

WHAT'S GOING ON WITH THE CMS SELF-REFERRAL DISCLOSURE PROTOCOL? - RECENT DEVELOPMENTS

This installment of Hall Render's Health Law Broadcast series on health care reform is designed to provide you with the insight, analysis and practical suggestions with respect to the various reform initiatives that will affect your organization.

The Centers for Medicare and Medicaid Services ("CMS") recently posted on its website two Self-Referral Disclosure Protocol ("SRDP") settlements. In addition to these two new settlements, CMS released its statutorily required "Report to the Congress: Implementation of the Medicare Self-Referral Disclosure Protocol" ("Report"). Combined, the settlements and Report offer additional, though limited, insight into the process for disclosing violations of the federal Stark Law to CMS.

On March 29, CMS reported that it settled violations of the Stark Law disclosed by a physician group practice located in Iowa for \$74,000. The physician group disclosed under the SRDP that it violated the Stark Law because the compensation methodology for certain employed physicians did not satisfy the requirements of the Stark Law bona fide employment relationship exception. Hall Render represented the physician group in this self-disclosure.

The same day, CMS also reported that it had settled a Stark Law violation disclosed under the SRDP by an Arizona acute care hospital. The hospital disclosed a single arrangement with a physician for the provision of locum tenens hospitalist services that did not meet the requirements of the personal service arrangements exception. The violation was settled for \$22,000.

One day after announcing the settlements, CMS also posted on its website the statutorily required Report to Congress describing the implementation of the SRDP and the status of the disclosures under the SRDP to date. As required by Section 6409 of the Patient Protection and Affordable Care Act (the "Act"), the SRDP was developed by CMS to allow health care providers to disclose violations of the federal Stark Law. According to the Report, CMS has received 150 disclosures from 148 providers, including 125 hospitals, since the SRDP was first published over 18 months ago. Seven of the disclosures have been resolved through settlement, 50 are still currently under CMS review, 61 require additional information from the disclosing party, 9 disclosures have been withdrawn by the disclosing party, 3 have been referred to law enforcement for resolution and 20 are in "administrative hold." The Report provides little additional information about the nature of the disclosed arrangements, other than to note that the most common violations involve a failure to comply with the Stark Law personal services exception, nonmonetary compensation exception, rental of office space exception and physician recruitment arrangement exception.

The Report reiterates that CMS has the authority to "reduce disclosed overpayments in a manner that is proportional to the nature of the disclosed violations." Prior to the enactment of the Act, CMS had limited authority to compromise overpayments associated with violations of the Stark Law, and alternative avenues to disclose violations were not appropriate in all circumstances or were foreclosed due to the nature of the violation. As discussed in the Report, CMS will review the facts and circumstances surrounding each disclosed matter to determine an appropriate resolution consistent with the criteria set forth in the SRDP.

Because CMS has released little information about the 150 disclosed arrangements and 7 settlements, it remains difficult for disclosing parties to predict how CMS might settle other SRDP cases. The settlement amounts do seem to provide some preliminary indications that CMS is using its authority under the Act to reduce the penalties for providers that voluntarily come forward and disclose Stark Law violations under the SRDP. In addition, the Report and other communications and education from CMS related to the SRDP do reveal some best practices when disclosing under the SRDP. For instance, providers should make sure their disclosures are structured in conformance with the SRDP, include an element-by-element legal analysis of each applicable exception under the Stark Law and describe in detail both its ongoing corporate responsibility activities and how each disclosed arrangement was terminated or rectified.

The SRDP can be an effective remedy for a provider to resolve any potential liabilities related to a violation of the Stark Law. In addition to CMS's authority to reduce the amount due and owing related to the violations, disclosing under the SRDP suspends the obligation to return identified overpayments within 60 days as required by Section 6402 of the Act. Providers should carefully analyze the facts and circumstances surrounding a potential Stark Law violation before determining the best course of action for resolving the matter.

If you have any questions regarding the SRDP, please contact:

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