



MODIFICATION TO HEALTH CARE SELF-DISCLOSURES

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Decreased Incentive to Disclose Violations of the Stark and Anti-Kickback Laws

Stark and Anti-Kickback violations is an area of a physician's practice that wakes them up in the middle of the night in a cold sweat. This is also an area that causes hospital and health care systems millions of dollars. Violators of these laws can face significant civil, criminal, and/or administrative sanctions. The sanctions may include financial penalties and potential exclusion from participation in federal health programs. The threat of these damages has prompted hospital and health care providers to attempt resolution of claims brought under these laws.

In fact, since 2006 the U.S. Department of Health and Human Services Office of Inspector General ("OIG") had encouraged health care providers to disclose Stark and Anti-Kick violations/compliance issues through a program called the Self Disclosure Protocol ("SDP"). The incentive to disclose compliance issues and violations was overwhelming because providers were able to resolve potential violations with fewer penalties than normally assessed by OIG.

However, on March 24, 2009, the OIG released an Open Letter indicating that it will no longer accept disclosures that involve potential violations of the physician self-referral ("Stark") Law unless there is also a colorable violation of the anti-kickback statute. The OIG's recent position decreases the motivation for healthcare providers to disclose such violations to the government. Moreover, the OIG indicated that it will settle anti-kickback violations disclosed through the SDP for a minimum of \$50,000.

Historically, civil money penalties were not an available remedy under the Anti-Kickback Statute. However, in 1997, express authority was enacted that provides for the recovery of civil money penalties. Now, the OIG has authority to impose civil money penalties in the amount of \$50,000 per violation, plus damages equal to three times the total amount of remuneration offered, solicited, or received. In light of such, the initial \$50,000 penalty may not be such a bad deal. And, although they announced minimum settlement, the OIG assures providers that it will generally resolve matters disclosed through the SDP for less than the maximum penalties.

This recent announcement should alert all healthcare providers to carefully review any violations and determine whether they should be voluntarily disclosed under the SDP. Healthcare providers should engage experienced health care regulatory and/or litigation counsel to advise them concerning voluntary disclosure in each situation.