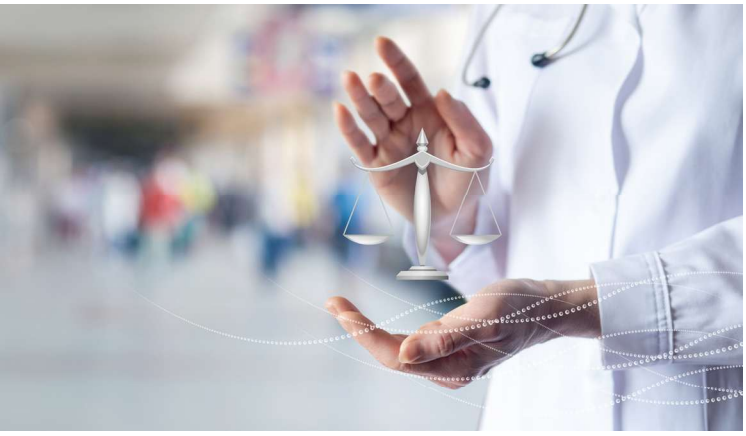
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Compliance

Amid DOJ and OIG retool, new self-disclosure rules broaden options

Your fraud self-disclosure options have expanded under new cooperative arrangements between HHS and the U.S. Department of Justice (DOJ), including a pilot program under which your False Claims Act (FCA) disclosure could not only lead to reduced penalties but also let you skirt corporate integrity agreements. Make sure you know which arrangement best suits your case.

Health care providers who found evidence of fraud within their own organizations have since 1998 had the option to self-disclose under the OIG's Health Care Fraud Self-Disclosure Protocol (SDP). While this self-disclosure brings no automatic benefits, OIG offers self-disclosers who meet certain standards potential breaks in terms of discretionary fines and penalties.

The SDP is open to both suspected civil non-compliance disclosures such as FCA violations and criminal ones, though providers have often been advised to report anything that might lead to criminal charges to DOJ as well.

But this division of labor between OIG and DOJ recently changed. In March, DOJ created a new Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP), billed as "the first-ever Department-wide corporate enforcement policy for criminal matters," offering "concrete benefits to incentivize companies to voluntarily disclose discovered misconduct, cooperate with our investigations, and timely and appropriately remediate the wrongdoing."

DOJ didn't mention health care specifically at the time, but on Oct. 15 announced it had collaborated with OIG on a new self-disclosure protocol for health care entities, which would report via the Health Care Fraud Section of its National

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Fraud Enforcement Division (NFED). Through NFED, health care entities would "receive the benefits of HHS-OIG's SDP automatically, with no additional direct submission necessary through the HHS-OIG portal."

In the announcement DOJ also clarified the criminal fraud question: "criminal health care matters should be disclosed to the Department of Justice," the agency said, and "a company that discloses only to HHS-OIG generally will not have made a voluntary self-disclosure to the Department and generally will not qualify for a declination on that basis."

A generous pilot

"Declination" is a process by which DOJ can decline to prosecute or pursue legal remedies within their discretion — an added self-disclosure incentive made especially vivid in a new six-month Healthcare False Claims Act Self-Disclosure Pilot Program (FCA SDPP) on which DOJ and OIG also collaborated.

The SDPP, which runs until April 22, 2027, offers health care entities who take part and report compliantly "favorable treatment from DOJ Civil Division and HHS in a coordinated civil release, with no factual admissions," and a number of other specific perks, including:

- Repayments calculated "with a 1.25—1.6 multiplier" as opposed to, for example, the treble damages (i.e., three-times multiplier) mandated by FCA;
- Exemption from Corporate Integrity Agreement;
- Exemption from Civil Monetary Penalties;
- Exemption from revocation of Medicare enrollment.

Khaled J. Klele, a partner with the McCarter & English law firm in Newark, N.J., notes that the revocation piece is significant because HHS recently gave DOJ revocation authority previously reserved for OIG (*PBN 9/21/26*); now DOJ says that "CMS shall not impose civil monetary penalties or seek revocation as part of any resolution under this pilot program."

Susan Carney Lynch, partner with the BCLP law firm in Washington, D.C., observes that some of the categories of information required by the new disclosure program are not really new. You'll find familiar prompts, such as "describe all relevant details," "append as exhibits all [relevant] documents," and certification and point of contact requirements.

However, the "remedial measures or other corrective action" requirement is slightly different. "In the past, entities would say, 'we found the problem and we plan to take these measures,'" Lynch says, "but here they're looking for measures *taken*." And with the customarily required "financial information sufficient to facilitate [repayment calculations]," she says, "it appears the government is looking for a *lot* of financial information upfront, more than typical."

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Why now?

Experts agree that DOJ and OIG are at least trying to reduce confusion over self-disclosure for health care entities. "The optimist in me says that the government is legitimately trying to streamline the reporting process in an effort to make the self-disclosure protocols less cumbersome," says Paul D. Werner of the Buttaci, Leardi & Werner firm in Princeton, N.J. But the pessimist in him "says this is just a big shiny tool being used to lure people into over-reporting."

Thomas H. Barnard, a former DOJ attorney and current shareholder with the Baker Donelson firm in Baltimore, thinks the feds are responding to "feedback from the defense bar that the uncertainty surrounding voluntary disclosure to only one entity, not knowing if the other entity would act, may complicate a decision to do a voluntary disclosure under certain circumstances."

What to watch for

Don't file everything with DOJ. Experts also agree that DOJ is now the place to go when you're sure you have criminal fraud going on. But the less clear you are about criminality, the less clear it is that DOJ is the right point of entry.

"Providers shouldn't treat every overpayment as a DOJ matter," cautions Michael Granston, partner with Covington & Burling LLP in Washington, D.C., and chair of its False Claims Act Investigations and Litigation practice. "Because every self-disclosure carries a degree of uncertainty and presents potential legal, financial and reputational risks, entities should only consider participating in the DOJ NFED disclosure program if their conduct meets the threshold of potentially criminal conduct."

"OIG's protocol remains the path for conduct that carries civil monetary penalties, such as false billing and kickback issues without criminal exposure," says George Breen of the Epstein Becker Green firm in Washington, D.C. "It generally requires at least 1.5 times single damages. Simple overpayments and errors go to CMS, as do Stark-only issues."

On the other hand, know what you lose if you don't go with DOJ. "A disclosure to OIG alone generally will not count as a voluntary self-disclosure to DOJ, which could cost a company a declination," Breen says.

Granston also notes that while the NFED disclosure program doesn't address civil liabilities, the pilot program does, so if an entity "desires a corresponding resolution of any civil False Claims Act liability, then the entity should consider making a separate submission" under that pilot.

The low multiplier doesn't always mean a small penalty. The 1.25-1.6 times multiplier in the pilot is "fairly low," Lynch says, but "it isn't clear yet what the damages methodology is going to look like. In an AKS [anti-kickback statute] violation, for example, the government has very broad discretion in terms of how they're going to sample and what they're going to do to arrive at a damages number. 1.6x might sound attractive in the abstract for an FCA matter, but if you have a sampling methodology that yields a gazillion-dollar recovery, it's still a lot of money."

If they know, no go. Also note that "this is about disclosure of something the government *does not already know*," Lynch says. "The risk that a company takes is, they won't know when they self-disclose whether there's a complaint under seal or something of that nature that might make them ineligible for this initiative — which is something to think about when you're disclosing."

Watch the whistleblower perk

DOJ's NFED also came out on Oct. 20 with a related "Fraud Whistleblower Incentive Program (WHIP)." This program, unlike the *qui tam* whistleblower protocol familiar from the False Claims Act, does not pay a percentage of a judgment awarded as a result of prosecutions they have initiated and that the government has joined, but instead offers fees of between $10,000 to $30,000 for "actionable tips" that lead to, and are paid at the time of, criminal charges.

It seems like small potatoes compared to the millions that can be had by *qui tam* relators — though, some experts point out, such judgments are not a sure thing, require heavy involvement from the relators, and may never lead to a positive result, whereas these awards merely require "actionable" information.

"Sometimes tips that may not be enough to make a whole FCA case may still be enough to aid an investigation," Barnard says. "Further, this [program] seems to contemplate use in criminal cases — and there is not

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always an automatic path for recovery for relators when a parallel criminal investigation results in charges."

"That may draw out people who wouldn't risk their careers on a distant, uncertain recovery," Breen says. "This is a tool to assist criminal enforcement, and the initial health care priorities are hospice, home health, day care, and 'special services' fraud." What is "special services" fraud? DOJ identifies it as "schemes such as falsely diagnosing patients with conditions like autism, paying kickbacks to parents to enroll children in special needs programs, or misusing people's identifying information."

"The concern for practices is that an employee may approach DOJ before management learns of the issue or finishes investigating," says Alexis D. Gregorian, a partner in the Bradley Arant Boult Cummings Government Enforcement & Investigations Practice Group in Atlanta. "Providers should not assume whistleblowers will report internally first — they now have greater incentive to bypass that step and go straight to DOJ."

Gregorian also reminds you that in order to take advantage of any of these self-disclosure programs, the conduct must be previously unknown to DOJ — something the new tipster program might make harder to achieve.

Emmet P. Ong, partner with BCLP in San Francisco, sees some concern with "whistleblowers jumping the gun" in the new category, "A well-developed whistleblower program will encourage [employees and management] to work through those issues and remediate problems," Ong says. "Not everything is fraud — often these problems arise from reasonable disagreements about the application of, e.g., a billing protocol. You would hate to see a flood of false alarms that undermines what companies have already done in terms of setting up whistleblower programs at the behest of the government."

"The best investment an entity can make" in this regard, Gregorian says, "is in publicizing their internal reporting structure to employees." — *Roy Edroso* (*roy.edroso@decisionhealth.com*) ■

RESOURCES

- DOJ, "Department of Justice Releases First-Ever Corporate Enforcement Policy for All Criminal Cases," March 10, 2026: *www.justice.gov/opa/pr/department-justice-releases-first-ever-corporate-enforcement-policy-all-criminal-cases*
- DOJ, "National Fraud Enforcement Division and the Department of Health and Human Services Announce Self-Disclosure Protocol for Criminal Health Care Fraud," Oct. 15, 2026: *www.justice.gov/opa/pr/national-fraud-enforcement-division-and-department-health-and-human-services-announce-self*
- DOJ, "Justice Department's Civil Division and the Department of Health & Human Services Announce Anti-Fraud Healthcare Self-Disclosure Pilot Program," Oct. 22, 2026: *www.justice.gov/opa/pr/justice-departments-civil-division-and-department-health-human-services-announce-anti-fraud*
- Backgrounder, "Department of Justice and Department of Health and Human Services Healthcare Self-Disclosure Pilot Program": *www.justice.gov/opa/media/1467546/dl*
- DOJ, "Fraud Whistleblower Incentive Program (WHIP)," Oct. 20. 2026: *www.justice.gov/fraud/whistleblower*

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