

Health Care Compliance Association
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Self-Disclosure: How to Avoid it, or If You Can't, How to Do It Right

David M. Glaser, Shareholder, Fredrikson & Byron PA

Tony Maida, Partner, McDermott Will & Emery, LLP

Lisa Re, Chief, Administrative and Civil Remedies Branch
Office of Inspector General

U.S. Department of Health and Human Services

Agenda

- How to Avoid Disclosure
 - Do you have an overpayment or potential fraud liability?
- If You Can't Avoid It, How to Do It Right
 - Where is the right place to disclose?
 - How do you set yourself up for a successful outcome?

Overpayment or Potential Fraud Liability

- Legal Questions
 - Applicable coverage and payment statutes and regulations
 - Manual provisions
 - 60 Day Overpayment Rule
- Factual Questions
 - Who, what, when, where, why
 - Internal investigation/review process
- Optics Considerations
 - Comfort level of explaining the decision to the government or other external stakeholder (e.g. potential buyer) in the future



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Is There An Overpayment?

- Documentation deficiencies are NOT always overpayments. (Beware of “overcoded.”)
- Condition of Participation vs. Condition of Payment. PIM §3.1 and U.S ex. rel. Hobbs v. MedQuest Assoc., April 1, 2013 (6th Cir.)
- Reassignment violations/Dating errors
- Signatures/orders
- Manual vs. regulation
- Are you “without fault?”



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Overpayment Statute: ACA, Section 6402(a); SSA Section 1128J(d); 42 U.S.C. § 1320a- 7k(d)

- **In general.** If a person has received an overpayment, the person shall –
 - report and return the overpayment to the Secretary, the State, an intermediary, a carrier, or a contractor, as appropriate, at the correct address; and
 - notify the Secretary, State, intermediary, carrier, or contractor to whom the overpayment was returned in writing of the reason for the overpayment.
- **What is an “Overpayment?”**
 - The term “**overpayment**” means any **funds** that a person receives or retains under subchapter XVIII or XIX of this chapter to which the person, after **applicable reconciliation**, is not entitled under such subchapter.

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Overpayments and False Claims

- **Deadline for reporting and returning overpayments.** The later of –
 - the date which is 60 days after the date on which the overpayment was identified; or
 - the date any corresponding cost report is due, if applicable
- **Enforcement:** If an overpayment is retained past the deadline, it may constitute an “obligation” under the False Claims Act.
 - False Claims Act: imposes liability for “knowingly concealing or knowingly and improperly avoiding or decreasing an obligation” to pay the United States. (31 USC 3729(a)(1)(G))
 - ACA also created new CMPL action for a penalty of up to \$10,000 per item or service and three times the amount claimed and exclusion for “Any person . . . that **knows** of an **overpayment** . . . and does not report and return the overpayment in accordance with [section 6402].”

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Final Rule, 81 FR 7954 (February 12, 2016)

- Regulatory provisions interpreting the Overpayment Statute (42 C.F.R. 401.301-5)
 - Lookback period
 - 6 years from the date the overpayment was received
 - How to report and return
 - Use the “most appropriate mechanism” based on the “nature of the overpayment”
 - Meaning of identified
 - When a provider or supplier “has determined, or should have determined through the exercise of reasonable diligence, that [it] received an overpayment and quantified the amount of the overpayment”
 - “Should have determined” means the provider or supplier failed to exercise reasonable diligence and in fact received an overpayment

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When does the 60 day clock start?

- CMS said providers have time to conduct the “reasonable diligence” before the 60 day clock starts to run
 - After receiving “credible information” the provider needs to undertake reasonable diligence
 - CMS articulated a 6 month “benchmark” for conducting reasonable diligence, except in “extraordinary circumstances” such as Stark issues, natural disasters, or states of emergency
 - The 60 day clock starts to run when either:
 - When the reasonable diligence is completed, or
 - On the day the credible information was received and the provider failed to conduct reasonable diligence (and an overpayment in fact was received)

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How does §1870 work?

- Overpayment Rule preamble ignores §1870
 - Statute requires waiver of the overpayment when “without fault”
 - Includes a presumption against recovery 5 years after the year payment is made
- Examples:
 - Payment made 1/4/13. Can recover 5 years after 2013, so count: 2014, 15, 16, 17, 18. Recovery possible through 12/31/18.
 - Payment made 12/31/12. Count 2013, 14, 15, 16, 17. Recovery until 12/31/17.
 - Note that references to “five years” are very misleading. Simplicity trumps accuracy

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Deciding Where to Disclose

- If you decide there is an overpayment or potential liability, where to report and return:
 - Contractor Refund
 - CMS SRDP
 - OIG SDP
 - State Medicaid agencies
 - DOJ



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Voluntary refund

- Simple process
- Minimizes legal fees
- Satisfies legal obligation to report and return overpayment
- No reduction from tainted claims
- No release
- Six-year lookback period under final rule
- Can help limit FCA exposure



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The Refund Letter

- Do you ever send a “placeholder” letter?
- Who is it from?
- Who is it to?
- How much detail do you provide?
- What about small issues where cost of investigation exceeds overpayment?
- What don't you say?

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Sample Letter – What to Say and What Not to Say

“We **recently** discovered that one of our physicians **was committing billing fraud**. She was **not documenting services properly**. We **inadvertently** billed for these services. We did a **statistically valid sample**. We **have corrected the problem.**”

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The Refund Letter

- “As part of our ongoing compliance process.”
- “More appropriate” is a great phrase.
- “Possible issues.”
- Reserve the right to recant.
- “Level we are confident defending...”
- Beware of “our attorney has told us . . .”
- “Refund” vs. “overpayment.”
- “Steps to improve....”

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Do You Rebill or Refund?

- Rebilling generates timely filing issues
- Refunding leaves bad claims data in the insurer's system
- For private payors, beware of your contract
- Refund is the way to go

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CMS Self-Referral Disclosure Protocol

- Actual or potential Stark violation only
- Benefits:
 - Reduce the amount “due and owing”
 - Stop the 60-day clock after submission to CMS
 - No FCA release, but can help limit exposure
 - *De facto* six-year lookback period pending OMB formal approval
 - Eliminate/manage uncertain liability that may impede bond financing or acquisition

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Experience With SRDP To Date

- Over 700 submissions since SRDP established
- Most submissions still outstanding -- 69 announced settlements (last checked March 27, 2016; last settlement announced January 7, 2015)
- Settlement amounts range from \$60 to \$584,000
 - Average settlement around \$125,000
- Settlement amounts suggest CMS is taking a reasonable approach to resolutions, but note the resolution is non-negotiable
- In light of the policy clarifications in the 2015 Final Physician Fee Schedule Rule, may consider whether withdrawal is appropriate

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OIG Self-Disclosure Protocol

- Created 1998, Updated 2013
- Receive about 100 submissions a year
- What = potential violations of federal criminal, civil, or administrative law for which CMPs are authorized
- Not admitting liability



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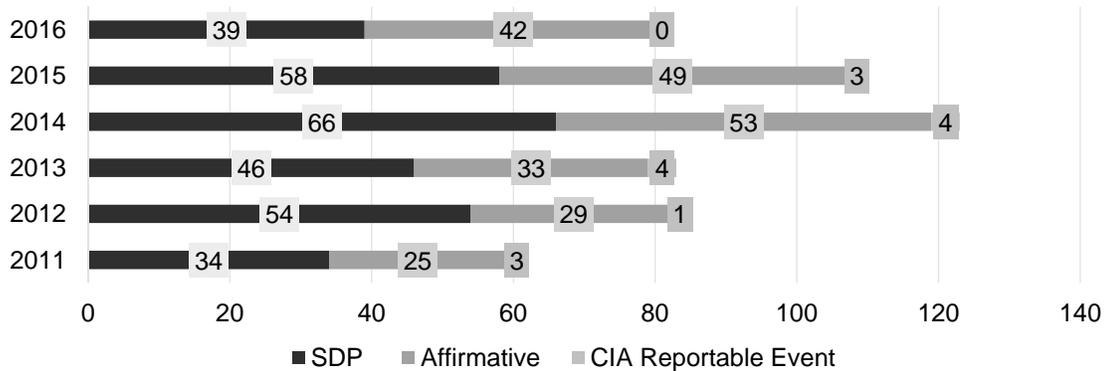
OIG Self-Disclosure Protocol

- What not eligible
 - Errors or overpayments where no potential violation of CMPL
 - Requests for opinion on whether there is a potential violation
 - Stark-only conduct
 - Settlement less than \$10,000 (\$50,000 for AKS)



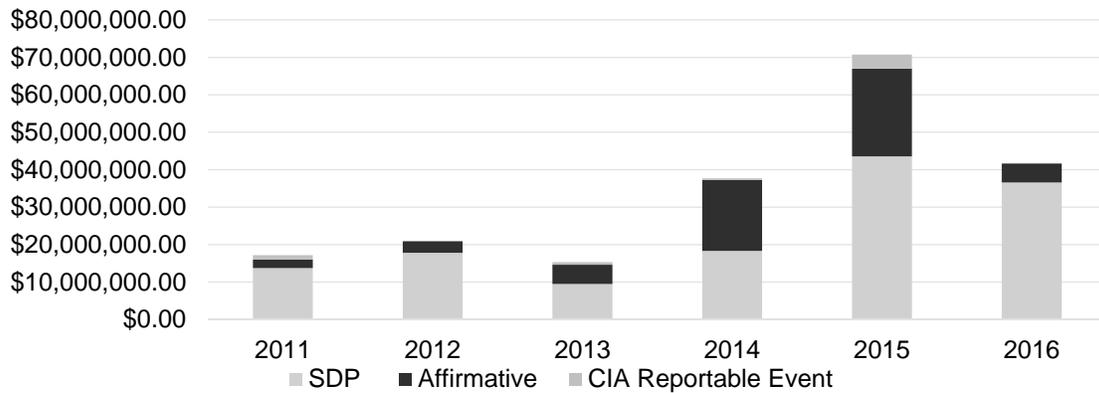
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CMP Settlement Count by Case Type



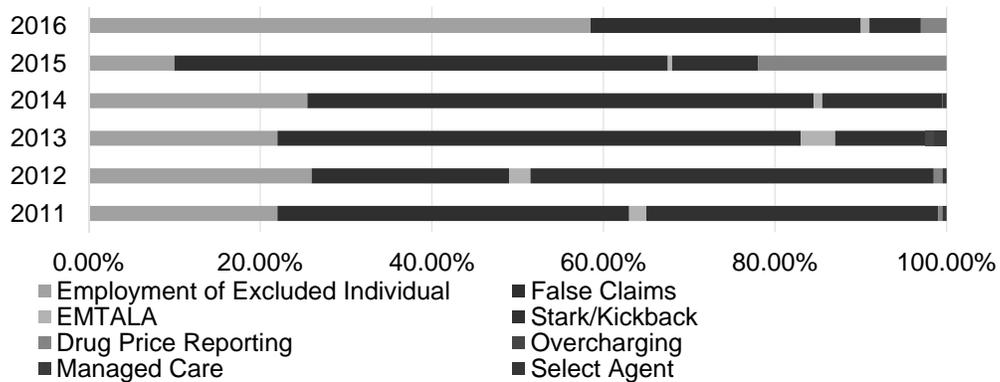
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CMP Monetary Recoveries by Case Type



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Percentage of CMP Monetary Recoveries by Allegation



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OIG SDP Resolutions

- Benchmark 1.5 multiplier
 - Claims Calculation
 - All claims or statistical sample of 100 claims minimum
 - Use point estimate (not lower bound)
 - Excluded persons – salary and benefits-based
 - AKS – remuneration-based
- Presumption of no CIA
- Six-year statute of limitations
- Tolling of the 60-day period after submission
- Does not secure FCA release, but can help limit exposure, including 60-day issues
- More predictable process, but DOJ may become involved

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Common Mistakes Providers Make in the OIG Self-Disclosure Protocol

- States in the initial disclosure or at settlement that there is no fraud liability.
- Does not identify potential laws violated.
- Discloses the conduct too early.
- No plan to quantify damages.
- Conduct only violates the Stark law.
- Refuses to pay a multiplier.
- Lack of cooperation.
- Argues damages should be calculated in a manner contrary to the revised SDP.

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Self-Disclosure Options

Refund	SRDP	SDP	State Agency	U.S. Attorney
<ul style="list-style-type: none"> • Simple process/ minimizes legal fees • No reduction in amount • No release of any kind • Six-year lookback period 	<ul style="list-style-type: none"> • Track record suggests likelihood of reasonable settlement • Stark only • 1877(g)(1) release • <i>De facto</i> six-year lookback period 	<ul style="list-style-type: none"> • Benchmark 1.5 multiplier • Release of CMPL and exclusion • Potentially reduce FCA exposure • Updated guidelines • Six-year SOL 	<ul style="list-style-type: none"> • Release of State authorities only • Uncertainty on posture and penalty amount • Experience may vary widely • SOL varies 	<ul style="list-style-type: none"> • Broadest release • Uncertainty on posture and penalty amount • Experience may vary widely • Six-year SOL

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Disclosure Pros and Cons

Pros

- Legal duty if received overpayment
- Start from positive place
 - Good corporate citizen
 - Effective compliance program
- Can be prepared
- Less disruptive
- Lower multiplier more likely
- Presume no CIA/exclusion
- Closure
- Less reputational effect possible

Cons

- Some pathways are less predictable than others
- Payment usually necessary
- Not place to get agency's opinion
- Can be long process
- Referrals among agencies possible
- Follow on actions by private insurance or states
- Some publicity still happens

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Common Questions

- When should you do the deep dive?
- How far back should you go?
- How handle small dollar issues where cost of investigating exceeds exposure?
- How structure sample?
- Use lower bound or point estimate?
- How handle subsequent audit on claims included in sample?

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How Do Refunds Affect RACs?

- If you have sampled, no single claim has been “refunded”
- This will be something to watch
- Note this is an issue even if the audit is on a different problem
- In any overpayment situation, always look at prior refunds/audits on the same issue
- (Note tie-in to rebill/refund issue!)

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What About Private Payors?

- No CMS regulation addresses obligations
- Contract (and manual??) control
- State statute of limitations apply
- State insurance law
- Is Medicare Advantage a private payor?

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What Do You Do With Copayments?

- Law is less clear
- Size matters (Would you bill the patient if they owed you the same amount?)
- State law

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Thank you!

David M. Glaser

612-492-7143

dglaser@fredlaw.com

Tony Maida

212-547-5492

tmaida@mwe.com

Lisa Re

202-205-9213

lisa.re@oig.hhs.gov