

Better to Ask for Forgiveness?

THE START SELF-REFERRAL PROTOCOL

Bruce A. Smith, Esq., Wood & Smith, P.C.

On September 23, 2010 CMS released the Voluntary Self-Referral Disclosure Protocol ("SRDP") to permit the settlement of actual or potential violations of the Stark law disclosed by a provider. Under the Affordable Care Act enacted in March, 2010, Congress directed the adoption of a self-referral protocol and granted CMS the authority to compromise or waive Stark sanctions, a power it had not previously had.

Generally, the Stark law prohibits an entity from billing Medicare or Medicaid for Designated Health Services that were referred to the entity by a physician who has a financial relationship with the entity unless an exception applies. The basic penalty for prohibited referrals is the denial of the claims or the recovery for claims already paid. An innocent, technical violation of the Stark law – say, failing to get a contract signed or operating under an expired contract – could expose a provider to enormous repayment liability.

The SRDP is intended to provide a way to settle Stark law violations and is open to all health care providers of service and supplies. It is not intended to provide guidance as to whether a violation of the Stark law has occurred, which is the province of CMS' Stark law advisory opinion process. A provider making a disclosure under the SRDP essentially must acknowledge that a violation has occurred.

The SRDP requires the submission of certain information to CMS. The disclosing party must provide a detailed description of the matter being disclosed, a legal analysis of why the disclosing party believes that a violation of the Stark law may have occurred, the duration of the violation, how the matter was discovered and corrective actions taken. The submission also must include a financial analysis which quantifies the total amount actually or

potentially due and owing and the methodology used to compute the amount. Notably, the “look back” period for the financial analysis is the time during which the disclosing party may not have been in compliance with the Stark law. This period could be substantially longer than CMS’ reopening period or the statute of limitations. Indeed, based on the date the Stark law was first adopted, the look back period could be up to 19 years!

After the disclosure has been made CMS will engage in a verification process which may involve requesting additional information from the disclosing party. The SRDP requires the good faith cooperation of the disclosing party in providing such additional information.

Upon completion of its review CMS will consider settling the matter for a reduced amount. The SRDP imposes no commitment on CMS’ part to do so. The SRDP lists five factors which CMS *may* consider when deciding whether to reduce the amounts owing by the disclosing party. Those factors include (i) the nature and extent of the improper illegal practice; (ii) the timeliness of the self-disclosure; (iii) the cooperation in providing additional information related to the disclosure; (iv) the litigation risk associated with the matter; and (v) the financial position of the disclosing party. The most important factor will likely be the nature and extent of the improper or illegal practice and the least important the ability of the disclosing party to pay. Certainly “technical” violations of the Stark law – such as contracts with missing signatures or lost or expired contracts – should be viewed more favorably by CMS than violations that might implicate fraud and abuse, such as contracts that are not commercially reasonable or are not based on fair market value. In the latter situation CMS has the right to – and may – refer the matter to the Department of Justice or the Office of Inspector General.

Any provider considering making a self disclosure under the SRDP needs to proceed cautiously and engage competent legal counsel.

Bruce Smith is a shareholder of Wood & Smith, P.C. and represents physicians on health law, business and real estate matters and can be contacted at (315) 423-0400 or at bsmith@woodsmithlaw.com.