

# HEALTH LAW

## Update

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

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## CMS Final Rule Requires Hospital Disclosure of Physician Ownership and Lack of 24/7 Physician Presence

August 10, 2007

On August 1, 2007, the Centers for Medicare & Medicaid Services (CMS) issued a final rule to update the hospital inpatient prospective payment system (IPPS) for fiscal year 2008. Included in the final rule were two important disclosure provisions that will apply to many hospitals across the country. These two disclosure requirements relate to (1) physician ownership of hospitals, and (2) whether physicians are on site at the hospital 24 hours a day, 7 days a week. Both these changes had been proposed by CMS earlier this year,<sup>1</sup> but have now been revised and finalized. The effective date for the final rule is October 1, 2007.

### **Disclosure of Physician Ownership**

Under the final rule, physician-owned hospitals must furnish written notice to all patients at the beginning of their hospital stay or outpatient visit that physicians have an ownership or investment interest in the hospital (note that there is no explicit requirement that the patient sign the written notice). For purposes of the final rule, the hospital stay or outpatient visit begins with the provision of a package of information regarding scheduled preadmission testing and registration for a planned hospital admission for inpatient care or outpatient service.

The required notice is intended to promote transparency and to assist the patients in making informed decisions regarding their care. The notice must disclose, in a manner “reasonably designed to be understood by all patients,” the fact that the hospital meets the federal definition of a physician-owned hospital.<sup>2</sup> The notice must also state that a list of the hospital’s physician owners or investors is

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<sup>1</sup> See 72 Fed. Reg. 24680 *et seq.* (May 3, 2007).

<sup>2</sup> A “physician-owned hospital” is defined as any Medicare-participating hospital in which a physician or physicians have an ownership or investment interest. The ownership or investment interest may be through equity, debt, or other means and includes an interest in an entity that holds an ownership interest in the hospital. 42 C.F.R. 489.3 (2007).

available upon request. As stated in our earlier *Health Law Update*<sup>3</sup> regarding the proposed version of the rule, the requirement that the notice be “reasonably designed to be understood by all patients” could be interpreted to mean that hospitals must have several written disclosure statements in different languages depending on their patient diversity. In the commentary accompanying the final rule, CMS does not provide any guidance as to how this particular aspect of the final rule will be interpreted.

The final rule’s disclosure requirements apply broadly to *all* hospitals with physician ownership, including critical access hospitals, and are not limited to specialty hospitals. However, CMS addressed the concerns raised by commenters regarding a physician’s ownership of publicly traded securities of a hospital company or investments in a mutual fund that owns interests in hospital companies. The final definition of a “physician-owned hospital” does not include hospitals in which the physician’s ownership is limited to holding the same types of publicly-traded securities or mutual funds as are set forth in certain ownership exceptions under the regulations implementing the federal physician self-referral law (the Stark Law).<sup>4</sup>

The final rule, importantly, does not include a provision from the proposed rule that would have required hospitals to mandate that all physician owners who are also members of the hospital’s medical staff disclose to the hospital, as a condition of continued medical staff membership, their ownership or investment interests in the hospital. In the commentary accompanying the final rule, CMS states its belief that finalizing this requirement would not have provided any additional protections for patients that are not already contained in the main provision of the rule requiring the hospital to make this disclosure. In addition, CMS indicates a desire to allow hospitals flexibility in the manner in which they meet this disclosure requirement.

As under the proposed rule, the final rule makes clear that CMS has the authority to terminate a hospital’s Medicare provider agreement for noncompliance with this physician-ownership disclosure requirement. CMS also has the authority to deny a physician-owned hospital’s initial provider agreement if the hospital does not have procedures in place to notify patients.

### **Disclosure of Lack of 24/7 Physician Presence in the Hospital**

The final rule also requires a hospital to (1) notify all patients in writing if a doctor of medicine or doctor of osteopathy is not present in the hospital 24 hours a day, 7 days a week, and (2) describe how the hospital will meet the medical needs of a patient who develops an emergency condition while no doctor is on site. The final rule is, except for minor wording changes, the same as the original rule proposed by CMS in May of this year.

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<sup>3</sup> See “CMS Proposes to Require All Physician-Owned Hospitals To Disclose Physician Investment to Patients,” May 4, 2007, available at [www.bassberry.com](http://www.bassberry.com).

<sup>4</sup> These Stark Law exceptions are set forth at 42 CFR 411.356(a) and (b). The publicly traded securities (including both stock and bonds) must be traded on the NYSE, AMEX, or NASDAQ, or on any of the other exchanges specified in the Stark exceptions, and must have stockholder equity (defined for purposes of these regulations as the difference in value between a corporation’s total assets and total liabilities) in excess of \$75 million at the end of the corporation’s most recent fiscal year or on average during the previous three fiscal years. If the investment is in a mutual fund, the fund must be a “regulated investment company” as defined by the IRS and must have total assets exceeding \$75 million at the end of the fund’s most recent fiscal year or on average during the previous three fiscal years. See 42 C.F.R. 489.3, which contains a cross-reference to these Stark Law exceptions.

This required written notice must be provided to all patients at the beginning of their hospital stay or outpatient visit. For purposes of the final rule, the hospital stay or outpatient visit has the same definition as under the physician ownership disclosure requirements, i.e., it begins with the provision of a package of information regarding scheduled preadmission testing and registration for a planned hospital admission for inpatient care or outpatient service.

CMS also clarified several points in its comments to the rule, including the fact that the rule requires patient notification, but does *not* obligate hospitals to obtain a patient's signature that the notice has been received. CMS emphasized, as it did with the rule on disclosure of physician ownership, that the rule regarding disclosure of physician presence in the hospital applies to *all* hospitals (including critical access hospitals) and is not limited to physician-owned specialty hospitals.

### **Conclusion**

If you have questions or would like a copy of the final rule, or if you would like assistance in incorporating the final rule into your policies and procedures, please contact one of the Bass, Berry & Sims attorneys in our Healthcare Practice Area listed at the end of this Update.

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