

## **New Inspector General's "Open Letter to Health Care Providers" Announced March 24, 2009**

The Inspector General released a new "Open Letter to Health Care Providers" on March 24, 2009 which refines his previously released Open Letters of April 24, 2006 and April 15, 2008. These Open Letters encouraged providers to utilize the OIG's Self-Disclosure Protocol ("SDP") to resolve matters giving rise to possible civil monetary penalties under the anti-kickback statute and the physician self-referral ("Stark") law.

The Inspector General's new Open Letter addresses two matters related to the SDP. First, the Open Letter limits a provider's ability to disclose instances of Stark non-compliance to only instances in which there is also a "colorable anti-kickback violation." The OIG will no longer accept self-disclosure protocol submissions that involve only liability under the Stark law. Second, the Open Letter sets a new floor for resolution of anti-kickback violations that are disclosed pursuant to the OIG's SDP: for anti-kickback self-disclosures submitted after the date of the Open Letter, the minimum penalty assessed by the OIG in resolving any such self-disclosures will be \$50,000.

In announcing the Open Letter, Tony Maida, Senior Counsel in the Office of Inspector General, cited an increasing number of "Stark-only" self-disclosures in recent months, and the difficulty that the OIG had experienced in calculating civil money penalties for Stark violations that do not involve "benefit conferred" on physicians. The OIG's anti-kickback CMP authority – the authority discussed in the 2006 Open Letter as the alternative remedy that the OIG would look to for Stark self-disclosures – allows the OIG to calculate a penalty that is equal to three times the amount of the financial benefit that was improperly conferred. Mr. Maida discussed instances where the only Stark non-compliance involved a missing signature on a contract as being an example of Stark non-compliance where there was no "benefit conferred" on the physician and where the OIG, therefore, had difficulty calculating a CMP penalty. Mr. Maida made the announcement at the American Health Lawyers Association's *Operationalizing Stark: From Complexity to Reality* Conference in Baltimore.

Mr. Maida also clarified that there are four things that the Inspector General does not intend to communicate by releasing the March 24, 2009, Open Letter:

- The Inspector General does not intend by this Open Letter to signal that kickbacks less than \$50,000 are OK. Mr. Maida made clear that the OIG views any kickback no matter how small as creating risk of abuse to the Federal health care programs.
- In publishing the Open Letter the Inspector General also does not intend to communicate that Stark enforcement is unimportant. According to Mr. Madia, arrangements that violate the Stark law often create risk of abuse for the Federal health care programs.
- Mr. Madia noted that the Department of Justice is not bound by anything in the Inspector General's Open Letter, stating that the DOJ makes its own decisions about when and how to enforce violations of legal requirements.
- Finally, Mr. Madia clarified that the Open Letter should not be seen as a statement about the government's legal rights to seek remedies for violations of the Stark law. The

government's legal remedies for Stark violations remain intact, in spite of the OIG's change of position in its willingness to accept self-disclosures of Stark violations.

Mr. Madia spoke on a Self-Disclosure panel that closed the AHLA's *Operationalizing Stark* conference. His co-presenters included several prominent Stark attorneys from around the country. They characterized the Open Letter as a discouraging development for health care organizations because it leaves providers who are attempting to resolve discovered instances of Stark non-compliance with limited alternatives. One speaker noted that the Department of Justice is now the only that is able and willing to consider giving a False Claims release to providers who find instances of "Stark only" non-compliance.

*Editor's note: This summary was provided by HCCA Immediate Past President Steven W. Ortquist, Partner, Meade & Roach, LLP.*