**OIG Issues Revised Provider Self-Disclosure Protocol**

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On April 17, 2013, the Office of Inspector General (the “OIG”) for the Department of Health and Human Services (“HHS”) issued a revised Provider Self-Disclosure Protocol (“SDP”) that has greater transparency than in the past, provides more detailed guidance on the disclosure process, and promises more streamlined reviews.

The original SDP, issued in 1998, established a process for healthcare providers to voluntarily identify, disclose, and resolve instances of potential fraud involving healthcare programs. After its initial release in 1998, the OIG issued three open letters clarifying and revising the SDP process.

The new SDP, which consolidates the prior guidance into one document, also conveys the OIG’s belief that providers will benefit from voluntarily disclosing potential fraud. For example, the OIG reveals that its “general practice” in SDP settlements is to require a minimum multiplier of 1.5 times the single damages. This multiplier is half of the treble damages potentially applicable in healthcare fraud and abuse cases. Moreover, the new SDP discloses that the OIG has instituted a presumption against requiring integrity agreement obligations. The OIG states that “Since 2008, we have resolved 235 SDP cases through settlements. In all but one of these cases, we have released the disclosing parties from permissive exclusion without requiring any integrity measures.” The OIG also promises to suspend a disclosing party’s obligation to return overpayments until a SDP settlement agreement is reached.

In addition to touting the benefits of disclosure, the OIG also utilizes the new SDP to clarify its expectations of disclosing parties. For example, the OIG clarifies that it expects a disclosing party to specifically identify the laws that were potentially violated instead of referring broadly to, for example, “federal laws, rules and regulations” or “the Social Security Act.” The OIG further clarifies that the SDP is not available to request an opinion regarding whether an actual or potential violation has occurred. The OIG also states that it will not tolerate statements that a party does not believe a violation has occurred. With respect to AKS and Stark violations in particular, the OIG expects to see a discussion of why the violation occurred (e.g., how fair market value was determined and why it is now in question or why the arrangement was not commercially reasonable).

The new SDP also provides more detailed information on how to calculate damages based on the type of case: false billing; excluded individuals; or violations of the Physician Self-Referral Statute (“Stark”) and the Anti-Kickback Statute (“AKS”). Statistical sampling continues to be endorsed for false billing and AKS violations. With respect to disclosures involving excluded persons, the new SDP recognizes that damages caused by the employment or contracting with non-physicians can be difficult to quantify. Therefore the OIG states that for excluded nurses, respiratory therapists, and billing and other administrative personnel, a provider should use the total “costs of employment or contracting” to estimate the value of the items and services provided by that excluded individual. The costs of employment or contracting include salary and benefits, health insurance, life insurance, disability insurance, and employer taxes paid related to employment (e.g., FICA and Medicare taxes). The total amount is then multiplied by the provider’s revenue-based federal health care program payor mix for the relevant time period. For conduct involving excluded physicians, the damages estimation is the total amounts claimed and paid by the Federal health care programs for the physician’s items or services.

For quantification of Stark/AKS damages, the revised SDP clarifies that the disclosing party must include the *total* dollar amount involved in each arrangement without regard to whether the disclosing party believes a portion of the total was offered, paid, solicited or received for a lawful purpose.

As an additional note, the OIG clarifies that its SDP is only for use with either AKS violations alone or AKS and Stark violations arise out of the same arrangement. Stark violations alone should be reported to the Centers for Medicare and Medicaid Services (“CMS”) through the Stark Self-Referral Disclosure Protocol (“SRDP”).