

**CMS Delegated Lead Responsibility For Development of New Affordable Care Act-Required Self-Referral Disclosure Protocol***October 15, 2010*

The Centers for Medicare & Medicaid Services (CMS) has been assigned responsibility for the development of the Medicare self-referral disclosure protocol required by Section 6409(a) and (b) of the Patient Protection and Affordable Care Act (ACA), Public Law 111-148, and the rules governing when HHS will exercise its discretion under Section 1877(g) of the Social Security Act to reduce sanction otherwise due and owing by provider for engaging in self-referral violations. Health & Human Services (HHS) Secretary Kathleen Sebelius announced her delegation of responsibility for the development of these new programs to the Administrator of CMS in the October 15, 2010 Federal Register [here](#).

Under ACA Section 6402, Medicare providers and suppliers generally must report and return Medicare overpayments by the later of:

- 60 days after the date on which the overpayment was identified; or
- The date any corresponding cost report is due, if applicable.

To encourage providers to self-disclose self-referral violations, however, Section 6409 of ACA dictates that HHS in cooperation with its Inspector General establish a Medicare self-referral disclosure protocol (SRDP) that Medicare providers may use to self-disclose actual or potential violations of the physician self-referral prohibitions of Section 1877 of the Social Security Act. Where a Medicare provider or supplier electronically submits a disclosure in accordance with the SRDP and receives email confirmation of receipt of the disclosure from CMS, the provider's otherwise applicable obligation to return a potential overpayment within 60 days under ACA Section 6402 will be tolled until:

- CMS and the provider enter into a settlement agreement;
- The provider withdraws from the SRDP, or
- CMS removes the provider of services or supplier from the SRDP.

In addition to delaying the deadline for returning overpayments, ACA also includes timely self-disclosure as one of the criteria that HHS can take into account when deciding whether to exercise its discretion to abate sanctions for violation of the self-referral prohibition. Unfortunately, Section 6409(a)(3) of ACA also expressly requires that the SRDP be distinct and separate from the advisory opinion process under 42 C.F.R. §§ 411.370 through 411.389. As a consequence, Medicare providers concerned about potential exposure under the self-referral rules generally should not expect to be allowed to seek protection under the SRDP while simultaneously seeking an advisory opinion for conduct underlying the same arrangement.

The author of this update, attorney Cynthia Marcotte Stamer, has extensive experience advising and assisting health care providers and other health industry clients to respond to these and other health care industry enforcement and other compliance, public policy, regulatory, staffing, and other operations and risk management matters. Ms. Stamer also regularly speaks and conducts training on and other health industry compliance, management and operations matters. You can get more information about her health industry experience [here](#). If you need assistance with these or other compliance concerns, wish to inquire about arranging for compliance audit or training, or need legal representation on other matters please contact Ms. Stamer at (469) 767-8872 or via e-mail [here](#).

Meanwhile, Section 6409(b) of the ACA grants HHS authority to reduce the amount of sanctions owing for all violations of the physician self-referral statute. In establishing the amount by which an overpayment resulting from an actual or potential violation(s) may be reduced, the Secretary may consider: the nature and extent of the improper or illegal practice; the timeliness of such disclosure; the

cooperation in providing additional information related to the disclosure; and such other factors as the Secretary considers appropriate.

Other Recent Developments

If you found this information of interest, you also may be interested in reviewing some of the following recent Updates available online by clicking on the article title:

- [HHS announces Rules Implementing Tools Added By Affordable Care Act to Prevent Federal Health Program Fraud](#)
- [Monday 9/13 Deadline To Comment Proposed HITECH Act HIPAA Privacy Rules; 9/14 Meeting Studies Proposed Changes](#)
- [OIG: Texas Overbilled Medicaid for Medical Transportation Costs](#)
- [DMEPOS Suppliers Face 9/27 Deadline To Meet Tightened Medicare Standards](#)
- [Initial EHR Certification Bodies Named](#)
- [HHS Announces Adjustments to Federal Medical Assistance Percentage \(FMAP\) Rates](#)
- [CMS Publishes Corrections To Proposed 2011 Physician Fee Schedule Rules](#)
- [Medicare Changing How It Pays For Outpatient Dialysis](#)
- [Last Call: Today Deadline To Comment on Proposed Edits To CMS Nursing Home Civil Monetary Penalty Regs](#)
- [Rite Aid Agrees to Pay \\$1 Million to Settle HIPAA Privacy Case As OCR Moves To Tighten Privacy Rules](#)
- [HHS Invites Input On Medicaid Changes To Promote Children's Health Quality](#)
- [CMS Adopts ESRD Facility Prospective Payment System & Proposes New Quality Incentive Program](#)
- [CMS Rule Clarifies When Outpatient Services Subject to 3-Day Rule & Finalizes FY 2011 Inpatient Payment Rates](#)
- [New Affordable Care Act Mandated High Risk Pre-Existing Condition Insurance Pool Program Regulations Set Program Rules, Prohibit Plan Dumping of High Risk Members](#)
- [CMS & ONC To Co-Host 7/22 ONC Certification & Medicare/Medicaid EHR Incentive Program Audio Training](#)
- [CMS Proposes Changes To Civil Monetary Penalty Rules For Nursing Homes](#)

For More Information

We hope that this information is useful to you. If you need assistance evaluating or responding to the Health Care Reform Law or health care compliance, risk management, transactional, operational, reimbursement, or public policy concerns, please contact the author of this update, Cynthia Marcotte Stamer, at (469) 767-8872, cstamer@Solutionslawyer.net.

Vice President of the North Texas Health Care Compliance Professionals Association, Past Chair of the ABA Health Law Section Managed Care & Insurance Section and the former Board Compliance Chair of the National Kidney Foundation of North Texas, Ms. Stamer has more than 23 years experience advising health industry clients about these and other matters. A popular lecturer and widely published author on health industry concerns, Ms. Stamer continuously advises health industry clients about compliance and internal controls, workforce and medical staff performance, quality, governance, reimbursement, and other risk management and operational matters. Ms. Stamer also publishes and speaks extensively on health and managed care industry regulatory, staffing and human resources, compensation and benefits, technology, public policy, reimbursement and other operations and risk management concerns. Her insights on these and other related matters appear in the Health Care Compliance Association, Atlantic Information Service, Bureau of National Affairs, World At Work, The Wall Street Journal, Business Insurance, the Dallas Morning News, Modern Health Care, Managed Healthcare, Health Leaders, and a many other national and local publications. For additional information about Ms. Stamer, her experience, involvements, programs or publications, see [here](#).

You can review other recent health care and internal controls resources and additional information about the health industry and other experience of Ms. Stamer [here](#). If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have

your current contact information – including your preferred e-mail – by creating or updating your profile at [here](#) or e-mailing this information [here](#). To unsubscribe, e-mail [here](#).

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