



Paul *Hastings*

The Ins and Outs of
Self-Disclosure

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Agenda

- ☐ Compliance Programs.
- ☐ The Law: Healthcare Fraud.
- ☐ Why Self-Disclose?
- ☐ Internal Investigations and Audits.
- ☐ Self-Disclose to Whom?
- ☐ How to Self-Disclose.
- ☐ The Risks and Benefits of Self-Disclosure.
- ☐ How to Minimize the Risks.

Compliance Programs

Compliance Programs

- ☐ To be considered effective, a compliance program must identify overpayments and/or other violations.
 - ☐ If not, the OIG will question whether it is an effective compliance program.
- ☐ However, the DOJ has stated that, “the commission of...crimes in the face of a compliance program may suggest that the corporate management is not adequately enforcing its program.”

“The Thompson Memo,” (Jan. 20, 2003)

Model Program for Individual and Small Group Physician Practices (October 5, 2000)

- ☐ Seven basic components of a compliance program
 - ☐ Conduct of periodic audits.
 - ☐ Establish written standards and procedures.
 - ☐ Designate a compliance officer.
 - ☐ Conduct training and education re: standards and procedures.
 - ☐ Respond to detected violations through investigation and disclosure to Governmental agencies.
 - ☐ Develop open lines of communication regarding compliance activities.
 - ☐ Enforce disciplinary standards through well-publicized guidelines.

Compliance Programs (*cont.*)

- ☐ “The extent of implementation will depend on the size and resources of the practice.”
- ☐ Specific Risk Areas as Identified by the OIG.
 - ☐ Coding and billing.
 - ☐ Reasonable and necessary services.
 - ☐ Documentation.
 - ☐ Improper inducements, kickbacks and self-referrals.
 - ☐ Retention of records.

Is the Compliance Program a “Paper Program.” The Thompson Memo (2003)

- ☐ Larry D. Thompson, Deputy Attorney General
- ☐ In answering these questions, the prosecutor should consider:
 - ☐ The comprehensiveness of the program;
 - ☐ The extent and pervasiveness of the criminal conduct;
 - ☐ The number and level of the corporate employees involved;
 - ☐ The seriousness, duration and frequency of the misconduct;
 - ☐ Remedial actions taken by the corporation

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Protections Against Healthcare Fraud

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- ☰ HIPAA—Healthcare Fraud.
- ☰ Civil False Claims Act.
- ☰ Program Fraud Civil Remedies Act of 1986.
- ☰ Mail Fraud.

Why Self-Disclose?

Why Self-Disclose? Legal Requirements

- ☰ Failure to Disclose under SSA Criminal and Civil Provisions.
 - ☰ Felony up to five years' imprisonment and/or fine of up to \$25,000.
- ☰ HIPAA
 - ☰ Health care fraud; theft or conversion in connection with health care; false statements relating to health care matters; obstruction of criminal investigations of health care offenses and laundering of monetary instruments related to a federal health care offense.

Why Self-Disclose? The Civil False Claims Act

☰ Civil False Claims Act

- ☰ Each false claim subjects the defendant to a civil penalty between \$5,000 and \$10,000.
- ☰ Government is entitled to recover 3x the amount of the actual damages the government sustains as a result of the false claim.
- ☰ If you self-disclose, recovery may be limited to 2x the actual damages

Why Self-Disclose? Potential *Qui Tam* Liability

- ☰ *"qui tam pro domino rege quam pro sic ipso in hoc parte sequitur"* meaning "who as well for the king as for himself sues in this matter."
- ☰ Civil False Claims Act allows individuals to file a lawsuit in the name of the U.S. Government charging fraud.
- ☰ Significant financial benefits for the Qui Tam Relator: 15% to 30% of judgment.

Why Self-Disclose? Potential *Qui Tam* Liability (*cont.*)

☰ [OIG Hotline: 1-800-HHS-TIPS](tel:1800HHS-TIPS)

☰ www.quitam.com

☰ www.quitamonline.com

☰ www.blowthewhistle.com

☰ www.whistlelaw.com

☰ www.whistleblowerlegal.com

Why Self-Disclose? Potential *Qui Tam* Liability (*cont.*)

- ☐ Public disclosure cuts off the rights of the relator.
- ☐ What constitutes public disclosure is an open issue.
 - ☐ “Disclosure of information to a competent public official about an alleged false claim against the government” constitutes a “public disclosure” within the meaning of the False Claims Act.
 - ☐ Notification to the Medicare carrier may not be deemed a public disclosure.

Why Self-Disclose? Federal Sentencing Guidelines

- ☐ Under the Guidelines, a corporation that has adopted “an effective program to prevent and detect violations of the law” is entitled to a reduction in a sentence that might be imposed.
- ☐ Benefit is lost “if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate government authorities.”

Why Self-Disclose? Federal Prosecution of Corporations and the Thompson Memo

- ☐ Guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation with a business crime.
- ☐ “In determining whether to charge a corporation, that corporation’s timely and voluntary **disclosure** of wrongdoing and its willingness to **cooperate** with the government’s investigation may be relevant factors.”
- ☐ “A corporation’s offer of cooperation does not automatically entitle it to immunity from prosecution.”
- ☐ Does cooperation require a waiver of all privileges?

Internal Investigation

When is an Internal Investigation Warranted?

- ☐ What is the nature of the allegation?
- ☐ Does the allegation involve a high risk area?
- ☐ Has the issue been previously investigated through some other person, department of the organization including outside counsel and consultants?
- ☐ Is the allegation or information credible?
- ☐ Does the organization have the budget and resources to conduct the investigation?
- ☐ Is the organization under a corporate integrity agreement?

When Should the Organization Use External Resources?

- ☐ Cases which are highly technical and specialized consulting knowledge and legal expertise is needed that goes beyond in-house capabilities or comfort zone.
- ☐ Conflict of interest involving the compliance officer or the person who would normally handle the investigation.
- ☐ When independence of an investigation may come into question if handled internally.
- ☐ External counsel can more effectively establish and maintain attorney-client privilege and maintain work product protection for outside consultant work.

How to Protect Investigation from Subsequent Disclosure

- ☐ Make sure an attorney—and no one else in the organization—engages experts and consultants.
- ☐ Ensure that counsel direct the investigation and the investigative team's task in writing.
- ☐ Use internal delegations of authority to cover work of internal personnel done at the request of counsel.
- ☐ Control the flow of information and documents so that an inadvertent disclosure to a third party is not made.
- ☐ Stamp documents: Privileged and Confidential: Attorney-Client Privilege

Document the Facts of your Initial Steps in the Investigation

- ☐ Create a response team to quickly evaluate deficiencies
- ☐ Thoroughly and promptly investigate all matters.
- ☐ Develop corrective action plans
- ☐ Conduct periodic review of problem areas.
- ☐ Promptly report and repay overpayments.
- ☐ Disclose the matter if it result in a probable violation of the law.

Document Results of Internal Investigation

- ☰ A description of how the problem was identified.
- ☰ A description of the organization's investigative efforts and resources used in investigating of the problem.
- ☰ A chronology of the investigative process (including the identification of interviewees and relevant interview summaries, a description of documents, records and files and locations searched in the process, and relevant audit summaries.

Conduct an Investigation Knowing Disclosure May be Appropriate

- ☰ In the Thompson Memo, one of the factors in reaching a decision as to the proper treatment of a corporate target is the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its officers and employees, including, if necessary, the waiver of the attorney-client privilege



Disclosure to whom? How to disclose?

Disclose To Whom?

- ☰ The Medicare Carrier.
- ☰ The OIG.
- ☰ The Department of Justice.

How to Disclose: Notification to Medicare Carrier

- ☐ Disclosure to the Carrier: The Letter
 - ☐ How much is the overpayment?
 - ☐ How was it calculated?
 - ☐ What gave rise to the overpayment?
 - ☐ What disciplinary action was taken?
 - ☐ How will you prevent the overpayment from happening again?
- ☐ Do you make repayment with the notification?
 - ☐ Pros and Cons.

How to Disclose: The OIG's Voluntary Self-Disclosure Protocol

- ☐ The OIG requires that the organization engage in specific investigatory steps to ensure that the disclosure is specific and made in good faith.
- ☐ Must be in writing.
- ☐ Must disclose if there is an ongoing federal or state investigation.
- ☐ Provide the departments and names of individuals involved in wrongdoing and what their roles were.

Voluntary Self-Disclosure Protocol (*cont.*)

- ☐ The disclosure should describe the potential causes relating to the wrongdoing and identify those officers, employees or agents who knew of the wrongdoing or should have known.
- ☐ Must provide a detailed chronology of the steps taken during the internal investigation to identify the wrongdoing, including identifying names of all persons interviewed, with a summary of the interview and a description of all documents reviewed.

Voluntary Self-Disclosure Protocol (*cont.*)

- ☰ Disclosure under the Protocol does not protect an organization from criminal liability or civil action under the False Claims Act.
- ☰ Disclosure may only be a mitigating factor in the OIG's recommendation to other prosecuting agencies such as DOJ.

How to Disclose: The Department of Justice

- ☐ Can notify local Assistant U.S. Attorneys General or notify central office in D.C.
 - ☐ Depends on the number of locations the problem occurred, your organization's relationship with the AUSA, and your organization's relationship with DOJ.
- ☐ AUSA can only provide protection or immunity from prosecution for offenses in their own jurisdictions.
- ☐ Stops the clock on disclosure deadline in the False Claims Act.



Benefits and Risks

Benefits and Risks

- ☐ Benefit: Limit liability under FCA and Federal Sentencing Guidelines.
- ☐ Risk: May result in outside investigation by Carrier, OIG or DOJ.
 - ☐ Who knows what they will find.
- ☐ Benefit: Cooperation with the OIG, DOJ or Carrier may result in favorable treatment
- ☐ Risk: Unnecessary disclosure.

How to Minimize Risks

- ☐ A thorough investigation before disclosure.
 - ☐ Nothing worse than an unnecessary disclosure.
- ☐ Make complete disclosure which clearly outlines the scope and course of the investigation.
 - ☐ May limit likelihood of outside investigation and the possibility that other compliance issues may be discovered.
- ☐ Be cooperative.



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