

# MEDICARE COMPLIANCE

## Prosecutor: Modest Self-Disclosures Are A Bad Sign for Compliance Programs

If compliance programs exist to identify and return overpayments, they aren't living up to their potential, Robert Trusiak, outgoing federal prosecutor and head of the national kyphoplasty enforcement initiative, tells RMC.

The fact that providers returned only \$15.4 million through the HHS Office of Inspector General's self-disclosure protocol from October 2011 through March 2012 is a bad sign given the half a trillion dollars Medicare spent last year, Trusiak says. "If compliance is defined as the identification and quantification of overpayments and remittance of overpayments to the U.S. taxpayer, then notwithstanding the compliance structures in place, it still has a long way to go," he says.

The \$15.4 million, cited in OIG's semi-annual report, "is a trifling amount of money" considering all the compliance architecture and CMS, OIG and Department of Justice audits, education and enforcement. The health reform law and the forthcoming revisions to the self-disclosure protocol "provide a real opportunity for institutional providers to reassess and recommit themselves to compliance, to partner with the federal government and to fulfill the true meaning of compliance," says Trusiak, who until July 30 was chief of the affirmative civil enforcement unit at the U.S. Attorney's Office for the Western District of New York.

There are a number of reasons that may explain the lack of self-disclosures, Trusiak says. One is the "disconnect" between compliance officers, who are often hard working and well-intentioned, and "the financial components of hospitals," which are focused on making money. "Some hospitals make a calculated decision that they can pay later if anyone ever comes knocking," he says. Another reason is limited resources; "hospitals are being pulled in a lot of different directions by different audit agencies" — including CMS, RACs and OIG — "and there are only so many resources to go around." The third reason is that hospitals often fix errors going forward but "don't address historical noncompliance," which means paying back reimbursement already collected because of the errors.

There is also the persistence of a misconception about the reach of the False Claims Act. As long as an overpayment is not the result of intentional bad acts, some hospital officials think it's just an error and the hospital doesn't have much to worry about. But Trusiak says that's not the case. "It's important for providers to recognize it's not binary" — either fraud or a mistake, he says. In reality, an overpayment may stem from reckless disregard or deliberate ignorance and could be actionable under the False Claims Act, says Trusiak, who has accepted a job as chief compliance officer and senior associate general counselor for Kaleida Health, the largest provider in western New York state.

Compliance officers interviewed had varying responses to Trusiak's comments. One compliance officer, who preferred not to be identified, agrees that the self-disclosure amount reflects poorly on compliance programs, and she knows of other compliance officers who feel the same way. There is resistance to self-disclosures at some hospitals because their executives worry about the repercussions. "The first fear is the immediate [financial] hit of the self-disclosure. The second fear is putting us on the government's radar," the compliance officer said. "I understand why management has that fear. No good deed goes unpunished."

### Compliance Officer Describes Clash

That was the mindset she faced when it was time for her hospital to look at possible problems with kyphoplasty billing. The compliance officer asked physicians who performed the spine procedure to review their cases and determine if the inpatient site of service was medically necessary. Ultimately, the physicians admitted that many of their cases could have been performed on an outpatient basis. When kyphoplasty was new, the physicians felt it was prudent to admit patients because a conservative course was justified. But as they told the compliance officer, "after I accumulated my own evidence-based information, I should have changed the way I managed those patients, and I didn't," she recalls. "We had doctors telling us to rebill those patients."

The board was notified of the problem and agreed with the plan to repay Medicare for the inpatient kyphoplasties. But then the finance department, concerned about the loss of reimbursement, objected and hired outside counsel. Fortunately, the compliance officer says, outside counsel advised the hospital to pay back the money, which it did, with a check to the Medicare contractor. "Finance grudgingly admitted it had to pay it back so it was repaid," she says. "My organization did the right thing." The fact she was met with "tons of resistance" from finance is not a surprise. "They live in fear" — of the immediate impact on cash flow and of drawing attention to similar problems. Regulators could theorize that a hospital that self-disclosed a site-of-service error for kyphoplasty might have one for pacemakers as well, for example. "Compliance officers have to swallow hard, fixing problems and moving forward knowing in their heart of hearts that regulators may say, 'you fixed this in 2011 but you knew it was probably going on in 2009 and 2010. Why didn't you go back?' And most compliance officers would probably say, 'that's the best deal I could work with management.'"

To alleviate fears of self-disclosures and therefore market the benefits of compliance, the compliance officer suggests establishing a track record with your Medicare administrative contractor. When you have to repay money, write a letter explaining it, put it in the context of your other voluntary repayments and personally deliver it. "Creating a positive impression about your organization and developing a reputation for actively helping and fixing problems and being totally transparent helps create immunity," she says. But whether this is a realistic plan depends on the tone at the top.

With a supportive environment at the top, self-disclosures could be "a slam dunk because we share the same philosophy," the compliance officer says. "Or you could tear your fingernails out because they make it so difficult."

Other compliance experts question Trusiak's assertions. There are different ways to help make Medicare whole besides OIG's self-disclosure protocol, says a compliance officer who did not want to be identified. Refunds occur through the refiling or withdrawal of claims — "it's continuous quality improvement, not just quality controls where you fix problems at the end of the line," he says. Anyway, "what good has the self-disclosure protocol done for anyone?" Even with a strong compliance program and an ethical organization, it will still get slammed with fines and penalties and be "excoriated" by the government. "We don't want one dime we aren't entitled to," he says, and his health care system will return money "early and often" when there are "mistakes and lapses." But it's frustrating to be penalized when Medicare rules are so confusing and hospitals are subject to constant changes from local coverage determinations, transmittals, the Office for Civil Rights and new initiatives, such as value-based purchasing and ICD-10, the compliance officer says. "I dare all these guys to come down and do it on a daily basis."

### **Self-Disclosures Aren't 'Lottery Jackpots'**

San Francisco attorney Judy Waltz agrees that self-disclosures may not be like lottery jackpots because "hospitals are now getting their claims right the first time." Or the abundance of external audits could be preoccupying hospitals to the extent they are not performing as many additional internal audits and their self-disclosures take a back seat. Anyway, Waltz notes that the self-disclosure protocol is self-limiting so the collection amount is only part of the compliance picture. OIG says it's designed to resolve violations of criminal, civil or administrative laws, and that regular overpayments should be returned to Medicare contractors. The fact is, providers and suppliers are making refunds, but more frequently to Medicare contractors rather than the OIG self-disclosure protocol.

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