

# HEALTH LAW UPDATE

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

## **Operators Are Standing By: CMS Removes Regulatory Credentialing and Privileging Burdens to Facilitate Telemedicine**

June 3, 2011

On May 5, 2011, the Centers for Medicare & Medicaid Services (“CMS”) published a final rule addressing hospital and critical access hospital (“CAH”) credentialing and privileging of telemedicine physicians and other practitioners (collectively, “practitioners”).<sup>1</sup> Recognizing that previous regulations have failed to “embrace new methods and technologies for service delivery,” and hoping to improve patient access to specialty care, CMS has revised the Medicare conditions of participation for hospitals and CAHs to allow for a new, more efficient, credentialing and privileging process for practitioners providing telemedicine services.<sup>2</sup> The new regulations become effective on July 5, 2011.

The final rule removes the requirement that hospitals and CAHs undergo a separate privileging and credentialing process for each practitioner on the other end of a telemedicine portal (CMS recognizes that this requirement was costly, burdensome and somewhat duplicative). After July 5, 2011, and as long as certain conditions are met, hospitals and CAH governing bodies have the option, when making recommendations on privileges for the individual distant-site practitioners, of relying on credentialing and privileging decisions made by a distant-site Medicare-participating hospital that provides telemedicine services.

The final rule also allows hospitals and CAHs to rely on credentialing and privileging information gathered by additional types of entities, called “distant-site telemedicine entities,” which are not Medicare-participating hospitals. CMS defines a “distant-site telemedicine entity” as one that – (1) provides telemedicine services; (2) is not a Medicare-participating hospital; and (3) provides contracted services in a manner that enables a hospital or CAH using its services to meet all applicable conditions of participation, particularly those requirements related to the

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<sup>1</sup> Hospital and Critical Access Hospital Conditions of Participation: Telemedicine Credentialing and Privileging, Final Rule, 87 Fed. Reg. 25550 (May 5, 2011). *See also* Hospital and Critical Access Hospital Conditions of Participation: Telemedicine Credentialing and Privileging, Proposed Rule, 75 Fed. Reg. 29479 (May 26, 2010).

<sup>2</sup> CMS considers “telemedicine” to be the “provision of clinical services to patients by practitioners from a distance via electronic communication.” 87 Fed. Reg. at 25551, 25556.

credentialing and privileging of practitioners providing telemedicine services to the patients of a hospital or CAH.<sup>3</sup>

In order to rely on privileging and credentialing decisions made by a distant-site Medicare-participating hospital or distant-site telemedicine entity, the hospital or CAH must ensure that there is a written agreement, available to Medicare surveyors upon request, which specifies (i) if the distant site is a Medicare-participating hospital, the responsibility of such hospital to meet CMS's credentialing and privileging standards with regard to its practitioners providing telemedicine services, or (ii) if the distant site is a distant-site telemedicine entity, the responsibility of such entity to enable the hospital or CAH to meet CMS' applicable credentialing and privileging standards with regard to its practitioners providing telemedicine services. In addition, the written agreement must ensure that each practitioner providing telemedicine services is privileged at the distant site and holds a license issued, or recognized, by the state in which the originating hospital or CAH is located (i.e., where the patient is receiving care via telemedicine). In the commentary, CMS states its expectation that the agreement delineate "how much [privileging and credentialing] information would need to be included and sent for each practitioner providing telemedicine services to the hospital or CAH" and that, in any event, CMS would expect "a hospital or CAH to have access to the complete credentialing and privileging file upon request." CMS does not comment on the ramifications that such access might have on any applicable peer review privileges and protections otherwise available to the distant-site hospital or telemedicine entity. Accordingly, each party to a telemedicine services agreement should consider this issue with the help of legal counsel.

In addition, hospitals and CAHs must perform internal reviews of distant-site telemedicine practitioners' performances with respect to local patients and send the associated distant-site hospital or telemedicine entity the results of those reviews for incorporation into the periodic appraisal of each distant-site practitioner. At a minimum, the information must include all adverse events resulting from the practitioner's telemedicine services and all complaints received regarding the practitioner. Hospitals and CAHs should consider with legal counsel whether there are any risk management or potential liability issues that may arise from providing such reviews.

If you have any questions regarding this Health Law Update, please contact any of the attorneys in our Healthcare Practice Group listed below.

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<sup>3</sup> 87 Fed. Reg. at 25553.

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