OIG Exclusion Violations: OIG's Updated Self-Disclosure Protocol Provides New Reporting Guidance

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On April 17, 2013, the Office of Inspector General ("OIG") issued an updated Self-Disclosure Protocol that many viewed as an attempt to make the process somewhat more "user friendly."[1] Regardless of whether that was the aim – or if it was achieved to some extent – the reason the update is of particular interest to us is that it has section which contains specific guidance on the disclosure of conduct involving excluded employees or contractors whereas the original protocol was silent on the topic.

By most measures, the OIG's protocol for self-disclosure is still an onerous one. Providers are required to conduct an internal investigation and present its findings in the form of a detailed self-disclosure narrative. The narrative must include, among other things, a complete accounting of the investigation itself, the conduct involved, the corrective efforts taken, the damages incurred, and how that amount was determined. [2]

In addition to these general requirements, disclosures relating to excluded employees or contractors has to include the following additional information:

- Who was excluded, their job duties and the dates of employment or contract
- The screening that was done before and/or during the employment or contract
- Why or how the screening process failed
- The corrective actions that have taken
- A calculation of the total amounts claimed and paid by Federal Program
- The revised protocol also requires that all other employees be screened through the OIG list of excluded individual employees[3]

It is also significant that the revision contains guidance for calculating the damages. While the OIG holds fast to the notion that all services directly provided and individually billed by an excluded individual are overpayments, it recognizes that quantifying services that were not billed separately can be problematic. In such cases, the guidance suggests that the amount paid should be estimated by taking the total cost of employment or contracting and multiplying by the federal payor mix (by unit if possible, or by the entire entity if not). According to the OIG, that amount should then be used as a "as a proxy" for the amount paid "for purposes of compromising OIG's CMP authorities" in a settlement.

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[1] Originally issued in 1999 in an attempt to encourage self-disclosure, the process has been viewed with skepticism from the outset and has met great favor as a resolution option.

[2] In return, the OIG states it may reduce CMP's to 1.5 times the loss. In addition, the OIG may still be required by Memorandum of Understanding with DOJ to refer the matter for civil or criminal prosecution, and entry into the program does not constitute a "public disclosure" under the False Claims Act. These considerations help explain the lack of popularity of the program.

[3] Dep't of Health and Human Servs. Office of the Inspector Gen. at 9.

The revision of the Self-Disclosure Protocol is important from the perspective of exclusion screening for three reasons. First, it strongly suggested that self-disclosures are the OIG's preferred avenue for resolving issues arising out of exclusion violations; second, it provided a methodology for approaching the difficult issue of computing the value of indirect and bundled services, and third, but perhaps most notably, it significantly raised the profile of issues related to conduct involving excluded persons and entities. This can sometimes have enforcement implications and serve as a sort of warning to the industry, and that appears to have been the case.