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# OIG Loosens Conditions For Health Care Voluntary Self-Disclosures; Provider Precautions To Prevent & Detect Violations & When Deciding Make Self-Disclosure

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Voluntary Self-Disclosures to the HHS Office of Inspector General (OIG) may be more attractive in certain circumstances for health care providers who exercise a compliance issue despite their diligence in their efforts to maintain compliance and act promptly to address a compliance issue upon discovery. Of course, actually making a Voluntary Self-Disclosure is not without risk, as was demonstrated in March by the $400,000 financial penalty imposed on Hardeman County Memorial Hospital (see our Client Alert of April 22, 2008) after it self-disclosed its involvement in an arrangement under which a physician was allowed to used free office space in an office building owned by the hospital, for approximately 11 years.

The OIG recently released an Open Letter to the provider community which increases the incentives for Voluntary Self-Disclosures in certain cases. The efforts to enhance the attractiveness of Voluntary Self-Disclosures come as the OIG and other Federal agencies are stepping up enforcement of Federal false claim and other health care fraud laws in response to Deficit Reduction Act mandates that have Federal and state regulators and program intermediaries targeting the billing and referral relationships of health care providers billing Medicare, Medicaid, or other Federal health care programs

The government long has urged health care providers that discover evidence of potential fraud under Federal health care laws to self-disclose. However, concern about perceived heavy handed requirements like heavy damages and requirements to enter into a Corporate Integrity Agreement (CIA) frequently has undermined the attractiveness of the voluntary self disclosure program to health care providers as a means for resolving compliance concerns. In a letter dated April 15, 2008, however, the OIG announced that it will no longer uniformly require that provider to enter into a CIA as a mere result of making a self-disclosure; instead, OIG will determine when the CIA requirement will apply on a facts and circumstances basis.

OIG announced its modification of its CIA requirements for Voluntary Self-Disclosures in a letter dated April 15, 2008. The announcement followed an earlier change in OIG policy which offers providers making Voluntary Self-Disclosures to qualify for reduced damages for fraud covered by such disclosures. Previously, the OIG committed to settling damages toward the lower end of the continuum. Damages for potential fraud can be increased up to three times under law. Last year's Open Letter to Providers offered to reduce the multiplier for good faith disclosures.

Providers often focus mainly on the amount of damages in deciding whether to make a voluntary self-disclosure. While potential financial damages that might be payable to the government certainly merit consideration, providers rarely seem to consider that under a CIA they will have significant obligations that are directly enforceable by the government. These additional obligations usually include initial and annual training for all personnel on general compliance topics, specialized training for specific job functions, drafting and enforcement of special policies, mandatory audits, and retention of an independent review organization to conduct annual audits. Failure to implement and live up to those obligations can result in additional financial damages and, worse, exclusion. Having to implement a compliance program, if one does not already exist, in the time of three months as a result of a CIA is an expensive and stressful undertaking that will effectively consume many staff hours that could be directed elsewhere.

The government's reasoning for making a CIA a discretionary remedy is that if a provider comes forward with a Voluntary Self-Disclosure, that provider must already have a working and effective compliance program. Then requiring additional obligations under a CIA becomes a disincentive to a Voluntary Self-Disclosure. Of course, in order to avoid imposition of a CIA, the provider must fully cooperate with the OIG, including being providing a complete description of the underlying conduct, a description of the provider's investigation into the matter, and an estimate of the amount of damages to Federal health care programs or a commitment to provide such estimate within three months of the provider's acceptance into the

Voluntary Self-Disclosure Program, and a statement of which laws the provider believes were violated. This information is required in addition to the information already required by the Voluntary Self-Disclosure protocol.

All of this presumes that the underlying matter involves potential fraud against Federally funded health care programs. Mere errors or overpayments should not be submitted through the Voluntary Self-Disclosure Program, but should be resolved directly with the claims processing entity, such as the intermediary or the carrier.

Of course, actually making a Voluntary Self-Disclosure is not without risk, as was demonstrated in March of this year by the CIA and settlement agreement entered into by Hardeman County Memorial Hospital (see our Client Alert of April 22, 2008). Hardeman County Memorial Hospital is a 24 bed, rural, critical access hospital, with three physicians on staff. The entire county's population is under 4,500. The next nearest hospital is approximately 80 miles away. When the hospital underwent a change in management, the new management conducted various audits. The audits revealed that a local physician had been utilizing office space in an office building owned by the hospital, but was not paying rent for approximately 11 years. The hospital voluntarily self-disclosed this potential Stark violation. The outcome was a financial penalty of nearly $400,000, plus imposition of a CIA containing significant requirements relating to structuring of physician relationships (including involvement of outside attorneys) and continual tracking, monitoring, and annual auditing of physician relationships. Because the CIA was entered into before the OIG's April 15th Open Letter, the costs to Hardeman County Memorial Hospital of implementing the CIA will likely significantly exceed the actual financial penalties. This case highlights both the risks inherent making a Voluntary Self-Disclosure and the benefits that may be gained from the OIG's new policy.

Deciding whether to make a Voluntary Self-Disclosure requires significant up-front investigation and audit work, work that should be done under attorney-client privilege. It is not uncommon to find that criminal statutes have been violated in addition to civil laws. Conducting an investigation without attorney direction and involvement waives potential privileges. Furthermore, many providers leap to the conclusion that fraud has occurred, when in reality all that has occurred is a billing error. When an issue arises, whether a billing error or actual fraud, the severity of the outcome often depends not only on the specific nature and magnitude of the violation, but also on the ability of the health care provider to demonstrate that the issue arose despite diligent efforts by the health care provider to maintain compliance and prevent violations through the establishment and administration of a strong and effective compliance program, its prompt discovery and redress of the problem, and genuine commitment to maintain compliance and avoid future violations. Accordingly, health care clients should both seek the advice of knowledgeable health care attorneys to evaluate the adequacy of current billing and other fraud prevention and other corporate compliance practices and policies, when investigating suspected problems, and when determining whether to make a Voluntary Self-Disclosure or take other action to redress concerns.

For help in reviewing or preparing your current compliance practices, investigating or responding to current billing or other health care fraud concerns, to obtain a copy of the OIG's Voluntary Self-Disclosure Protocol, its Open Letters, for assistance in evaluating whether a particular situation merits a Voluntary Self-Disclosure, copies of past Client Alerts, or in addressing other compliance or health care concerns, please contact Cynthia Marcotte Stamer at cstamer@solutionslawyer.net, 972-419-7188, or Heidi Kocher at hkocher@solutionslawyer.net, 972-419-7107.

## *About Cynthia Marcotte Stamer & Heidi Kocher*

***Cynthia Marcotte Stamer***, P.C., a member of the law firm of Glast, Phillips & Murray, P.C, has extensive experience advising, and representing health care providers and other health industry clients about health care operations, reimbursement, regulatory and public policy, risk management, human resources, credentialing and peer review, technology, privacy, licensing, compliance, contracting, and other concerns. Her clients include hospitals, physicians, clinics, IPAs, PHOs, skilled nursing facilities, assisted living and home health, rehabilitation, imaging and other diagnostic services providers, DME, physician practice management companies and other management services organizations, heath care technology, payers, employers, public health, school and other health involved governmental entities, and other health industry clients. Recognized in the International Who's Who of Professionals and bearing the Martindale Hubble AV-Rating, Ms. Stamer is a highly regarded legal advisor and consultant, author and speaker, who regularly conducts management and other training on health care reimbursement and other health industry operational, regulatory, and public policy matters.

Chair of the American Bar Association (ABA) Health Law Section Managed Care & Insurance Interest Group and known for her practical, direct problem-solving approach, Ms. Stamer also applies her extensive industry experience in numerous professional and industry leadership roles. In addition to her ABA Health Law Section involvement, Ms. Stamer serves on the editorial advisory boards of and is a contributing author for the Bureau of National Affairs and other publications, served as the Compliance Committee Chair and a member of the Board of the National Kidney Foundation of North Texas Board of Directors, serves on the continuing education and conference planning committees of the ABA Joint Committee On Employee Benefits (JCEB), the HFMA Lone Star Chapter, TAHFA, the IRS TEGE Advisory Council, and numerous other health industry groups. She also is the past-president of the Alliance for Health Care Excellence, and founder of its Health Care Heroes and Patient Empowerment Programs. She also is active in numerous other industry organizations including the American Health Lawyers Association, the Medical Group Management Association, the Alliance for Healthcare Excellence, the Dallas Bar

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Ms. Stamer is a widely published author and highly sought-after speaker nationally and internationally sought out for her strategic knowledge and insights on operational and technical health care risk management and operational concerns. A columnist for MD News and recurring author for various other health industry publications, Ms. Stamer's insights have been quoted by the Wall Street Journal, the Bureau of National Affairs (BNA), HIPAA Comply, Private Payer News, Modern Health Care, Managed Healthcare Executive, Health Leaders, Caring for The Elderly Magazine, For The Record, the Dallas Morning News, Spencer Publications, the Dallas Business Journal, the Houston Business Journal, and a various other national and local publications. Ms Stamer is the author of 100s of publications on health industry matters including numerous highly regarded works published by the American Bar Association, Aspen Publishers, BNA, the American Health Lawyers Association, the Medical Group Management Association, Government Institutes, Inc., Decision Health and others.

***Heidi Kocher*** has over 10 years experience in healthcare law, having represented many kinds of healthcare providers, from small DME companies to large national health care organizations. Prior to returning to private practice, Ms. Kocher was in-house at one of the largest national hospital companies. Her wide-ranging experience includes advising corporate and individual clients on the myriad federal and state fraud and abuse laws, such as Stark, the Anti-kickback statute, and False Claims Act, structuring mergers, acquisitions, joint ventures, employment agreements, and other deals, developing compliance programs and plans, interfacing with fiscal intermediaries, carriers, and other payers, resolving reimbursement issues, conducting investigations, assisting with preparing for and responding to JCAHO surveys, obtaining advisory opinions from the OIG, and representing providers in relation to federal and state agencies. She has worked with hospitals, physicians, mid-level practitioners, pharmacies, DME companies, LTACs, SNFs, home health and hospice agencies, inpatient rehab facilities, clinical laboratories, as well as allied health practitioners. She is active in the Health Care Compliance Association, and has written numerous articles and provided training on various healthcare law topics.

For more information about Ms. Stamer and Ms. Kocher, a listing of selected publications and other health industry links, information about workshops and other training and other health industry information and resources or other details about Cynthia Marcotte Stamer, P.C. and Glast, Phillips & Murray, P.C., see CynthiaStamer.com or contact Ms. Stamer or Ms. Kocher.

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