



Self-Reporting Of Violations Has Benefits, Drawbacks

PROTOCOL HELPS PROVIDERS COMPLY WITH LAW REGARDING IMPROPER REFERRALS

By **REBECCA A. MATTHEWS**
and **JODY ERFARB**

On April 7, 2011, the Centers for Medicare and Medicaid Services (CMS) announced that it was processing 60 disclosures pursuant to the Self-Referral Disclosure Protocol (SRDP) introduced last fall. Under the SRDP, providers may voluntarily disclose violations of the Physician Self-Referral Law, more commonly known as Stark.

Stark prohibits a physician from making referrals for certain designated health services payable by Medicare or Medicaid to an entity with which he or she has a financial relationship, unless an exception applies. Because Stark is a strict liability law, its severe penalties may be imposed even for technical violations, including common mistakes such as failure to renew an expired contract. Many providers, therefore, face Stark compliance problems and, because the SRDP is voluntary may struggle with deciding whether or not to disclose under the new protocol.

To date, there has been only one publicized SRDP settlement: on Feb. 20, 2011, Saints Medical Center in Lowell, Mass., announced that it agreed to pay \$579,000 to resolve its Stark liability. Because Saints Medical Centers' potential liability was alleged to be \$14 million, it appears that the Centers for Medicare and Medicaid Services is looking to resolve acknowledged Stark liabilities in a flexible, collaborative manner through use of the self-referral protocol.

Until more of these cases are resolved

and additional information on the centers' review of disclosures is known, providers who are considering disclosure should carefully evaluate the potential benefits and dangers.

Eligibility

Participation in the self-referral protocol is limited to actual Stark violations. If the disclosure includes violations of other laws, such as the Anti-Kickback Statute, which is enforced by the Office of the Inspector General, the protocol cannot be used. The inspector general's Self-Disclosure Protocol, which has been in place since 1999, should be considered in such instances.

According to the Self-Referral Disclosure Protocol, if a disclosing party argues that the circumstances do not violate Stark, the disclosure will not be accepted. Therefore, providers are well-advised to ensure that a true Stark violation occurred and should be prepared to enter a corresponding monetary settlement before disclosing pursuant to the SRDP.

Benefits

An immediate benefit to disclosing pursuant to the Self-Referral Disclosure Protocol is that the submission of a disclosure suspends the obligation to return overpayments within 60 days of identification. This suspension lasts until a settlement agreement is entered or the disclosing party

withdraws or is removed from the SRDP.

In theory, the greatest benefits of self disclosure pursuant to the SRDP are that the provider can resolve the violation, potentially pay reduced monetary amounts, and avoid a costly government investigation. The Centers for Medicare and Medicaid Services is not, however, obligated to reduce any overpayment amounts identified.

In March 2012, CMS must submit a report to Congress on the SRDP detailing the number of settled self disclosures, the



Rebecca A. Matthews



Jody Erfarb

Rebecca A. Matthews is a partner and Jody Erdfarb is an associate in Wiggin and Dana's Health Care Department.

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amounts collected, and other data. Until then, other than anecdotal settlements that may become public, providers have little precedent or other guidance to predict how their cases may be resolved, causing the greatest potential benefit of the SRDP to also be one of its greatest potential dangers.

Dangers

Further Investigation: The Centers for Medicare and Medicaid Services makes it clear that not only may it refer a disclosure to the Office of the Inspector General and the Department of Justice for investigation, but also, that if it uncovers matters during its verification process that are outside the scope of the matter disclosed, CMS may treat them as new matters outside the SRDP, subject to separate investigation by the appropriate authorities.

Period of Disallowance: Self-Referral Disclosure Protocol submissions must include the disclosing party's financial analysis of its Stark liabilities, which sets forth the total amount, itemized by year, that is actually or potentially "due or owing." Generally, this calculation will include all Medicare payments for designated health services received by the dis-

closing party that were made as a result of referrals generated while the relationship was not Stark compliant. The calculation must cover the entire time period "during which the disclosing party may not have been in compliance with the physician self-referral law." When the disclosure involves longstanding arrangements, this period could cover many years and even go further back than the general four-year period in which CMS may re-open claims for good cause. Providing a financial analysis for that entire time period may prove challenging for some providers and may also make it difficult for providers to negotiate smaller settlements.

Forfeiture of Right to Appeal: As a condition of disclosing a matter pursuant to the SRDP, the disclosing party must agree that no appeal rights attach to claims relating to the conduct disclosed if resolved through a settlement agreement.

Cooperation: Providers must be extremely meticulous in ensuring that all submissions are 100 percent accurate and honest and must be prepared to cooperate fully with requests for additional information. A perceived lack of cooperation could result in CMS' removal of the

case from the SRDP and referral to other government authorities.

Conclusion

The considerations listed here are only a sampling of those that should be evaluated when making the complex decision of entering the Self-Referral Disclosure Protocol. In cases where a provider is aware of an overpayment due to Stark noncompliance and where no other laws are implicated, the SRDP may be an attractive option because it may result in reduction of the overpayment even while potentially exposing the provider to other liability.

Although proceeding with the Self-Referral Disclosure Protocol has inherent dangers, failing to disclose potential Stark liability may put a provider in significant jeopardy as well. As such, many providers facing the decision to disclose under the SRDP may feel stuck in a "damned if you do, damned if you don't" quagmire. As more information, particularly about specific SRDP settlements, is released, providers may feel more comfortable taking advantage of the SRDP's benefits. In the meantime, providers should carefully analyze the risks and benefits involved before proceeding. ■