Proposed Rule Increases Incentive for Medicare Fraud Whistleblowers

While the landscape of how healthcare fraud whistleblowers are perceived and rewarded is shifting, it is not a decision for to take lightly.

Incentivizing individuals to report illicit activity and regulatory violations in relation to HIPAA is not new.

In fact, "In the June 8, 1998 Federal Register (63 FR 31123), we [HHS] published a final rule with comment period titled, 'Medicare Program; Incentive Programs-Fraud and Abuse.' This final rule with comment period implemented section 203(b) of HIPAA by establishing a reward program to encourage individuals to report potential fraud and abuse to Medicare and by adding a new section, 42 CFR 420.405, to the regulations. Section 420.405(a) specifies a collection threshold of at least $100 (consistent with section 203(b) (2) of HIPAA)." Since that time, the Incentive Reward Program and certain provider enrollment provisions changed from "10 percent of the overpayments recovered in the case or $1,000, whichever is less, to 15 percent of the final amount collected applied to the first $66,000,000." This was released in the Federal Register on April 29, 2013.

A physician may be one of the individuals who alert the government and collect a reward. This is not an uncommon phenomenon when looking at the whistleblower suits that were brought by physicians under the False Claims Act. Therefore, physicians should be aware of the options available to them to report certain activities and know that they have played an active role in maintaining the integrity of the Medicare program.

Historically, being a whistleblower had a negative connotation and there was a fear of being ostracized by colleagues, as well as being unable to find a position in the future. Over the past few years, there has been a shift and the government acknowledged, "This success is also largely attributable to the brave individuals who initiate many of the investigations through whistleblower suits and to the Obama Administration’s efforts to coordinate enforcement efforts across government. While today we focus on federal recoveries, the cases successfully pursued by the civil division and the United States Attorneys throughout the country also returned billions of dollars to state Medicaid funds and homeowners threatened with foreclosure."

There are certain nuances of qui tam suits that everyone needs to be aware of.

• First, if there is a problem or issue that is identified, bring it to the attention of the appropriate person within the entity. This gives them a chance to cure. Often times, whistleblowers report the problems multiple times.
• Second, filing a qui tam suit is nothing to be taken lightly. It is imperative to find an attorney with experience in this area because of different procedures associated with filing a qui tam suit.
• Third, there may be additional considerations, such as the individual’s position within the organization. Executives and board directors have different duties, and while filing this type of suit is not impermissible, there are additional steps that must be taken and shown before this level of fiduciary can file such a claim.

In sum, while the landscape is shifting in terms of whistleblower perspective, it is not a decision to be taken lightly.