

## ATLANTA HOSPITAL NEWS

### CMS ISSUES SELF-REFERRAL DISCLOSURE PROTOCOL

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As most healthcare providers and suppliers know, battling fraud is, and has been, at the forefront of health care reform. While many provisions aim to deter fraud through increased penalties and to ferret out fraud through increased investigations, the Centers for Medicare and Medicaid Services (“CMS”) has recently developed a self-referral disclosure protocol (“SRDP”) process through which providers and suppliers who discover self-referral violations can turn themselves in, and potentially face lesser damages. Pursuant to Section 6409 of the Patient Protection and Affordable Care Act signed into law on March 23, 2010, CMS finally secured the authority to address disclosures that, in the disclosing party’s reasonable assessment, are actual or potential violations of the physician self-referral law or “Stark law.”

Disclosures pursuant to the SRDP require submission of a significant amount of data, including information identifying the disclosing party and an organizational chart if the party is owned or controlled by a system or network. A disclosing party must also identify the parties, the time periods, and the types of financial relationships involved, and provide a statement regarding why the violation occurred (e.g., intentional conduct or lack of internal controls). The disclosing party must also submit a complete legal analysis showing which elements of an exception were met, and which elements were not. Furthermore, the disclosing party must provide information regarding current compliance programs and/or history of violations. The disclosing party will also be expected to conduct a financial analysis setting forth the total amount due and owing based on the applicable “look back” period. According to CMS, the “look back” period is the length of time of noncompliance.

CMS will verify all the information submitted. As part of the verification, CMS states that it “must have access to all financial statements, notes, disclosures, and other supporting documents without the assertion of privileges or limitations on the information produced.” CMS also states, however, that in the normal course, it will not seek written communications subject to the attorney-client privilege.

CMS will consider several factors in determining whether to reduce the amounts otherwise owed, including the following: (1) the nature and extent of the improper illegal practice; (2) the timeliness of the self-disclosure; (3) the cooperation in providing additional information related to the disclosure; (4) the litigation risk associated with the matter disclosed; and (5) the financial position of the disclosing party. Although CMS may consider these factors, CMS makes no guarantee that it will reduce the amount owed by the provider or supplier. In fact, CMS could conclude that the disclosed matter warrants a referral to other civil and/or criminal authorities.

Although the SRDP is limited to self-disclosures related to Stark law violations described in more detail below, the SRDP is open to all healthcare providers and suppliers, whether

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individuals or entities, and is not limited to any particular industry, medical specialty or type of service. A disclosing party will make its submission electronically, and receive an email response from CMS. In general, the deadline for reporting and returning overpayments is 60 days after the overpayment is identified or the date any corresponding cost report is due, if applicable. If a provider or supplier electronically submits a disclosure under the SRDP (and receives email confirmation from CMS), the obligation to return an overpayment will be suspended until a settlement is reached or either party withdraws from the SRDP.

Nevertheless, the SRDP process is only available for actual or potential Stark violations. Anti-Kickback Statute violations should be disclosed under the separate Self-Disclosure Protocol issued by the Office of the Inspector General (“OIG”) (See 63 Fed. Reg. 58300 (Oct. 30, 1998) and the OIG’s Open Letter to Health Care Providers (March 24, 2009)). Additionally, CMS admonishes that the SRDP is not a procedure to obtain advisory opinions.

The SRDP process is a rigorous process, which the provider or supplier should consider thoughtfully. Partaking in the SRDP process will require full cooperation, which could mean handing over otherwise privileged information to the federal government. Unlike previous attempts to develop self-disclosure programs such as Operation Restore Trust, a pilot project developed under the Clinton administration in 1995 that promised a reduction in mandatory damages from three times the amount due plus attorneys’ fees to twice the amount that had been incorrectly paid or other current disclosure programs such as the OIG disclosure program identified above and, of course, a provider’s regulatory right to submit corrected invoices, the SRDP may provide opportunities for providers to secure reduced payment obligations when errors are discovered and reported properly. Given the amount of disclosure and the waiver of other procedural rights and privileges that are cornerstones of the SRDP, providers would be wise to consider the SRDP carefully.