# Just What the DOJ Ordered: Telehealth Enforcement Actions Are Here to Stay

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Since the worldwide spread of COVID-19, the demand for telehealth services has surged[1]. The Centers for Medicare and Medicaid Services (CMS) reported over an 11,000% increase in virtual visits (i.e., video- or phone-based visits) during the pandemic. As private healthcare providers have shifted to telehealth, so too has the Department of Justice (DOJ) emphasized identifying, targeting and combatting telehealth fraud. The DOJ recently charged 345 defendants from 51 federal districts with greater than $6 billion worth of fraud losses resulting from false and fraudulent claims to federal healthcare programs and private insurers. Of the $6 billion, roughly $4.5 billion relates to telehealth.

The DOJ has filed criminal charges against more than 100 doctors, nurses and other licensed medical professionals engaged in fraudulent practices in telehealth. According to court documents, certain defendant telehealth executives allegedly paid doctors and nurse practitioners to order unnecessary durable medical equipment, genetic and other diagnostic testing, and pain medications, either without any patient interaction or with only a brief telephonic conversation with patients they had never met or seen. Durable medical equipment companies, genetic testing laboratories and pharmacies then purchased those orders in exchange for illegal kickbacks and bribes and submitted false and fraudulent claims to Medicare and other government insurers.

The Department of Justice is not the only federal agency that has a watchful eye on telehealth. Health and Human Services (HHS) Deputy Inspector General Gary Cantrell recently recognized the immense value of telehealth in providing healthcare, while also acknowledging the potential for abuse. "Telemedicine can foster efficient, high-quality care when practiced appropriately and lawfully. Unfortunately, bad actors attempt to abuse telemedicine services and leverage aggressive marketing techniques to mislead beneficiaries about their healthcare needs and bill the government for illegitimate services."

In recognition of the value of expanded use of telehealth in response to the pandemic, CMS has sharply expanded the number of services available via virtual care, upped payments for audio-only visits and granted a blanket waiver enabling providers licensed in one state to provide services to patients in another (subject to applicable state law requirements). In a recent interview, CMS Administrator Seema Verma told reporters her department is evaluating the telehealth waivers to determine if they should be extended past

the scope of the national emergency, and is in the process of additional rulemaking around the issue. Because much of Medicare telehealth policy is governed by statute, CMS' ability to modify the parameters via waivers is not absolute.

With a corresponding concern for the increased potential for billing abuses, CMS also announced a record-breaking number of administrative actions related to telehealth fraud, revoking the Medicare billing privileges of hundreds of medical professionals for their involvement in telehealth schemes

Although the COVID-19 pandemic has prompted the DOJ to emphasize investigation and enforcement actions aimed at fraudulent telehealth practices, the agency will undoubtedly continue to aggressively combat healthcare fraud across the industry. The DOJ recently publicly announced the creation of the National Rapid Response Strike Force, as part of its Health Care Fraud Unit. The National Rapid Response Strike Force's mission is to investigate and prosecute fraud cases involving major healthcare providers that operate in multiple jurisdictions. This Strike Force has led the response to detection and prevention of telehealth fraud during the COVID-19 pandemic, but the scope of its work will be much broader. The Strike Force is expected to build on the work of the Health Care Fraud unit, which, since its founding in 2007, has charged more than 4,200 defendants who have collectively unlawfully billed the Medicare program for approximately $19 billion.

While a number of fraud-fighting tools are in the arsenal of federal regulators, the civil False Claims Act (FCA) (31 U.S.C. § § 3729-3733) has been a particularly powerful enforcement tool. Penalties under the FCA include treble damages and per claim fines of between $11,665 (minimum) and $23,331 (maximum).

In 2019, the DOJ's enforcement of the False Claims Act resulted in healthcare-related false claims recoveries worth $2.6 billion, approximately 85% of the total False Claims Act recoveries for that year. In one recent example, on November 19, 2020, the DOJ announced that Kaiser Foundation Health Plan of Washington will pay over $6.3 million for submitting invalid Medicare Advantage diagnoses and received inflated payments from Medicare as a result. A whistleblower, Teresa Ross — a former employee of Group Health Cooperative in Washington — had filed the lawsuit. This settlement is a stark reminder that healthcare providers, including those providing telehealth services, must not only be vigilant in their adherence to federal law, but also ensure they create appropriate, effective internal reporting protocols for potential whistleblowers.

Even as the healthcare industry responds to modern challenges like the COVID-19 pandemic with a pivot to telehealth, the DOJ has also pivoted into these new areas of health care to detect and prosecute those who commit healthcare fraud. Providers must remain vigilant in this regulatory environment, including by implementing systems to detect and prevent potential fraudulent conduct.

If you have questions about state or federal healthcare compliance audits, investigations or enforcement actions, please contact White Collar Group Chair Susan Gaertner, Jackson Hobbs or your regular Lathrop GPM contact. Our White-Collar Group, also focuses on False Claims Act litigation, responding to State Attorney General investigations and a variety of other compliance work.

[1] Alexander GC, et al., *Use and Content of Primary Care Office-Based vs Telemedicine Care Visits During the COVID-19 Pandemic in the US*, JAMA Net Open (Oct. 2020) (number of telemedicine consultations increased thirtyfold to more than 35 million in 2020's second quarter).