

# HEALTH LAW

## Update

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

## Little-Noticed CMS Data Collection Initiative Has Potentially Big Enforcement Implications

June 1, 2007

On May 18, 2007, the Centers for Medicare & Medicaid Services (CMS) published in the Federal Register a notice of its intent to send to a group of 500 hospitals a request for a Disclosure of Financial Relationship Report (DFRR) requiring each hospital to supply detailed information concerning its ownership, investment, and compensation arrangements with physicians.<sup>1</sup> According to CMS, the DFRR is a new mandatory collection instrument that CMS will use to “obtain information necessary to analyze each hospital’s compliance with Section 1877 of the [Social Security] Act (‘the physician self-referral law’) ... .”<sup>2</sup> CMS indicates that the data that are collected “may be shared with other federal agencies and with Congressional committees.” Thus, the DFRR in effect may function as a self-reporting tool that CMS can use to enhance enforcement efforts.

CMS’ stated legal basis for the authority to collect this data is Section 1877(f) of the physician self-referral law, commonly known as the Stark Law, which requires providers to supply the Secretary of Health and Human Services with information concerning ownership, investment, and compensation arrangements with physicians. A copy of the DFRR, which shows the types of data that hospitals must supply, is available on CMS’ Web site.<sup>3</sup> The DFRR requests information relating to ownership and compensation arrangements from both physician and non-physician owned hospitals, so providers should not expect that CMS will send the DFRR request only to physician-owned specialty hospitals.

The DFRR will be sent by e-mail and once a hospital receives the e-mail request, it will have 45 days to respond.<sup>4</sup> The CEO, CFO, or other comparable officer must certify in writing that the responses are

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<sup>1</sup> 72 Fed. Reg. 28056 (May 18, 2007).

<sup>2</sup> See the “Supporting Statement” posted by CMS on its Web site along with the form of DFRR. The link to these materials is in footnote 3, below.

<sup>3</sup> Go to <http://www.cms.hhs.gov/PaperworkReductionActof1995/PRAL/list.asp#TopOfPage> and click on CMS-10236.

<sup>4</sup> An entity that furnishes 20 or fewer Part A and/or Part B services during a calendar year is exempted from this reporting requirement pursuant to 42 CFR § 411.361(b).

true and correct. Failure to submit a timely response may result in civil monetary penalties of up to \$10,000 a day.

CMS does not explicitly state whether it eventually will send the DFRR in its current form to subsequent groups of hospitals. Rather, CMS has indicated that it will use the data received from the 500 hospitals to propose periodic reporting requirements for all hospitals, which could mean that CMS will use a different format for the DFRR in the future. Specifically, CMS is considering whether to survey all hospitals annually, stagger the surveys, and/or concentrate its efforts on certain types of financial relationships or hospitals. CMS indicates that it will submit a future notice of proposed rulemaking for any such ongoing reporting requirements.

CMS sent a voluntary request similar to the DFRR to 450 hospitals last year. Section 5006 of the Deficit Reduction Act of 2005 (DRA) required CMS to prepare a strategic implementing plan concerning physician investment in specialty hospitals and, in connection therewith, CMS sent a voluntary survey in May of 2006 to a sample of both specialty hospitals and competitor acute care hospitals. In August of 2006, CMS reported the findings of the voluntary DRA surveys, noted the need to determine the manner and frequency of ongoing reporting by providers, and expressed concern that the voluntary survey request generated a low response rate.<sup>5</sup> The failure of hospitals to respond has given CMS cause to question whether the reason for the non-disclosure was because, in CMS' words, these hospitals have "tainted relationships" or whether the non-disclosure was for another reason. CMS intends to begin the mandatory DFRR disclosure with the 290 hospitals that did not respond together with an additional 210 hospitals.

Included with the DFRR worksheets are explicit instructions on the information to be submitted. Worksheets 1-5 of the DFRR relate to ownership or investment interests held by physicians in the hospital, including questions about hospital characteristics, the audited financials for the hospital, cost of investment, names of investors, loans to physicians, and leases or "under arrangements" transactions. Worksheet 6, which consists of two separate sheets, requires information on compensation arrangements with both owner and non-owner physicians, such as rental of office space, equipment rental, personal service arrangements, and recruitment. Worksheet 6 also asks for information on a hospital's compliance with different Stark exceptions, including the non-monetary compensation exception and the medical staff incidental benefits exception. Requests for information about fair market value appear throughout the worksheets.

Hospitals that receive the DFRR will face the challenge of quickly and accurately compiling information to respond to this request. Compliance programs need to be reviewed to make sure that systems are in place to track both ownership and compensation relationships with physicians in order to enable the hospital to meet the deadlines should the hospital receive a DFRR request. Further, hospitals may wish to review their current compliance controls to assess compliance with the physician self-referral law.

CMS is accepting comments on the proposed data collection through July 17, 2007. It is possible that the DFRR request will be sent out shortly after this date, especially given the fact that the Program Safeguard Contractor hired to review the submitted DFRR information is charged with completing its

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<sup>5</sup> See the *Health Law Update* from Bass, Berry & Sims, dated September 7, 2006, discussing the final report issued by CMS on specialty hospitals.

task by September 30, 2007. If you have any questions about the DFRR request, 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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