

OMIG'S SELF-DISCLOSURE GUIDANCE

Health Alert
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On March 12, 2009, New York State's Office of Medicaid Inspector General (OMIG) issued its highly anticipated Self-Disclosure Guidance, which sets forth the basic process for participating in the OMIG's Self-Disclosure Program (SDP). The state's goal in enacting the SDP is to enhance efforts to eliminate fraud while simultaneously offering providers a mechanism to reduce their legal and financial exposure.

Advantages of Self-Disclosure

To encourage self disclosures among health care providers, the guidance enumerates the following benefits of self-disclosure:

- Forgiveness or reduction of interest payments for up to two years
- Extended repayment terms
- Waiver of penalties and/or sanctions
- Timely resolution of the overpayment
- Recognition of the provider's compliance and a decrease in the likelihood of imposition of an OMIG Corporate Integrity Program
- Possible preclusion of subsequently filed New York State False Claims Act *qui tam* actions based on the disclosed matters

When, Where, and What to Disclose

The first hurdle for health care providers is determining when and what to disclose under the SDP. The answer is unclear; in fact, the guidance states that because of the complexity of issues surrounding self-disclosures, providers may want to consider obtaining the advice of experienced health care legal counsel or consultants.

Nonetheless, providers are encouraged to disclose inappropriate payments as early in the discovery process as possible to maximize the potential benefits of self-disclosure. Also, in some instances the OMIG will seek participation in devising a methodology for calculating damages. If a consultant is retained for that purpose, the OMIG may require that it have input.

Providers are advised to quickly assess whether the overpayment warrants self-disclosure or whether it would be better handled through the administrative billing processes. According to OMIG, when deciding whether to disclose, a provider should consider the precise issue, the amount involved, any patterns or trends that the problem may demonstrate, the period of noncompliance, the circumstances that

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led to the noncompliance, the organization's history, and whether the organization has a corporate integrity agreement in place. Issues that are identified as appropriate for disclosure are (1) substantial routine errors, (2) systematic errors, (3) patterns of errors, and (4) potential violations of fraud and abuse laws.

The OMIG contrasts these examples with "minor or insignificant matters" and "simple, more routine occurrences of overpayment." Nonetheless, the Guidance acknowledges that the SDP is significantly more expansive in scope than the protocol of the Federal Department of Health and Human Services Office of the Inspector General (OIG). Under recent clarifications to the Federal OIG's protocol, providers have been notified that mere billing errors and overpayments are not to be resolved through the federal self-disclosure process.

This distinction in scope is the primary difference between the federal and state SDPs. It is believed that one of the reasons for the State's broad approach is the fact that jurisdiction for fraud cases lies with the Attorney General's Medicaid Fraud Control Unit (MFCU), not the OMIG. As a result, once a disclosure has been screened by the OMIG, if the facts give rise to fraud (especially criminal fraud), the matter will likely be referred to MFCU. Thus, providers disclosing fraud need to decide whether to notify the OMIG under the SDP or whether to go straight to MFCU. Moreover, a similar analysis must be conducted with respect to billing errors. The SDP requires providers to distinguish between "patterns of errors" that should be disclosed to the OMIG and "simple, more routine occurrences of overpayment" that should be disclosed to billing intermediaries. All of these issues will require careful analysis and, if possible, the advice of experienced counsel.

Procedures for Disclosure

If a provider makes the determination to disclose a problem, it must follow the series of steps set forth in the SDP. First, an initial report is prepared that must include, among other things, the basis for the disclosure, how it was discovered, the time period involved, an approximation of any financial impact, the Medicaid rules implicated, and any corrective actions that have been taken. OMIG has developed a self-disclosure form for the initial report. Providers may access a printable version at www.omig.state.ny.us. Once submitted, the OMIG staff will review the initial disclosure and contact providers to discuss what steps need to be taken and what additional information is necessary. OMIG expects that the vast majority of disclosures will be complete within six months of the initial submission.

Unlike the Federal SDP, New York encourages providers to repay the amount owed as early as possible even when there is no agreement about the total amount of loss. The SDP states that any payment will be credited toward the final settlement amount. However, only upon completion of the investigation process will a full payment will be finalized.

Cooperation With OMIG

There is no question that the timing of the resolution and the extent of the benefits extended will depend on the state's perception of its ability to access information from the provider. In recent years, this has become a thorny area of law because of the potential for waiving privileged information. New York has addressed the issue head-on, and the SDP states that it does not intend to seek information that impinges on the attorney-client privilege or work product protections. Instead, OMIG commits to working cooperatively with provider's counsel to "explore ways to gain access to factual or non-protected information pertinent to the case." The practical implications of this policy will be fully tested. Government lawyers and the private bar have long disagreed over where those lines should be drawn. For instance, are attorney notes regarding facts learned during interviews with employees protected? A host of complex questions like this one will gauge the state's commitment to cooperative resolution of these issues.

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CONCLUSIONS

Deciding when, and to whom, to make a self-disclosure is one of the most difficult ethical and business decision a health care provider may face. And these decisions are further complicated by the boundaries of privileged information. Nonetheless, self-disclosure can be an important part of a working relationship with regulators. But it can also be an expensive and disruptive undertaking. New York's new SDP is an important development in health care practice. Before deciding whether to self-disclose, providers should consult an attorney to (1) discuss whether or not a self-disclosure is warranted, (2) discuss to whom self-disclosure should be made, (3) conduct or advise about the provider's internal investigation, and (4) review a provider's existing compliance program for efficacy.

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