

HEALTH LAW

Update

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

The Dreaded Debut of the DFRR: Is it on the Horizon?

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While much of the country was busy with holiday preparations in December, CMS was busy revising and republishing its proposed Disclosure of Financial Relationships Report ("DFRR").¹ As you may remember, in 2007 CMS first published notice of its intent to send 500 hospitals a request for a DFRR that would require each hospital to supply detailed information concerning its ownership, investment, and compensation arrangements with physicians.² This first mandatory DFRR survey was withdrawn (while it was awaiting approval at the U.S. Office of Management and Budget) just before the issuance last spring of the proposed 2009 inpatient prospective payment system rule (the "Proposed 2009 IPPS"). Then in the Proposed 2009 IPPS, CMS published for the second time its intent to implement the DFRR program.³

Now, by means of the publication in the Federal Register in December of 2008, CMS has announced revisions to the DFRR program and the DFRR survey instrument. In announcing the revised DFRR program, CMS has restated its intent to use the responses gathered from the DFRR collection to: "(1) identify arrangements that potentially may not be in compliance with the physician self-referral statute and implementing regulations; and (2) to identify examples and areas of noncompliance that may assist [CMS] in any future rulemaking concerning the reporting requirements and other physician self-referral provisions." The DFRR will require hospitals to supply information for any cost reporting period(s) ending in 2006 and, therefore, may look at physician relationships extending into 2005 and perhaps earlier.

The re-proposed DFRR program contains the following revisions:

- Reduces the number of hospitals that will receive the DFRR from 500 to 400.
- Increases the estimated number of burden hours associated with completing the DFRR from 31 to 100 hours per hospital.
- Inserts a disclaimer: "To the extent we do not find a physician self-referral violation based on our review of the DFRR, this should not be taken as an

¹ 73 Fed. Reg. 77701 (Dec. 19, 2008); DFRR Survey and Supporting Documents. PRA Listing CMS-10236 (Dec. 12, 2008) available at <http://www.cms.hhs.gov/PaperworkReductionActof1995>.

² 72 Fed. Reg. 28056 (May 18, 2007).

³ 73 Fed. Reg. 23528, 23697 (Apr. 30, 2008).

affirmative statement that the financial relationships are in compliance. Further, the government will not be estopped from determining that there is a violation based on further review of information collected either as part of the DFRR or any other source."

- Replaces the request to provide physicians' Unique Physician Identifier Numbers (UPIN) with a request for physicians' National Provider Identifiers (NPI).
- Clarifies that where the financial relationship is with a physician's immediate family member rather than the physician him/herself, the hospital should insert "N/A" into the NPI field.

In addition, it appears that CMS is going to attempt to deliver the DFRR to the selected hospitals via email but may still send letters. Hospitals still have 60 days to complete the DFRR. Upon completion, the DFRR must be signed by the organization's CFO, CEO or other appropriate official and then one original and one copy must be mailed to CMS with all supporting documentation. Hospitals may not electronically submit the completed DFRR although CMS requests (does not require) that hospitals send an electronically scanned copy of the DFRR and supporting documentation to HOSPITALDISCLOSURE@cms.hhs.gov.

We expect the final regulatory clearance on the DFRR soon unless the Office of Management and Budget heeds the urgings of groups such as the American Hospital Association, which recently issued a comment letter asserting that the purpose and need of the DFRR is "insufficient to justify the time, effort and dedication of resources that would be required of community hospitals."⁴ If you have any questions concerning this Health Law Update, please contact any of the attorneys in our Healthcare Industry Practice Group listed on the following page.

⁴ Letter to OMB Office of Information and Regulatory Affairs. American Hospital Association (Jan. 16, 2009) available at <http://www.aha.org/aha/letter/2009/09116-cl-cms10236.pdf>.

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