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New Federal Self-Disclosure Protocol Released

In April, the Department of Health and Human Services Office of Inspector General (OIG) substantially revised its 15-year old Self-Disclosure Protocol (SDP). The SDP has enabled providers of federal health care programs to voluntarily report possible violations and settle them under OIG's civil monetary penalty (CMP) system. Usually, CMPs are lower for providers who self-disclose violations and cooperate with OIG during the review process than for violations found through a government-initiated investigation. Further, OIG believes that the SDP expedites case resolution.

Different types of information will be required in submitting self-disclosures, depending on the type of potential violation. For example, if a provider discovers that it has employed or contracted with someone on OIG's List of Excluded Individuals and Entities, it must report:

- The individual's identity and a provider identification number if there is one;
- His/Her job duties;
- His/Her dates of employment or contractual relationship;
- A description of any background check performed prior to hiring;
- The provider's normal screening process (including policies and procedures) and why it believes that an excluded individual was retained;
- How the provider discovered this violation; and
- Any corrective actions (including a copy of revised policies and procedures) taken to prevent this from happening in the future.

The revised SDP lists a similar set of directions for reporting an arrangement that may have violated the Anti-Kickback Statute and the Stark Law, including a provision that the provider clearly acknowledge the arrangement as such. If the self-disclosure is for false billing of claims, providers must either review all claims affected by the disclosed matter, or a statistically valid random sample of at least 100 claims that can be projected to the total number of claims affected by the disclosed matter.

Self-disclosing possible violations can result in penalty multipliers to the single damages amount involved. While OIG acts on a case-by-case basis, it says in the revised SDP that its standard practice is to apply at least a 1.5 multiplier. The minimum settlement for an Anti-Kickback Statute violation handled under the SDP will be $50,000; the minimum for other types of violations will be $10,000. If the OIG confirms that a provider has been accepted into the SDP process in a timely manner, that provider would not be subject to the overpayment rule proposed in February 2012, which would require repayment within 60 days of identification.

Providers should note that while OIG encourages them to self-disclose criminal conduct, which OIG then reports to the Department of Justice (DOJ), the revised SDP does not apply to DOJ in determining how it will handle the matter. However, OIG says that it may advocate to DOJ where appropriate on behalf of a provider who is using the SDP process. Likewise, DOJ will apply penalties using its legal authority (which could be more severe) where it joins OIG in settling self-disclosed civil violations, but OIG can advocate in favor of resolving the case consistent with its own approach if warranted.