

CMS Continues Self-Referral Disclosure Protocol (SRDP) Settlements

In January of 2012, the Centers for Medicare and Medicaid (CMS) announced that two additional providers had agreed to voluntary settlements of Stark Law violations under the Self-Referral Disclosure Protocol (SRDP), bringing the total number of settlements published since the Protocol's inception in 2010 to four¹ despite over 100 submissions as of September 2011.² In the most recent settlements, a Georgia hospital settled with CMS for \$4,500 after disclosure of a Stark violation which resulted from funds paid to two physicians in excess of the annual non-monetary compensation limit.³ The other settlement involved a California hospital's disclosure of the same violation, and resulted in liability to CMS in the amount of \$6,700.⁴ In general, the Stark law prohibits physicians from referring Medicare and Medicaid patients for "designated health services" to entities with which they or their immediate family members have a financial relationship.⁵

As part of a greater effort to recoup Medicare funds, the Affordable Care Act (ACA) required CMS to create the SRDP, a program which incentivizes the self-disclosure of provider Stark Law violations by offering reduced financial liability should a provider suspect that it may have violated the Stark Law.⁶ The purpose of the Protocol is to facilitate the resolution of potential or actual Stark violations, and the ACA gives the Secretary of Health and Human Services (HHS) the authority to reduce provider penalties for those who incur liability through the self-disclosure process.⁷ Under the law, the Secretary may consider: (1) the nature and extent of the improper or illegal practice; (2) the timeliness in which the possible violator disclosed the occurrence; (3) the amount of cooperation in providing additional information related to the violation and disclosure; and, (4) other relevant factors.⁸

The SRDP, however, does not operate concurrently with other self-reporting tools, such as the Office of the Inspector General (OIG) Advisory Opinion process or the OIG Self-Disclosure Protocol. The ACA states the SRDP is distinct from the OIG Advisory Opinion process.⁹ In an Advisory Opinion, the OIG provides a requesting party with a legal opinion, offering guidance to ensure that an entity's policies are not in conflict with any Fraud and Abuse laws. As the SRDP and Advisory Opinion processes are separate, a provider of services or

supplies may not simultaneously disclose an actual or potential violation through both the SRDP and Advisory Opinion processes.¹⁰

In addition to the Advisory Opinion process, the OIG maintains its own Self-Disclosure Protocol, which is available for entities to disclose conduct that raises potential liability under federal criminal, civil, or administrative laws.¹¹ As with the Advisory Opinion process, suppliers and providers cannot disclose the same conduct under both the SRDP and OIG's Self-Disclosure Protocol.¹² Providers who are unsure if their conduct constitutes a Stark violation should seek an Advisory Opinion rather than initiating the self-disclosure process, as the latter will almost certainly result in a demand for repayment.¹³ It should be noted that disclosure through the SRDP must relate to Stark issues only,¹⁴ otherwise, alternative methods of self-disclosure should be considered.

The first SRDP provider settlement occurred in February, 2011.¹⁵ Although details of the settlements are not released to the public through CMS, the entities involved may voluntarily release the information. Settlements in which details are disclosed to the public show the drastic difference between settlement payment amounts and total potential liability. For example, Saints Medical Center in Lowell, Massachusetts had approximately \$14 million in Stark violation liability, however, the organization was able to settle with CMS for a one-time payment of \$579,000.¹⁶ As of September 2011, CMS had received 109 SRDP submissions,¹⁷ which may indicate more providers are eager to resolve violations given the reduced financial liability associated with participation in the SRDP. In addition to lowering the payment amount for violations, CMS officials are hopeful the SRDP will speed up the resolution process for violations.¹⁸ Providers who disclose to the SRDP will have the usual 60-day deadline for returning overpayments suspended while the submission is under review.¹⁹

The SRDP's documentation requirements may pose a significant burden on providers' time and finances, as the Protocol requires submission of a complete financial analysis identifying any funds which might be owed as a result of a potential Stark violation.²⁰ However, in contrast to the harsher monetary penalties imposed by

disclosure through alternative self-disclosure processes, such as through Medicare Administrative Contractors (MACs), the OIG, or the U.S. attorney's office,²¹ many providers may decide the benefit of reduced liability available through the SRDP far outweighs the administrative and financial burdens posed by its disclosure requirements. Providers should be mindful, however, that submissions through the SRDP will not necessarily be accepted by CMS,²² and should be prepared to use an alternative method of self-disclosure.

In order for Congress to assess the SRDP's effectiveness to date, CMS must submit a detailed report on the SRDP no later than March 2012. The report must include information on the number of health care providers and suppliers who have made disclosures under the SRDP; the amounts collected; and, the types of violations reported.²³ Depending on Congress's findings with respect to the SRDP's impact, the program could be terminated. Accordingly, providers considering voluntary disclosure of a potential Stark violation through the SRDP may wish to submit their SRDP disclosures in the immediate future.

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