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Do Your Diligence: M&A Considerations Following OIG's Special Fraud Alert on Telemedicine

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Reimbursement and licensing regulations that once restricted telehealth services have relaxed in recent years, fueling massive investment in telemedicine companies and provider implementation of telehealth modalities. A study by McKinsey shows that telemedicine now comprises between 13% to 17% of all health care visits and that hundreds of billions of dollars will be shifted into virtual or virtually enabled care.

Any entities that plan to invest or are already invested in digital health companies, entities that contract with them, or providers that offer in-house telehealth modalities must be aware of the significant regulatory oversight the industry faces. There is no better example of this scrutiny than the Special Fraud Alert (SFA) published by the Office of Inspector General (OIG) on July 20 — the same day the Department of Justice (DOJ) announced a massive fraud takedown, targeting telemedicine providers and physicians that netted criminal charges against 36 defendants in schemes that allegedly defrauded the government out of more than $1.2 billion.

Why the Special Fraud Alert Matters

The OIG publishes SFAs to address potentially suspect arrangements that could violate fraud and abuse laws, including the Anti-Kickback Statute and Civil Monetary Penalties Law. The OIG has only issued three SFAs since 2014, which means that investors must take notice as SFAs telegraph OIG's forthcoming enforcement activity. This SFA signals the OIG's current focus on telemedicine companies, their relationships with providers and industry, and their handling of telehealth laws and regulations.

OIG Identifies "Suspect Characteristics" in Telemedicine Arrangements

The SFA, titled "OIG Alerts Practitioners to Exercise Caution When Entering into Arrangements with Purported Telemedicine Companies," discusses the myriad of telehealth fraud schemes that it has investigated and will continue to target. Primarily, these are situations where telemedicine companies use kickbacks to aggressively recruit and reward providers for referrals. Those referrals are generally for unnecessary items and services for "purported patients" who are solicited by telemedicine companies to further the fraudulent scheme and with whom there is often no legitimate patient-physician relationship. The SFA reminds providers that liability for violations of the law can attach to both sides of a kickback arrangement, and enforcement may lead to criminal, civil, or administrative liability.

The SFA identified the following six "suspect characteristics" that would-be or current investors in the telemedicine space should carefully consider for their portfolio companies and during diligence on potential acquisition targets:

1. The existence of “purported patients” identified or recruited by a 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.

2. Insufficient provider contact with patients or their medical information such that they cannot meaningfully access medical necessity.

3. Compensation by the telemedicine company to the provider based on volume of items or services rendered.

4. A telemedicine company only furnishing items and services reimbursable by federal health care programs and not accepting other insurance payment.

5. A telemedicine company claiming to only furnish items and services to individuals who are not federal health care program beneficiaries, while billing federal health care programs.

6. A telemedicine company furnishing only one product or a single class of products, potentially restricting treating options.

How the Special Fraud Alert Affects Telemedicine M&A

The diligence team of a transaction involving telemedicine, whether the target is a telemedicine company or contracts with one, should consider and directly request information regarding the OIG’s list of suspect characteristics. Because the OIG will heavily scrutinize any relationships or arrangements involving patient visits via telehealth, telemedicine, or telemarketing, below are five recommendations in light of this SFA:

- Audit clinical documentation and billing information to verify the underlying medical necessity of services rendered through telemedicine and that a patient-provider relationship was sufficiently formed. Determine how patients are engaged, how their records are maintained, who sees the patients, and what follow-up with providers occurred.

- Review the target’s compliance program and related policies, particularly with respect to telehealth and telemarketing, to determine whether appropriate safeguards are in place. Ask about whether the company or provider has reviewed telehealth laws in their states of operation.

- Evaluate any contractual or financial arrangements with physicians or referral sources and pay special attention to payments contingent on patient or service volume. Ensure that post-closing operation replaces such arrangements with lower risk models of compensation.

- Obtain referral data and compare it to the respective financial arrangements with referrals sources to identify disparate treatment depending on referrals volume. Pay particular attention to any relationships between the telehealth company and industry partners like durable medical equipment suppliers, pharmacies, or laboratories.

- Analyze payor sources and understand the purpose of the target’s payor mix. Identify anomalies based on service type or geography that may suggest an increased risk profile.

Investors should note that this list is not exhaustive and that other potential regulatory concerns, such as compliance with the Controlled Substances Act, and state licensing requirements should be analyzed by the diligence team before a transaction moves forward.

How Troutman Pepper Can Help

While short-term flexibilities create incentives for investment in telemedicine, the OIG’s SFA makes clear that telemedicine will be subject to heightened scrutiny for the foreseeable future. Smart investors will discuss the potential pitfalls attendant to telemedicine with an attorney who understands the industry, its history, and its future. Please contact the authors of this article to learn more about telemedicine regulation, enforcement, and market insight.

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