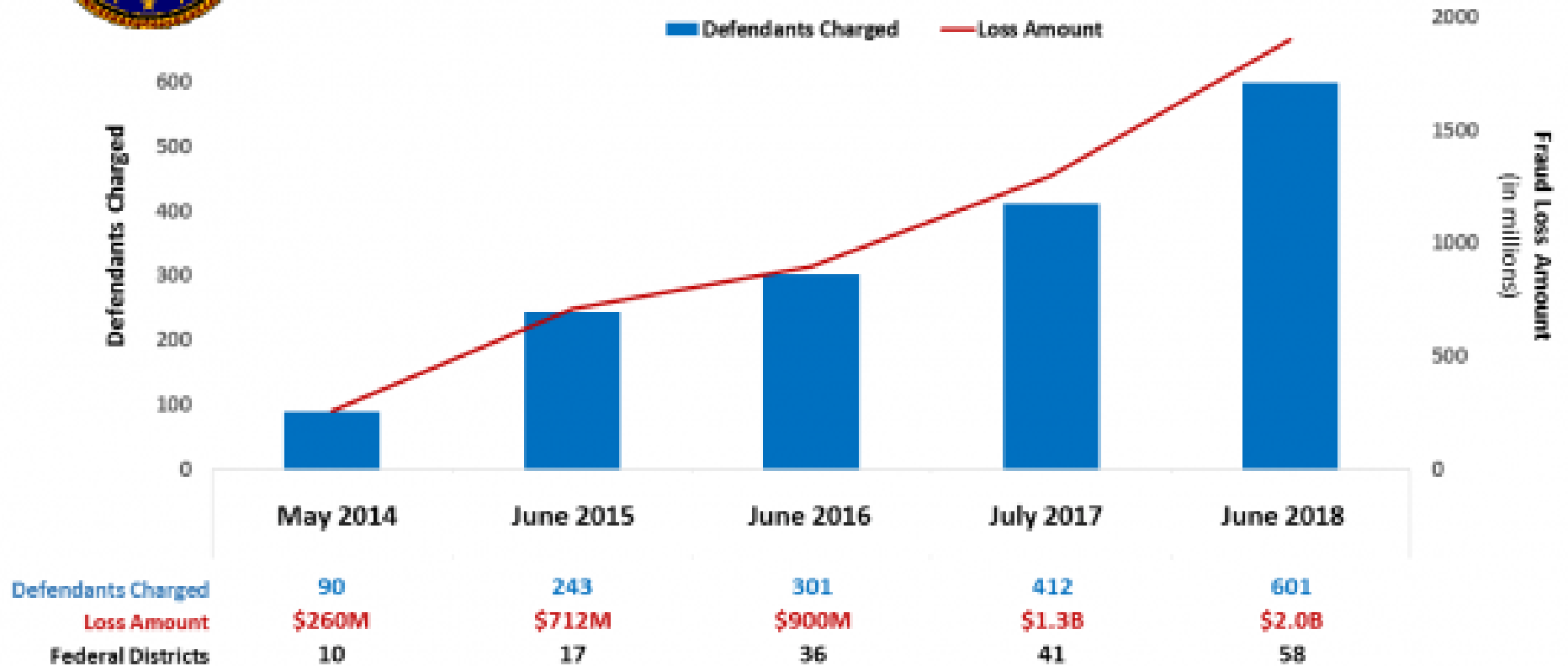
Penalties Increased (see 45 CFR 102.3)

	Old Penalty	New Penalty
False Claims Act	\$5,500 to \$11,000 per claim	\$10,781 to \$21,563 per claim
• Failure to repay		\$20,000 per claim
Anti-Kickback Statute	\$25,000 criminal penalty 5 years in prison	\$100,000 criminal penalty 10 years in prison
	\$50,000	\$100,000 civil penalty
Ethics in Patient Referrals ("Stark")	\$15,000 per claim	\$24,748 per claim
• Circumvention scheme	\$100,000	\$164,992
Civil Monetary Penalties Law		\$5,000 to \$100,000
• Induce beneficiaries	\$10,000	\$20,000
• Induce physicians	\$2,000	\$5,000
• Excluded Provider	\$10,000	\$20,000



National Health Care Fraud and Opioid Takedown Trends

FY 2014 - FY2018



To make matters worse...

***You must narc
on yourself!***

**Affordable Care Act
report and repay
requirement.**



Fraud and Abuse Laws



- False Claims Act
- Anti-Kickback Statute (“AKS”)
- Eliminating Kickbacks in Recovery Act (2018) (“EKRA”)
- Ethics in Physician Referrals Act (“Stark”)
- Civil Monetary Penalties Law (“CMPL”)
- Montana Laws

False Claims Act

- **Cannot knowingly submit a false claim for payment to the federal government.**
- **Must report and repay an overpayment within later of 60 days after overpayment identified or date cost report is due.**

(42 USC 1347)

- **Subject to qui tam litigation.**

Penalties

- **Repayment plus interest**
- **Civil monetary penalties of \$11,781 to \$21,563 per claim**
- **3x damages**
- **Exclusion from Medicare/Medicaid**

Anti-Kickback Statute

- **Cannot knowingly and willfully offer, pay, solicit or receive remuneration to induce referrals for items or services covered by government program unless transaction fits within a regulatory safe harbor.**

(42 USC 1320a-7b(b))

- **“One purpose test”**

Penalties

- 10 years in prison
- \$100,000 criminal fine
- \$100,000 civil penalty
- 3x damages
- Exclusion from Medicare/Medicaid

(42 USC 1320a-7b(b); 42 CFR 102.3)

- Automatic False Claims Act violation

(42 USC 1320a-7a(a)(7))

Anti-Kickback Statute: Safe Harbors

- Bona fide employment
- Personal services contracts
- Leases for space or equipment
- Investments in group practice
- Investments in ASCs
- Sale of practice
- Recruitment
- Certain investment interests
- Waiver of beneficiary coinsurance and deductible amounts.
- Transportation programs
- OB malpractice insurance subsidies
- Electronic health record items or services
- Referral services
- Referral arrangements for specialty services
- Warranties
- Discounts
- Others

(42 CFR 1001.952)



Eliminating Kickback in Recovery Act (“EKRA”)

- Cannot solicit, receive, pay or offer any remuneration in return for referring a patient to a laboratory, recovery homes or clinical treatment facility unless arrangement fits within regulatory exception.

(18 USC 220)

- Applies to referrals paid by private or public payers.

Penalties

- \$200,000 criminal fine
- 10 years in prison
(18 USC 220)
- Maybe Anti-Kickback Statute violation

Ethics in Patient Referrals Act ("Stark")

- If physician (or family member) has financial relationship with entity:
 - Physician may not refer patients to entity for designated health services ("DHS"), and
 - Entity may not bill Medicare or Medicaid for such DHS

unless arrangement fits within a regulatory exception.

(42 USC 1395nn; 42 CFR 411.353)

Penalties

- No payment for services provided per improper referral.
 - Repayment w/in 60 days.
 - Civil penalties.
 - \$24,748 per claim submitted
 - \$164,992 per scheme
- (42 CFR 411.353, 42 CFR 102.3)
- Likely False Claims Act violation
 - Likely Anti-Kickback Statute violation

Stark

- Applies to referrals by physician to entities with which the physician (or their family member) has financial relationship.
- Physician =
 - MDs
 - DOs
 - Oral surgeons
 - Dentists
 - Podiatrists
 - Optometrists
 - Chiropractors
- Family member =
 - Spouse
 - Parent, child
 - Sibling
 - Stepparent, stepchild, stepsibling
 - Grandparent, grandchild
 - In-law

(42 CFR 411.351)

Stark

- Applies to referrals for designated health services (“DHS”) payable in whole or part by Medicare or Medicaid.
 - Inpatient and outpatient hospital services
 - Outpatient prescription drugs
 - Clinical laboratory services
 - Physical, occupational, or speech therapy
 - Home health services
 - Radiology and certain imaging services
 - Radiation therapy and supplies
 - Durable medical equipment and supplies
 - Parenteral and enteral nutrients, equipment, and supplies
 - Prosthetics and orthotics
- CMS website lists some of the affected CPT codes.
(42 CFR 411.351)

Stark Safe Harbors

Apply to both ownership and compensation

- Physician services group practice.
- In-office ancillary services provided through group practice*.
- Others.

(42 CFR 411.355)

Apply to ownership

- Rural providers.
- Whole hospital.
- Publicly traded securities.

(42 CFR 411.356)

Apply to compensation:

- Bona fide employment.
- Personal services contracts.
- Space or equipment rental.
- Physician or midlevel recruitment.
- Fair market value.
- Non-monetary compensation up to \$300.
- Medical staff incidental benefits.
- Professional courtesy.
- Certain IT subsidies.
- Certain payments by a physician for items or services at FMV.
- Others.

(42 CFR 411.357)

Civil Monetary Penalties Law

Prohibits certain specified conduct, including:

- Offering inducements to federal program beneficiaries unless fit within exceptions.
- Offering inducements to physicians to limit medically necessary services.
- Submitting claims for services ordered by, or contracting with, an excluded entity.

(42 USC 1320a-7a; 42 CFR 1003)

Penalties

- \$5,000 to \$20,000 per violation.
- Exclusion from Medicare and Medicaid

(45 CFR 102.3)

Montana Fraud and Abuse Laws

M O N T A N A



False Claims Act

- Cannot knowingly present or cause to be presented a false or fraudulent claim to Medicaid for payment or approval.
- If benefitted from inadvertent submission of a false or fraudulent claim, must disclose the false or fraudulent claim to the governmental entity within a reasonable time after discovery.

(MCA 17-8-403(1))

- Permits qui tam suits.

Penalties

- \$5,500 to \$11,000* per claim
- Up to 3x damages
- Expenses, costs and attorneys fees.

(MCA 17-8-403)

* Subject to inflation adjustment.

Medicaid Fraud Statute

- Cannot knowingly solicit, accept, offer or provide remuneration (e.g., kickback, bribe or rebate) for furnishing services or items for which payment may be made under Medicaid program or in return for purchasing, leasing, ordering, arranging for, or recommending the purchasing, leasing, or ordering any services or items from a provider for which payment may be made under the Medicaid program.
- Federal AKS safe harbors apply.
(MCA 45-6-313(1))

Penalties

- Cannot bill for services.
- Must repay amounts improperly billed.
- \$1,500 to greater of \$50,000 or 10x value of payments obtained.
- 6 months to 10 years in prison.
- Mandatory exclusion from Medicaid program.

(MCA 45-6-313)

Hospital Privileges

- **Hospital may not condition staff membership or clinical privileges on a physician's agreement to make referrals to that hospital any related facility.**

(MCA 50-5-117)

- **Note: under Stark, a hospital or other provider may require an employee or contractor to make referrals subject to certain limitations.**

(42 CFR 411.354(d)(4)).

Self-Referral Law

- **In workers compensation cases:**
 - provider may not refer a worker for treatment or diagnosis to a facility owned wholly or in part by the provider unless the provider informs the worker of the ownership interest and provides name and address of alternative facilities, if they exist.

(MCA 39-71-315)

- Treating physician may not refer a claimant to a facility at which the physician does not directly provide care or services when physician has an investment interest in the facility unless (i) authorized by the insurer, or (ii) there is either a demonstrated need in the community for the facility and alternate financing is not available.

(MCA 39-71-315, 39-71-110)

Applying the Rules





Freebies to Patients

May offer free or discounted items to **govt beneficiaries** if:

- Remuneration is not likely to influence the beneficiary to order or receive items or services payable by federal or state health care program.

(42 USC 1320a-7a(5))

- Item or service is of low value, i.e.,
 - Each item or service is less than \$15, and
 - Aggregate is less than \$75 per patient per year.

(OIG Bulletin, *Offering Gifts and Inducements to Beneficiaries* (8/02); 66 FR 24410-11; OIG Policy Statement Regarding Gifts of Nominal Value (12/7/16))

➤ Beware EKRA...

Freebies to Patients

May offer free or discounted services to **govt beneficiaries** if:

- Financial need
 - Good faith determination that beneficiary has financial need or after reasonable collection efforts have failed;
 - Not offered as part of any advertisement or solicitation;
 - Not tied to provision of other federal program business; and
 - Reasonable connection between item or service and medical care of beneficiary.

(42 CFR 1320a-7a(i); 42 CFR 1003.101; *see also* OIG Bulletin, *Hospital Discounts Offered to Patients Who Cannot Afford to Pay Their Hospital Bills*)

Freebies to Patients

- May offer free or discounted items to **govt beneficiaries** if:
 - Incentives to promote delivery of preventative care.
 - Payments meeting AKS safe harbor.
 - Any other remuneration that promotes access to care and poses a low risk of harm to patients and federal health care programs.
 - Retailer coupons, rebates or rewards offered to public.
 - Certain other situations.

(42 USC 1320a-7a(i); 42 CFR 1003.101)

➤ Beware EKRA...



Free Tests or Screening

- OIG has approved free screening services or tests (e.g., free blood pressure check by hospital) where:
 - Not conditioned on the use of any items or services from any particular provider.
 - Patient not directed to any particular provider.
 - Patient not offered any special discounts or follow-up services.
 - If test shows abnormal results, visitor is advised to see his or her own health care professional.

(Adv. Op. 09-11)

- *Advisory Opinions are not binding, but provide guidance.*
- Beware EKRA...

Free Transportation



- AKS safe harbor: local transportation
 - Set forth in policy applied uniformly
 - Not determined based on volume or value of referrals
 - Not air, luxury, or ambulance-level transport
 - Not publicly marketed or advertised
 - Drivers not paid per beneficiary
 - Only for established patients within 25 miles or, in rural area, 50 miles
 - Costs not shifted to payers or individuals

(42 CFR 1001.952(bb))

➤ Beware EKRA...

Free Transportation

- AKS safe harbor: shuttle service that operates on set schedule
 - Not air, luxury, or ambulance-level transport
 - Not publicly marketed or advertised
 - Drivers not paid per beneficiary
 - Only within provider's local area, i.e., within 25 miles or, in rural area, 50 miles
 - Costs not shifted to payers or individuals

(42 CFR 1001.952(bb))

➤ Beware EKRA...

Waiving Copays or Deductibles



May waive or discount **govt** copays or deductibles if:

- Not offered as part of any advertisement or solicitation;
- Do not routinely waive copays or deductibles; and
- Waive or discount after
 - **good faith determination that the beneficiary is in financial need, or**
 - **unable to collect after reasonable collection efforts.**

(42 USC 1320a-7a(i)(6); 42 CFR 1003.101; *see also* Adv. Op. 12-16)

- Document factors such as local cost of living; patient's income, assets and expenses; patient's family size; scope and extent of bills.

Waiving Copays or Deductibles

May waive or discount **govt** copays if satisfy AKS safe harbor.

- Hospital inpatient stay paid under PPS.
 - Waived amounts cannot be claimed as bad debt or shifted to any other payers.
 - Offered without regard to the reason for admission, length of stay, or DRG.
 - Waiver may not be made as part of any agreement with third party payer with limited exceptions.
- FQHC or other health care facility under any Public Health Services Grant.

(42 CFR 1001.952(k))

Waiving Copays or Deductibles

- Beware private payer contracts.
- Beware EKRA...

Writing Off Bills



- Writing off entire debt safer than waiving copays.
 - No one gets billed.
- The key: document legitimate purpose, i.e., not intent to generate referrals!
 - Resolution of legitimate dispute or settlement of claim.
 - Unsuccessful attempts to collect.
 - Financial need.
 - Other

Writing Off Bills

- Under CMPL, may waive or discount beneficiary's bills if:
 - Good faith determination that beneficiary has financial need or after reasonable collection efforts have failed;
 - Not offered as part of any advertisement or solicitation;
 - Not tied to provision of other federal program business; and
 - Reasonable connection between item or service and medical care of beneficiary.

(42 CFR 1320a-7a(i); 42 CFR 1003.101; *see also* OIG Bulletin, *Hospital Discounts Offered to Patients Who Cannot Afford to Pay Their Hospital Bills*)

Writing Off Bills

- **OIG suggests that hospitals (and presumably other providers) should:**
 - **Have a reasonable set of financial guidelines based on objective criteria that documents real financial need.**
 - **Recheck patient's eligibility at reasonable intervals to ensure they still have financial need.**
 - **Document determination of financial need.**

(OIG Bulletin, Hospital Discounts Offered to Patients Who Cannot Afford to Pay Their Hospital Bills)

Prompt Pay Discounts



- OIG has approved prompt pay discounts for **govt** beneficiaries if:
 - Amount of discount relates to avoided collection costs.
 - Offered to all patients for all services without regard to patient's reason for admission, length of stay, or DRG.
 - Not advertised so as to solicit business.
 - Notified private payers of program.
 - Costs not passed to Medicare, Medicaid or other payers.

(56 FR 35952; Adv. Op. 08-3)

Prompt Pay Discounts

- Private payer issues
 - Generally cannot discount copays and deductibles without violating managed care contracts unless payer agrees.
 - May adversely affect “usual and customary charges” and payer’s reimbursement under contract.
 - Payers may claim the benefit of the discount if the insurer pays within the relevant time.
- *Check your payer contract or contact your private payers.*
- Beware EKRA...

Self-Pay Discounts



- Providers may generally charge different patients or payers different amounts.
 - Negotiated rates for payers.
 - Negotiated rates or discounts for self-pay patients.
- Limitations:
 - Illegal discrimination (e.g., race, sex, religion, etc.).
 - Perhaps hospitals that submit cost reports.
 - Perhaps FQHCs.
 - In some states, payer contracts may contain “most favored nation” clauses requiring providers to give their best rates.
 - Self-pay or other discounts may affect “usual and customary” charges.

Medicare “Substantially in Excess” Rule

- Provider may not charge Medicare “substantially in excess” of the provider’s usual charges.

(42 USC 1320a-7(b)(6); 42 CFR 1001.701(a)(1)).

- **Test: whether the provider charges more than half of its non-Medicare/Medicaid patients a rate that is lower than the rate it charges Medicare.**
- **OIG has stated that it would not use the rule to exclude or attempt to exclude any provider or supplier that provides discounts or free services to uninsured or underinsured patients.**

(See OIG Adv. Op. 15-04; OIG Letter dated 4/26/00, available at <http://oig.hhs.gov/fraud/docs/safeharborregulations/lab.html>)



Paying Patient's Premiums

- If paying Medicare Part B, C or D premiums:
 - **OLG approved plan's payment of Part B premiums for ESRD patients where:**
 - Patients are already receiving the services, so unlikely to induce services that might not otherwise be received.
 - No inappropriate patient steering to particular providers.
 - Patients are not coerced into enrolling in Part B.
 - Certain protections built in to protect Medicare program from additional costs.
 - **OLG cautioned that it might reach different result in other circumstances.**

(Adv. Op. 13-16; *see also* Adv. Op. 01-15 and Adv. Op. 13-16))

Paying Patient's Premiums

- If paying premiums for health insurance exchange:
 - “HHS has significant concerns with this practice because it could skew the insurance risk pool and create an unlevel playing field in the Marketplaces. HHS discourages this practice and encourages issuers to reject such third party payments. HHS intends to monitor this practice and to take appropriate action, if necessary.” (HHS Letter dated 11/4/13).
 - Letter does not apply to:
 - Indian tribes and govt grant programs.
 - Payments made by private non-profit foundation based on defined criteria based on financial status that does not consider health status and payment covers entire year.
- (HHS Letter dated 2/7/14; 79 FR 15240)

Paying Patient's Premiums

- If paying private insurance premiums (e.g., COBRA or other coverage):
 - Probably does not implicate AKS or CMPL unless it is tied to or induces referrals for services payable by govt programs.
 - May implicate state AKS, but not tested.
 - COBRA regulations contemplate that COBRA premiums may be paid by third party.
 - Check payer contracts.
- *But stay tuned—this is a developing area of the law.*
- Beware EKRA...

Relationships with Referring Providers

- **Contracts**

- Employment
- Services Agreements
- Leases
- Recruitment
- Joint Ventures

- **Free or discounted items**

- Gifts
- Space, equipment, support
- Professional courtesies
- Incidental benefits
- Insurance
- Over/under payments



- ✓ Stark
- ✓ Anti-Kickback Statute
- ✓ CMPL
- ✓ EKRA
- ✓ Montana Laws

Action Items



Check your relationships

With patients

- Billing policies
 - Waiving copays
 - Write offs
 - Prompt pay or self-pay discounts
 - Free or discounted items
- Marketing / advertising
 - Thank you gifts
 - Loss leaders
 - Free screening programs
 - “Refer a friend” programs
 - Others?

With referral sources

- Contracts and leases
 - Fair market value
 - Compensation not based on referrals
 - Services actually provided
- Visiting specialists
- Overpayments or payment for items not provided
- Gainsharing
- Joint ventures
- Practice support
- Professional courtesies
- Others?

Review and Update Compliance Plan

- Ensure it has required elements
 - Policies, procedures and standards of conduct
 - Designated compliance officer and committee
 - Conduct effective training and education
 - Develop effective lines of communication, e.g., complaint hotline
 - Conduct internal monitoring and auditing
 - Enforce through publicized disciplinary guidelines
 - Respond promptly to offenses and implement corrective action.

See OIG Supplemental Compliance Program Guidance for Hospitals, 70 FR 4858, available at

<https://oig.hhs.gov/fraud/docs/complianceguidance/012705HospSupplementalGuidance.pdf>

Train Key Personnel

- Include following people:
 - Administration.
 - Compliance officers and committees.
 - Human resources.
 - Physician relations and medical staff officers.
 - Marketing / public relations.
 - Governing board members.
 - Purchasing.
 - Accounts payable.
- Document training.
- Review and repeat.

If you think you have a problem

- Don't do this!



If you think you have a problem

- Suspend payments or claims until resolved.
- Investigate problem per compliance plan.
 - Consider involving attorney to maintain privilege.
- Implement appropriate corrective action.
 - But remember that prospective compliance may not be enough.
- If repayment is due:
 - Report and repayment per applicable law.
 - Self-disclosure program.
 - To OIG, if there was knowing violation of False Claims Act, Anti-Kickback Statute or Civil Monetary Penalties Law.
 - To CMS, if there was violation of Stark.

Additional Resources



<https://oig.hhs.gov/compliance/compliance-resource-portal/>

The screenshot shows a web browser window displaying the Compliance Resource Portal. The browser's address bar shows the URL <https://oig.hhs.gov/compliance/compliance-resource-portal/>. The page header includes the U.S. Department of Health and Human Services logo and the text "Office of Inspector General". A search bar and a "Submit a Complaint" button are visible. The main navigation menu includes "About OIG", "Reports", "Fraud", "Compliance", "Exclusions", "Newsroom", and "Careers". The main content area features a large heading "Compliance Resource Portal" and a sub-heading "Highlights from Principal Deputy IG Joanne Chiedi's 2019 HCCA Compliance Institute Remarks". A sidebar on the left lists various resources such as "Compliance", "Compliance Resource Portal", "Accountable Care Organizations", "Advisory Opinions", "Compliance Guidance", "Corporate Integrity Agreements", "Open Letters", and "RAT-STATS". A right-hand sidebar contains a call to action: "Email your suggestions for new OIG compliance resources" with an envelope icon. Below this, a paragraph explains that the portal is not a formal agency solicitation and that suggestions are welcome. The Windows taskbar at the bottom shows the date and time as 10:07 AM on 6/22/2019.

Compliance Resource Portal | Off x +

<https://oig.hhs.gov/compliance/compliance-resource-portal/>

An official website of the United States government [Here's how you know](#)

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Compliance Resource Portal

[Highlights from Principal Deputy IG Joanne Chiedi's 2019 HCCA Compliance Institute Remarks](#)

Toolkits +

Provider Compliance Resources and Training +

Advisory Opinions +

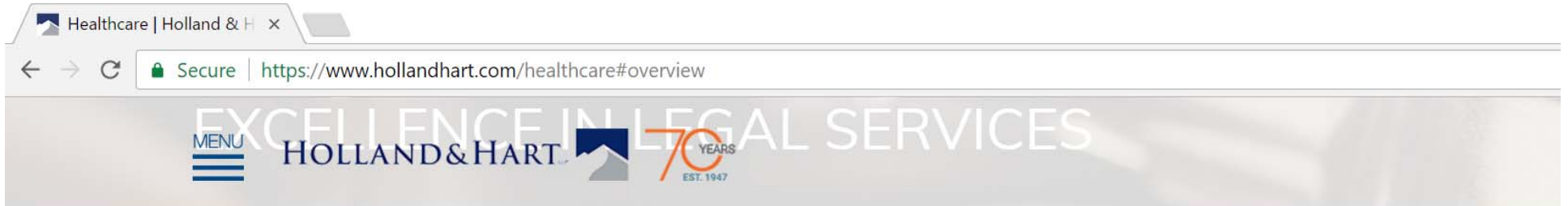
Voluntary Compliance and Exclusions Resources +

Email your suggestions for new OIG compliance resources

This is not intended to be a formal agency solicitation. OIG welcomes ideas for new compliance resources that would be helpful to the health care community and that are consistent with OIG's mission, in any format. The receipt of a suggestion does not obligate OIG to take action, including responding to the suggestion, making suggestions public, or issuing public guidance. Members of the public are

10:07 AM
6/22/2019

<https://www.hollandhart.com/healthcare#overview>



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Access to previous webinar recordings, publications, and more.

The Healthcare Industry is poised to continue its rapid evolution. With this sector now making up close to 20 percent of GDP, our lawyers stand ready to help as changes unfold.

Issues such as rising healthcare costs, healthcare reform, data and privacy security, and innovations in healthcare delivery, device and pharmaceutical designs are forefront in the minds of many of our clients. We are here to guide our clients through the challenges and opportunities that arise in this dynamic industry.

Clients We Serve

- Hospitals
- Individual medical providers
- Medical groups
- Managed care organizations (MCOs)
- Third-party administrators (TPAs)
- Health information exchanges (HIEs)
- Practice managers and administrators
- Veterinary hospitals and facilities
- Independent Practice Associations (IPAs)
- Imaging centers
- Ambulatory surgery centers
- Medical device and life science companies



Questions?



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