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SUMMARY

We are identifying flaws in the private pay model of drug treatment that lead to fraud and abuse and exacerbate the number of deaths during the opioid epidemic. Individuals with substance use disorder (SUD) from throughout the country are lured to treatment destinations such as Florida to enter drug recovery centers, only to be exploited by unscrupulous individuals seeking to profit from patient brokering, illegal kickbacks and insurance fraud. We are making recommendations to significantly reduce fraud and abuse within this industry, and ultimately result in better patient outcomes including fewer overdoses and deaths.

The "Florida Shuffle" starts with deceptive marketing practices, offers or inducements. Once in Florida, the patient goes through a course of treatment covered by private insurance. During outpatient phases of treatment, the out-of-state patient, in need of a place to live, will be referred to a sober home, which is a group home for individuals in recovery. Federal law prevents the regulation or inspection of these residences and many are little more than flophouses where drug abuse, human trafficking and other crimes are prevalent. When insurance benefits are exhausted, outpatient care ends and the individual leaves the sober home. A relapse, however, will trigger a new round of treatment, so rogue providers seek profit through failure rather than sobriety. This recycling of treatment and relapse can continue as long as the patient is insured, and remains alive.

The current economic model favors relapse. In many instances, patients are offered benefits by patient brokers representing shady facilities and induced to relapse to be eligible for additional treatment and benefits. Providers that do not engage in these activities are not only at a disadvantage, but in many cases are forced out of business.

We offer five recommendations that can be addressed on the federal level:

1- Use the Affordable Care Act (ACA) to address these private insurance abuses. Adopt the ACA's outcome-based reimbursement approach for Medicare over the current fee-for-service reimbursement model for private pay drug rehabilitation. This would reward the best recovery centers while shuttering rogue operators. It could also improve patient outcomes, as providers will be incentivized towards a longer term, lower-level

continuum of care rather than ineffectual short bursts of intensive forms of treatment with no follow up.

2- Address the abuses in the sober home industry by clarifying the Americans With Disabilities Act (ADA) and Fair Housing Amendments Act (FHAA) to allow states and local governments to enact reasonable regulations for the health, safety and welfare of vulnerable sober home residents.

3- Expand the jurisdiction of the U.S. Attorney's Office in each jurisdiction to prosecute privately funded facilities engaging in insurance fraud and patient brokering activities under the Federal Anti-Kickback Statute (AKS).

4- Clarify the safe harbor exception under the AKS regarding bona fide employees.

5- Target marketing fraud, which is the first act that lures addicts into the endless cycle of relapse. States have limited jurisdiction and resources to prosecute large marketing firms engaging in deceptive practices. These interstate practices need to be scrutinized by the appropriate federal agencies and fraudulent actors held civilly or criminally accountable.

TESTIMONY OF DAVE ARONBERG, STATE ATTORNEY, 15TH JUDICIAL CIRCUIT, FLORIDA

My name is Dave Aronberg. I'm the State Attorney for Florida's 15th Judicial Circuit, which covers all of Palm Beach County. As the Chief Law Enforcement officer for a county at the forefront of the national opioid crisis, I want to thank you, Mr. Chairman, and all of the committee members, for your leadership in confronting this unprecedented epidemic. I also applaud your advocacy of the 21st Century Cures Act, which will speed the discovery and development of new cures and treatments, including alternatives to the addictive prescription painkillers that have led to so many needless deaths.

Because of Palm Beach County's tropical climate and long established drug treatment industry, we have always been a destination for people with substance use disorder. [See PowerPoint Slide #2.] In recent years, however, we have seen an influx of unscrupulous individuals who enrich themselves by exploiting those in recovery. These opportunists are misusing well-intended federal laws to prey on opioid addicts, who are often willing to participate in patient brokering, illegal kickbacks and insurance fraud in exchange for illicit benefits such as cash, free rent, transportation and even drugs themselves.

This is the Florida Shuffle. [See PowerPoint Slide #3.] It starts with deceptive marketing practices, offers or inducements, such as a free one-way plane ticket to a Florida rehab center. Today, 75% of all private-pay patients in Florida drug treatment centers come from out of State, and for too many of them, they leave our community only in ambulances or body bags. Once in Florida, the patient goes through a course of treatment covered by insurance. Together, the Affordable Care Act (ACA) and the Mental Health Parity and Addition Equity Act of 2008 provide coverage for drug rehabilitation on a traditional fee-for-service basis with no yearly or lifetime limits and with relapse always covered as an essential health benefit. During outpatient phases of treatment, the out-of-state patient, in need of a place to live, will be referred to a sober home, which is a group home for individuals in recovery. The Americans with Disabilities Act (ADA) and Fair Housing Amendments Act (FHAA) together prevent the regulation or inspection of these residences, and so many are little more than flophouses where drug abuse, human trafficking and other crimes are prevalent. When insurance benefits are exhausted, outpatient care ends and the individual leaves the sober home. A relapse, however, will trigger a new round of treatment, so rogue providers seek profit through endless failure rather than sobriety.

In July 2016, our office formed a Sober Homes Task Force to crack down on the fraud and abuse in the drug treatment industry. Our Task Force has since made 41 arrests, mostly for illegal patient brokering, which is a third-degree felony in Florida punishable by up to 5 years in

prison. We also work with the U.S. Attorney's Office for the Southern District of Florida to target insurance fraud, which led to the recent federal conviction and 27-and-a-half year sentence for drug treatment and sober home kingpin Kenneth Chatman.

As we succeed in arresting rogue providers and shutter corrupted facilities, we have seen the criminal element leave Palm Beach County for other communities unaware of the Florida shuffle. We have held training sessions for prosecutors and law enforcement officials throughout the State and we're offering our assistance to jurisdictions throughout the country.

On the legislative front, our office empaneled a Grand Jury and created two additional citizens' Task Forces to recommend changes to State law, leading to the 2017 passage of Florida House Bill 807, which tightened enforcement and oversight of the drug recovery industry.

But local and State law enforcement cannot solve this problem alone. We need the federal government to fix federal laws and regulations that exacerbate the national problem and tie our hands at the local level. My Chief Assistant, Alan Johnson, and I offer five recommendations:

First, address private insurance abuses by adopting the Affordable Care Act's outcome-based reimbursement model used in the Medicare program instead of the current fee-for-service reimbursement model for private pay drug rehab. This would reward the best recovery centers while shuttering rogue operators. It could also improve patient outcomes, as providers will be incentivized towards a longer term, lower-level continuum of care rather than ineffectual short bursts of intensive forms of treatment with no follow up. Studies have shown that a more effective and less expensive approach is to provide decelerated care over 12 months instead of an unending series of intensive 7 to 14 day inpatient stays followed by intensive outpatient treatment for 4 to 6 weeks marked by over-testing and overbilling.

Second, address the abuses in the sober home industry by clarifying the Americans with Disabilities Act and Fair Housing Act to allow states and local governments to enact reasonable regulations for the health, safety and welfare of vulnerable sober home residents. The Department of Justice (DOJ) and the Department of Housing and Urban Development (HUD) attempted to issue such a clarification last year, but it was unhelpful. Entitled "State and Local Land Use Laws and Practices and the Application of the Fair Housing Act," the Joint Statement seemed to ignore the realities on the ground that the very federal laws designed to protect individuals in recovery – the ADA and the FHAA -- are instead being used to shield those who do them harm. Chief Assistant Alan Johnson will now offer three additional recommendations.

TESTIMONY OF ALAN S. JOHNSON, CHIEF ASSISTANT STATE ATTORNEY, 15TH JUDICIAL CIRCUIT, FLORIDA

My name is Alan Johnson. I'm Chief Assistant State Attorney, 15th Judicial Circuit in and for Palm Beach County, Florida. One of my duties is to supervise both the civilian and law enforcement sides of the Palm Beach County Sober Homes Task Force.

As we succeed in arresting and prosecuting rogue providers and shuttering corrupt facilities, we have seen the criminal element leave Palm Beach County for other communities that may not be aware of the Florida Shuffle. We have held training sessions for prosecutors and law enforcement officials throughout Florida and we're offering our assistance to other jurisdictions throughout the country. Our Task Force has also worked with the U.S. Attorney's Office for the Southern District of Florida to target insurance fraud, which led to the recent federal conviction and 27 year prison sentence for drug treatment and sober homes kingpin Kenneth Chapman.

However, there are a number of roadblocks facing local, state and federal prosecutors in effectively combating these abuses. The following are several concrete steps that can close loopholes in the law, protect the vulnerable patients with substance use disorder from exploitation, and assist prosecutors in their efforts to reign in the corruption that has plagued the treatment industry.

EXPAND THE FEDERAL ANTI-KICKBACK STATUTE (AKS) TO INCLUDE PRIVATELY FUNDED TREATMENT:

Federal law prohibits offering or paying, soliciting or receiving, anything of value (i.e., kickbacks) for patient referrals. Currently, the Federal Anti-Kickback Statute only applies to schemes involving federally assisted programs, such as Medicare and Medicaid. Patient brokering abuses, regardless of whether the insurance is public or private, hurts patients and increases the cost of health care to everyone. Kickback schemes can freeze competing suppliers, cause overutilization of services, harm competition and the freedom of choice. Anti-kickback statutes, both state and federal, are designed to prevent (1) corruption of medical judgments, (2) overutilization of services –unnecessary billing, (3) unfair competition, (4) increased costs to the system and (5) patient steering.

In other words, the same public purpose behind the AKS applies equally to both federally funded and private treatment. Currently, federal law enforcement and prosecutors have only limited jurisdiction to investigate and prosecute bad actors defrauding private insurance programs. Federal prosecutors are limited in their ability to prosecute corrupt marketers and patient brokers whose schemes do not involve federally-assisted programs. The private

industry-wide fraud has been estimated in the billions of dollars. The human cost of substandard care motivated by greed is incalculable. We ask that this committee explore an amendment to the AKS that would bring this law enforcement tool to bear on the rampant exploitation occurring in the private pay sector of substance use disorder treatment. At a minimum, jurisdiction should be extended to private insurance contracts obtained through the ACA exchanges.

Local and state law enforcement agencies cannot fight this battle alone, especially against well funded regional and national criminal networks.

MODIFY THE BONA FIDE EMPLOYEE (BFE) SAFE HARBOR WITHIN THE AKS.

There are a number of exceptions to the AKS (adopted by most state patient brokering statutes) that create safe harbors for treatment facilities. One such safe harbor is the Bona Fide Employee exception (BFE). Hiring an employee is often used as a method to disguise kickback schemes. Under the Bona-fide Employee Exception, the AKS does not prohibit, "…any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services [.]" 42 USC § 1320a-7b(b)(3)(B).

According to a 1991 OIG opinion, the thinking behind this safe harbor is that the employer-employee relationship is unlikely to be abusive, in part because the employer is generally fully liable for the actions of its employees and is therefore more motivated to supervise and control them. Our experience shows the opposite; many employers are fully invested in the brokering schemes, oftentimes hiring recovering addicts to put "heads in the beds." We ask that the current BFE be amended to exclude employees from being paid bonuses or commissions based on the value or volume of referrals that they generate.

In addition, we ask that the phrase, "…for employment in the provision of covered items or services" be clarified to mean that any payment to an employee must be for the performance of services that are actually covered by insurance. While the current wording of the statute is clear to us, Federal Courts continue to disagree as to the meaning of this phrase.

Another safe harbor, Personal Services and Management Agreements (PSM), applies to contractual relationships with third party persons or entities. Requirements found in this safe harbor should be made applicable to the BFE exception as well. They include the following:

1- The agency agreement is set out in writing and signed by the parties.

2- The agency agreement covers all of the services the agent provides to the principal for the term of the agreement and specifies the services to be provided by the agent.

3- The aggregate compensation paid to the agent over the term of the agreement is set in advance, is consistent with fair market value in arms-length transactions and is not determined in a manner that takes into account the ***volume or value of any referrals*** or business otherwise generated between the parties.

4- The services performed under the agreement do not involve the counseling or promotion of a business arrangement or other activity that violates any State or Federal law.

5- The aggregate services contracted for do not exceed those which are reasonably necessary to accomplish the commercially reasonable business purpose of the service.

42 CFR 1001.952 (emphasis added)

The above requirements for the PSM safe harbor are designed to promote transparency and discourage patient brokering abuses. This reasoning applies equally to employees and may be applied to the BFE safe harbor by simply switching the words "agency" and "agent" to "employment" and "employee." It should be noted that any treatment provider will be able to hire and maintain employees without adhering to these requirements; however, if that employee violates the AKS or state equivalent patient brokering statute, they may not use the safe harbor as an affirmative defense.

ENHANCE FEDERAL ENFORCEMENT OF CIVIL AND CRIMINAL INTERSTATE MARKETING FRAUD

One of the many contributors to fraud and abuse in the private treatment side of the opioid crisis is false and misleading advertising. Millions of dollars are spent to gain placement, particularly for on-line internet access, to create a funnel from one part of the country to treatment destinations such as Florida, Arizona, Texas and California. In many cases, phone numbers and maps of legitimate providers are hijacked by unscrupulous marketers. On-line positioning in one geographic area can mislead the caller into thinking a facility is local, when the local number is in reality a Trojan horse, answered by a lead generator and sold downstream to the highest bidder. These phone calls are extremely valuable. In some cases, a downstream lead generated call may cost a facility or marketer over $1,000 or more, once insurance is validated.

Florida recently passed landmark legislation to reign in some of the abusive practices in the marketing of addiction services. HB 807 included new deceptive and fraudulent marketing

practices statutes, recognizing vulnerable consumers and their families are at risk of being victimized by practices that adversely impact the delivery of health care. False or misleading statements or information about a provider or operator's products, goods, services or geographical location marketed on advertising materials, in media or on its website are now violations of state civil and criminal law.

While Florida has prohibited false and misleading advertising, the reality is that many of these fraudulent marketers are operating on a regional or national level. Jurisdiction and investigatory limitations severely hinder effective state action. Lack of resources is also a problem. Local law enforcement is not equipped to investigate large marketing firms operating over state lines. Holding abusive interstate marketers and marketing systems to task, both civilly and criminally, should be made a priority of the appropriate federal agencies.

CLARIFY THE AMERICANS WITH DISABILITIES ACT (ADA) AND THE FAIR HOUSING AMENDMENTS ACT OF 1988 (FHAA) TO PROTECT RESIDENTS OF SOBER HOMES

In 2016, there were 4,661 opioid overdose responses by Fire Rescue in Palm Beach County alone; 552 of them resulting in death. Many, if not most of the calls, were to sober homes.

The Americans with Disabilities Act (ADA) and the Fair Housing Amendments Act (FHAA) limit government oversight of sober homes that house persons recovering from Substance Use Disorder (SUD). When President Reagan signed the FHAA, he added people with disabilities to the classes protected by the nation's Fair Housing Act (FHA). The amendments recognized that many people with disabilities need a community residence in order to live in the community like a family as an alternative to institutionalization. SUD is a recognized disability under the ADA and FHAA. However, unlike other disabilities, a person suffering from SUD is not protected under Federal Law if he or she is actively using controlled substances. In no other instance is a disability conditioned on the actions of the disabled. This is an important distinction when applying protections for persons with SUDs. The nature of the disease creates a circumstance whereby the disabled are vulnerable and easily exploited or manipulated. The need for standards in community housing for this vulnerable class must be considered when applying Federal Law.

Because of a lack of oversight, the majority of sober homes in Palm Beach County are little more than flop houses. Many are owned or operated by convicted felons, are in crime ridden neighborhoods with drug dealers literally next door. Other than voluntary certification with the non-profit organization, Florida Association of Recovery Residences (FARR), there is little or no protection for this vulnerable class. Enforcing criminal laws and municipal code enforcement is reactive and ineffective in protecting sober home residents.

Local and State governments do not have the right to ban or refuse reasonable accommodation in the enforcement of local codes and ordinances. However, there needs to be an acknowledgement that some oversight is necessary for the health and safety of the sober home residents.

There is a type of sober home that is recognized by Congress, called Oxford House. Oxford houses are residences that are chartered by a non-profit, national organization that applies strict rules and conditions attendant upon residence. These rules include, in part, sobriety, collective self governance and good neighbor policies. Oxford House is listed by SAMSHA on the National Registry of Evidenced-based Programs and Practices (NREPP).

In addition, there is a national organization, the National Alliance of Recovery Residences (NARR), that has developed model rules and standards for sober homes that have been adopted by various state non-profit certifying entities. In Florida, the Florida Association of Recovery Residences (FARR) has been authorized by statute and through designation by the appropriate executive department, to certify recovery residences. Certification requires quality standards, including core principals of a recovery based drug free environment, management by a certified recovery residence administrator, a good neighbor policy, ethics and safety standards, resident rights and obligations as well as a displacement policy when a resident materially violates these standards. The Florida legislature has made FARR certification voluntary, in large measure to avoid liability under the ADA and FHAA. Most sober homes remain uncertified.

As previously stated, SUD is a unique disability. Persons with SUD are extremely vulnerable to manipulation and abuse. This is especially true when they have actively used in the recent past. Most sober home residents are currently participating in active intensive out-patient treatment programs. Some have recently completed treatment and are vulnerable to relapse. The lack of standards in housing has strongly contributed to the recycling of SUD patients in and out of treatment. Safe and sober housing is the key to long term sobriety. It should be noted that sober homes are residences only, that is, no treatment is performed in the house.

The proliferation of sub-standard sober homes must be addressed at the federal level. We recommend that states be given the ability to require certification under NARR or similar standards, or other recognized programs such as Oxford House to protect the vulnerable residents living in sober homes. Clarification of the ADA and FHAA can also be achieved through administrative changes to the CFR applicable to group homes housing persons considered disabled due to SUD.