

# HEALTH LAW

## Update

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

## CMS Proposes to Require All Physician-Owned Hospitals To Disclose Physician Investment To Patients

May 4, 2007

On April 13, 2007, the Centers for Medicare & Medicaid Services (CMS) issued a Notice of Proposed Rulemaking containing proposed changes to the hospital inpatient prospective payment system (IPPS) for fiscal year 2008.<sup>1</sup> One of the significant provisions of this proposed rule requires all physician-owned hospitals that participate in the Medicare program to notify patients in writing, at the beginning of the patient's hospital stay or outpatient visit,<sup>2</sup> that the hospital meets the federal definition of a physician-owned hospital, i.e., it is owned in whole or in part by one or more physicians, and that the list of the hospital's physician owners is available upon request. Under the proposed rule, CMS would have the authority to deny or terminate a hospital's Medicare provider agreement if it does not implement these procedures to disclose physician ownership in the hospital.

CMS proposes to define "physician-owned hospital" as any participating hospital in which a physician or physicians have an ownership or investment interest. A physician's ownership or investment interest in a hospital "may be through equity, debt, or other means, and includes an interest in an entity that holds an ownership or investment interest in the hospital."<sup>3</sup> Given the literal breadth of this proposed definition, it could conceivably encompass ownership of publicly traded stock or investment in a mutual fund that owns stock in a publicly traded healthcare company that owns the hospital to which the physician refers.

It is uncertain whether the rule, when finalized, will be interpreted this broadly, but if it is interpreted this broadly, it could pose practical problems. CMS is soliciting comments specifically

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<sup>1</sup> This proposed rule was published in the Federal Register on May 3, 2007. See 72 Fed. Reg. 24680 *et. seq.* (May 3, 2007).

<sup>2</sup> 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 the provision of a package of information regarding an outpatient service." 72 Fed. Reg. at 24833.

<sup>3</sup> 72 Fed. Reg. at 24833.

to determine whether to adopt exceptions to the definition of “physician-owned hospital” based on (1) the nature of the physician’s investment interest (for example, CMS might consider an exception for ownership of publicly traded securities and mutual funds), or (2) the size of the physician’s ownership interest or the size of the hospital’s assets. Any such exception potentially could reduce the number of hospitals and physicians who may be subject to the disclosure requirements.

Another feature of the proposed rule is that it requires the hospital’s written notification to patients of physician ownership and of the patients’ right to obtain a list of physician investors to be written in a manner capable of being understood by all patients. If adopted, this requirement could be interpreted to mean that hospitals must have several written disclosure statements in different languages depending on their patient diversity. The proposed IPPS rule also does not specify how frequently the hospital must update its disclosure identifying the individual physician owners.

CMS has further proposed that physician-owned hospitals require all physician owners who are also members of the hospital’s medical staff to disclose in writing, as a condition of continued medical staff membership, their ownership or investment interest in the hospital at the time the physician refers his or her patients to the hospital.<sup>4</sup> This requirement could potentially be interpreted to impose an affirmative obligation on the hospital to monitor physicians so as to ensure that they are making the required disclosure.

CMS has indicated that the proposed physician ownership disclosure rules are intended to increase the transparency of physicians’ financial interests in health care facilities to which they refer patients, as well as the health and safety of patients to allow individuals to make informed decisions regarding their treatment, and to permit patients to evaluate whether the physician’s ownership creates a conflict of interest that is not in the patient’s best interest.

CMS is accepting comments on the proposed rule through June 12, 2007. The final rule is expected to become effective on October 1, 2007. If you have questions about this proposed rule, or if you would like our assistance in drafting comments to the proposed rule, 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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<sup>4</sup> Many states have similar disclosure obligations. For example, the Tennessee Physicians’ Conflict of Interest Disclosure Act of 1991 (Act) requires physicians to disclose to patients and referring colleagues the physician’s ownership interest in a health facility at the time of the referral and prior to utilization. Tenn. Code Ann. § 63-6-502. Health facility is not defined by the Act, but presumably would include a hospital. There are no published opinions interpreting the Act by the Tennessee courts, Attorney General or other regulatory agency.

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