

HEALTH LAW

Update

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

Disclose, Disclose, Disclose – CMS Wants to Know About Your Physician Financial Relationships

May 15, 2008

On April 14, 2008, as part of the Proposed Changes to the Hospital Inpatient Prospective Payment System and Fiscal Year 2009 Rates ("Proposed 2009 IPPS"), the Centers for Medicare & Medicaid Services ("CMS") proposed several changes aimed at promoting transparency of physician and hospital financial relationships. This Health Law Update briefly summarizes these proposed changes.

I. Proposed Changes to Disclosure of Physician Ownership in Hospitals

Background. In the final 2008 Hospital Inpatient Prospective Payment Systems rule (the "Final 2008 IPPS"), published in August 2007, CMS revised the Medicare regulations governing provider agreements to require every physician-owned hospital to disclose to its patients at the beginning of their hospital stay or outpatient visit that the hospital is physician-owned and that the names of its physician owners are available upon request.¹ In the recent Proposed 2009 IPPS, CMS proposes several changes that will, if finalized as written, both broaden and narrow the application of this requirement.

Immediate Family Members. First, the Proposed 2009 IPPS proposes to extend the reach of the disclosure requirement to include not only physicians who have an ownership or investment interest in a hospital but also any "immediate family member of a physician." CMS explains that its aim is to keep the regulations consistent with the physician self-referral statute (commonly known as the Stark Law). Accordingly, CMS proposes to apply to the disclosure requirement the Stark Law's definition of "immediate family member," which includes a "husband or wife; birth or adoptive parent, child, or sibling; stepparent, stepchild, stepbrother, or stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; grandparent or grandchild; and spouse of a grandparent or grandchild."² Therefore, if the proposal is finalized, each hospital in which a physician or an immediate family member of a physician has an ownership or investment interest will have to disclose that it is physician-owned and, upon request, provide all patients with a list of such physicians or their immediate family members.

¹ See 72 Fed. Reg. 47385-87 (Aug. 27, 2007) (codified at 42 C.F.R. §§ 489.3, 489.20(u))

² 42 C.F.R. § 411.351

Non-Referring Physician Ownership. Second, the disclosure regulation as originally promulgated captured physician-owned hospitals even if their physician owners did not refer patients to the hospital (e.g., retired physicians who retain an interest in the hospital but no longer practice or refer patients). In the Proposed 2009 IPPS, CMS recognizes that "requiring a hospital with no referring physician owners to disclose to all patients that it is physician-owned and to provide the patients with a list of the (non-referring) physician owners would be an unnecessary burden on the hospital and be of no value in assisting the patient in making an informed decision as to where to seek treatment."³ Based on this rationale, CMS is proposing to create an exception to the disclosure requirement for a physician-owned hospital that does not have any physician owners, or immediate family members, who refer patients to the hospital. The proposed exception would require, however, that any hospital utilizing this exception attest in writing that it meets the exception and maintain such attestation in its files for review by State or Federal surveyors or other government officials.

Disclosure Time Frame. Third, CMS seeks to revise the disclosure requirement to clarify that hospitals must include in the notice to patients that the list of physicians, or immediate family members of physicians, who are owners and investors will be furnished at the time the list is requested by or on behalf of the patient. CMS establishes this time frame with the goal of facilitating patients' ability to make informed decisions *before* treatment has been furnished at the hospital.

Condition of Medical Staff Membership. Finally, CMS is also proposing to obligate each physician-owned hospital to require all physician members of its medical staff, as a condition of continued medical staff membership or admitting privileges, to agree to disclose any ownership or financial interest that the physician or any of his or her immediate family members holds in the hospital, in writing, to all patients whom they refer to the hospital. The physician would have to make this disclosure at the time he or she refers the patient to the hospital for services.

Enforcement. In order to enforce the proposed changes related to the timeframe of required disclosures and to ensure that hospitals carry out their obligation to require medical staff members to disclose their (or their immediately family members') ownership or investment interests in the hospital directly to patients, the Proposed 2009 IPPS proposes to permit CMS to terminate the Medicare provider agreement of any hospital that fails to comply with these changes.

II. Proposed Collection of Information Regarding Financial Relationships Between Hospitals and Physicians

Background – Round One. On May 18, 2007, CMS published 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.⁴ The DFRR survey was withdrawn (while it was awaiting approval at the U.S. Office of Management and Budget) just before the Proposed 2009 IPPS was issued.

³ 73 Fed. Reg. 23528, 23683 (Apr. 30, 2008).

⁴ 72 Fed. Reg. 28056 (May 18, 2007).

Round Two. In the Proposed 2009 IPPS, CMS proposes for the second time its DFRR program as a means "to analyze the types of financial relationships involving hospitals and physicians, the structure of various compensation relationships and trends therein, and potentially whether the hospitals are in compliance with the physician self-referral law" and the corresponding regulations.⁵ In this new proposal, CMS retains its plan to send the DFRR to approximately 500 hospitals and specifically states that the DFRR information request will reach beyond physician-owned specialty hospitals to all hospitals because (a) physician investments in any type of hospital raise potential issues concerning compensation arrangements that can be associated with the investment, and (b) other types of compensation arrangements implicate the Stark Law.

Time and Burden Estimates. The Proposed 2009 IPPS revises CMS' original time and burden estimates for hospitals to complete the DFRR. CMS currently estimates that the DFRR will take an average of 31 hours to complete. CMS proposes a requirement that hospitals complete, certify and return the DFRR survey to CMS within 60 days of the date that appears on the cover letter or email request. CMS notes its authority to impose civil monetary penalties ("CMPs") of up to \$10,000 for each day the DFRR is not completed and returned to CMS; however, CMS indicates in the Proposed 2009 IPPS that it "does not seek to invoke this authority and will work with entities to comply with the reporting requirements."⁶ In addition, prior to implementing any CMPs, CMS indicates it will issue a letter to the hospital inquiring as to the reason for the delay and that upon a demonstration of good cause, it will issue an extension of time to submit the DFRR.

Proposed Form of DFRR. A copy of the proposed DFRR collection survey, and its corresponding instructions, is included in the Proposed 2009 IPPS at Appendix C.⁷ CMS is requesting feedback from providers on the following aspects of the proposed DFRR collection survey:

- Whether the collection effort should be recurring, and, if so, whether it should recur on an annual or some other periodic basis.
- Whether CMS is, through the DFRR, collecting too much or not enough information, and whether it is collecting the correct type of information.
- The amount of time it will take hospitals to complete the DFRR and the costs associated with completing the DFRR; the amount of time CMS should give hospitals to complete and return their responses to CMS.
- Whether CMS should direct collection instruments to all hospitals, and, if so, whether CMS should stagger the collection so that only a certain number of hospitals are subject to it in any given year.
- Whether hospitals, once having completed the DFRR, should have to send in yearly updates to report changing information.⁸

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

⁶ *Id.* at 23698.

⁷ *Id.* at 23923-23938. Please note, however, that Worksheet 8 in the version published in the Federal Register on April 30, 2008 appears to be missing 3 questions that were included in the version released by CMS on April 14, 2008. We suspect this is an oversight that will be corrected in a future publication.

⁸ *Id.* at 23698.

If you have any questions about any of the proposed disclosure requirements in this Update, please do not hesitate to contact any of the attorneys in our Healthcare Industry Practice Group listed below.

Bass, Berry & Sims Healthcare Attorneys

H. Stanford Adams, Jr.
(615) 742-7775
sadams@bassberry.com

Starr Brown
(615) 742-6530
sbrown@bassberry.com

Pooneh Ghiassi
(615) 742-7782
pghiassi@bassberry.com

Angela Humphreys
(615) 742-7852
ahumphreys@bassberry.com

Seth A. Killingbeck
(615) 742-7707
skillingbeck@bassberry.com

Claire F. Miley
(615) 742-7847
cmiley@bassberry.com

Shannon Pinkston
(615) 742-7727
spinkston@bassberry.com

Scott B. Shanker
(901) 543-5932
sshanker@bassberry.com

Krista L. Thornton
(615) 742-7734
kthornton@bassberry.com

H. Lee Barfield, II
(615) 742-6202
lbarfield@bassberry.com

Mary Beth Fortugno
(615) 742-7739
mfortugno@bassberry.com

Anna Grizzle
(615) 742-7732
agrizzle@bassberry.com

Clevonne M. Jacobs
(615) 742-7769
vjacobs@bassberry.com

David King
(615) 742-7890
dking@bassberry.com

T. Scott Noonan, Co-Chair
(615) 742-6273
noonan@bassberry.com

Cynthia Y. Reisz
(615) 742-6283
creisz@bassberry.com

Catherine J.B. Sloan
(615) 742-7789
csloan@bassberry.com

Leigh Walton, Co-Chair
(615) 742-6201
lwalton@bassberry.com

Philip F. Berg
(615) 742-7908
pberg@bassberry.com

Valere B. Fulwider
(615) 742-7742
vfulwider@bassberry.com

Elisa E. Harris
(615) 742-6553
eharris@bassberry.com

J. James Jenkins, Jr.
(615) 742-6236
jjenkins@bassberry.com

Leslie Maclellan
(615) 742-7818
lmaclellan@bassberry.com

Brenda N. Phillips
(615) 742-6237
bnphillips@bassberry.com

Brian D. Roark
(615) 742-7753
broark@bassberry.com

Danielle M. Sloane
(615) 742-7763
dsloane@bassberry.com

Elizabeth S. Warren
(615) 742-7719
ewarren@bassberry.com

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315 Deaderick Street • Suite 2700 • Nashville, TN 37238-3001 • (615) 742-6200

The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103-3672 • (901) 543-5900

1700 Riverview Tower • 900 S. Gay Street • Knoxville, TN 37902 • (865) 521-6200