

PUBLICATION

Recent CMS Guidance Partially Lifts Veil on Stark Self-referral Disclosure Protocol [Ober|Kaler]

2013 Issue 3 - Focus on Fraud and Abuse

In 2012, the Centers for Medicare and Medicaid (CMS) issued much-anticipated guidance on the Self-Referral Disclosure Protocol (SRDP) through its publication of thirteen settlements and its statutorily-mandated “Report to Congress: Implementation of the Medicare Self-Referral Disclosure Protocol” (Report).

The SRDP, which was authorized by the Affordable Care Act (ACA) and released by CMS in September 2010, offers providers and suppliers the opportunity to disclose and resolve actual or potential violations of the Stark law. In administering the Protocol, CMS is authorized to reduce the amount owed to the government as a result of Stark Law violations. In addition, submitting parties are granted a suspension of the 60-day deadline for the reporting and return of overpayments. Due to these incentives, the provider community initially regarded the SRDP with optimism, given that providers may be held strictly liable under the Stark law for minor, unintentional, and technical violations. However, substantial uncertainty has remained with respect to the Protocol’s operation and to what extent CMS will exercise its discretion to compromise amounts owed for disclosed violations. The 2012 Report and the settlement announcements provide welcome — if modest — guidance for providers considering whether to utilize the SRDP to resolve potential Stark violations.

Published Settlements

Although it had received over 100 submissions as of September 2011, CMS announced only a few settlements during the SRDP’s inaugural year. In 2012, CMS accelerated the pace by publishing the following 13 settlements, bringing the total number of announcements to 16:

1. A California hospital settled two Stark law violations that exceeded the annual nonmonetary compensation limit for physicians for \$6,700. (Jan. 5, 2012)
2. A hospital in Georgia paid \$4,500 to settle violations involving two physicians and the annual nonmonetary compensation limit. (Jan. 5, 2012)
3. A physician group practice in Iowa settled Stark law violations for \$74,000 after disclosing that its compensation for certain employed physicians failed to satisfy the requirements of the bona fide employment relationship exception. (Mar. 9, 2012)
4. An Arizona acute care hospital settled a Stark law violation for \$22,000 after disclosing a single physician arrangement that did not meet the personal service arrangements exception. (Mar. 20, 2012)
5. A hospital located in North Carolina settled six Stark law violations for \$6,800 after disclosing that it exceeded the calendar year nonmonetary compensation limit for two physicians during three consecutive years. (Apr. 5, 2012)
6. An Alabama hospital paid \$42,000 to resolve a Stark violation involving a rental charge formula that did not satisfy the requirements of the rental of equipment exception. (June 13, 2012)

7. A hospital in Maine agreed to pay \$59,000 to settle potential Stark law violations relating to arrangements with a physician and physician group practice that failed to satisfy the requirements of the personal services exception. (June 28, 2012)
8. A Massachusetts hospital paid \$208,000 to settle violations concerning arrangements with two physician practices for call coverage that did not satisfy the personal service arrangements exceptions. (July 31, 2012)
9. A hospital located in Florida paid \$22,000 to resolve arrangements with three physicians that did not satisfy the personal service arrangements exception. (Aug. 15, 2012)
10. A Missouri hospital paid \$125,000 to settle Stark law violations involving two physicians for the provision of dental services that did not meet the requirements of the personal service exception. (Aug. 22, 2012)
11. A North Carolina-based general acute care hospital and its hospice agreed to pay \$584,700 to settle several Stark law violations involving arrangements and payments that failed to meet the physician recruitment, fair market value, and personal services arrangement exceptions. (Oct. 25, 2012)
12. A hospital in California settled a Stark law violation, which arose from its failure to meet the physician recruitment exception, for \$28,000. (Nov. 6, 2012)
13. An acute care hospital in California settled a violation of the Stark law for \$1,600 after disclosing that it failed to meet the personal service arrangements exception for an on-call arrangement with a physician. (Dec. 27, 2012)

These settlements suggest that the preponderance of matters resolved under the SRDP involve hospitals and non-egregious violations of the Stark law. Little commonality is found, however, in the size of the settlements, which vary dramatically—suggesting that settlement calculations are highly fact-dependent. Additionally, information disclosed to the public from other sources suggests that by reaching settlement under the SRDP, some providers are able to evade the imposition of substantially greater repayment sums. For example, in February 2011 the Saints Medical Center in Lowell, Massachusetts agreed to pay \$579,000 to settle alleged violations relating to issues with night coverage, medical directorships, and stipends. Subsequent media reports indicated that the underlying overpayment amounts spanned between \$785,000 and \$14.5 million.

Report to Congress

In March 2012, CMS released its Report to Congress describing the implementation of the SRDP. Covering the period dating back to the SRDP's establishment, the Report provides statistics on submitted provider disclosures, including the number and status of disclosures, the types of disclosing parties, and the number of resolutions. According to the Report, hospitals accounted for 125 of the total 150 disclosures submitted under the Protocol and the most commonly disclosed violations concerned the failure to comply with Stark law exceptions for personal service arrangements, rental of office space, non-monetary compensation, and physician recruitment arrangements. Three of the disclosures were referred to either the Office of Inspector General or the Department of Justice for law enforcement consideration.

At the time of the Report's issuance, CMS had reached settlement on only 6 of the 150 filed submissions. CMS indicated that this backlog was due in part to the complexity of many of the disclosures, which involve multiple parties and arrangements over the course of extended periods of time. To perform the necessary factual, legal, and financial analyses and to detail the relevant Stark law exception(s) and the amount of remuneration and tainted Medicare billings involved, disclosure submissions often total hundreds of pages in length. Of the 150 filed disclosures, 61 were placed on temporary hold due to the submitting party's need to forward additional information. CMS noted that as it continues to educate the provider community, the quality of the submissions has improved, suggesting that the overall resolution process may become more efficient with time.

Assessing CMS's Guidance

Although CMS's recent feedback is welcome, many in the provider community have found it wanting in several respects. As noted above, CMS has not disclosed the total potential overpayments in the settled cases, meaning that providers are unable to calculate an average discount that may be realized through disclosure. Moreover, besides noting the uniqueness of each disclosure, CMS has not shed additional light on the manner in which it evaluates the five core factors it considers in determining whether to reduce the amounts owed — namely, the nature of the violation, the disclosure's timeliness, the provider's cooperation, the matter's litigation risk, and the disclosing party's financial position.

Nevertheless, providers may receive some encouragement from the modest size of some of the settlements. This suggests that CMS is choosing to reduce penalties for some providers that voluntarily disclosed under the SRDP. In addition, certain practice pointers may be gleaned from a comprehensive appraisal of CMS's publications. For instance, parties seeking timely resolution should ensure that their submissions are thorough and supported by all relevant information and documentation. A submission should include detailed legal and factual analyses that break down each applicable Stark law exception and its constituent elements. In advocating for a reduction in the amount due and owing, disclosing parties should emphasize favorable facts weighing on the nature of the underlying activity, the timeliness of the disclosure, the level of cooperation with government authorities, and any ongoing corporate responsibility initiatives.

Although the total amount of available guidance on the SRDP remains sparse, with its release of 13 settlements and a Report in 2012, CMS has established a promising trend toward greater disclosure. Accordingly, providers should remain vigilant for the release of further guidance in 2013.