

HEALTH LAW

Update

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

CMS Issues Final Report on Specialty Hospitals and Reveals Plans for New Measures Affecting All Hospitals

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On August 8, 2006, the Centers for Medicare & Medicaid Services (CMS) released its Final Report and Strategic and Implementing Plan related to specialty hospitals (the “Final Report”). Pursuant to Congressional mandate in 2003, CMS surveyed physician-owned specialty hospitals for the purpose of developing a plan to address certain aspects of their operation. The Final Report contains the results of that survey and reveals CMS’ plans to (1) promote transparency of physician investment in all hospitals, (2) increase scrutiny of non-bona fide investments and disproportionate returns, (3) promote better coordination between physicians and hospitals, and (4) clarify obligations under the Emergency Management Treatment and Labor Act (EMTALA). CMS declined to extend the suspension on enrollment for physician-owned specialty hospitals; thus, the suspension expired, clearing the way for new enrollees in the Medicare program. The plan outlined in the Final Report will affect all hospitals, not just specialty hospitals, and will also affect other physician syndications.

SUMMARY OF FINAL REPORT

New reporting and disclosure requirements

CMS announced that it will implement new periodic reporting and disclosure requirements for all hospitals, not just specialty hospitals, with respect to physician investment and compensation relationships. The Final Report indicated that CMS’ initial efforts will focus on obtaining responses from the specialty hospitals that failed to complete the investment portion of the surveys distributed by CMS earlier this year. Ultimately however, all hospitals will have to comply with periodic reporting requirements. Hospitals that do not respond timely with the required information will face stiff penalties, including up to \$10,000 for each day the response is late. CMS has yet to determine the procedures and deadlines for this regular disclosure process.

In addition to fulfilling periodic reporting requirements to CMS, specialty hospitals will be required to disclose to patients in advance of providing care that their staff physicians have an investment interest in the hospital. CMS also indicated in the Final Report that other regulations

aimed at full and complete disclosure of physician investment and compensation arrangements could be forthcoming. This requirement applies to specialty hospitals, and could be extended by CMS in the final regulations to include all hospitals.

Increased scrutiny of physician investments

CMS stated in the Final Report that it will focus more intently on non-bona fide physician investments as well as disproportionate returns on physician investments. In CMS' view, either situation creates a compensation arrangement as defined in 42 U.S.C. § 1395nn (the Stark law) that cannot be protected by the exception for ownership interests in whole hospitals. In addition, according to CMS, either situation raises the possibility of an illegal kickback scheme.

CMS highlighted the fact that a non-bona fide investment can take many forms and is often not immediately apparent, so further scrutiny of physician investments is necessary. In its survey of specialty hospitals, CMS considered, among other factors, the manner in which investors were selected and retained. It concluded that referral volume or revenue was a critical factor for some hospitals in selecting investors. The Final Report suggests that CMS will continue to focus on whether offers to invest are made to non-physicians and non-referral sources, on the same terms as those offered to physicians, in assessing whether a physician investment is bona fide.

Additionally, CMS addressed disproportionate returns and reiterated the importance of ensuring that distributions to physicians are proportionate to the physician's investment. CMS indicated that profit distributions and dividends that exceed the physician's ownership interest would not fall within the whole hospital ownership exception and would therefore have to meet a separate compensation arrangement exception under the Stark law. In the Final Report, CMS cites an example of a referring physician who owns a two percent interest in a specialty hospital and receives ten percent of the profit distributions. The excess eight percent distribution is not subject to an exception, according to CMS, and therefore violates the Stark law.

Promote physician and hospital collaboration

In response to criticism that physician-owned specialty hospitals are better able to support physician and hospital collaboration because their interests are so closely aligned, CMS indicated that it would implement demonstration programs, including a "gainsharing" program, to better promote coordination between physicians and hospitals. The goal of this initiative is to enable hospitals to allow physicians, who are not investors, to share in the hospitals' cost savings.

EMTALA guidance

Stopping short of requiring all specialty hospitals to maintain emergency departments, CMS indicated that it will provide further guidance on specialty hospitals' obligations with respect to emergency care. The Final Report specifically states that CMS will require a specialty hospital to accept transfers of patients if it has the capacity to provide care to such patients.

WHAT THE FINAL REPORT DID NOT INCLUDE

No new guidance regarding definition of specialty hospital

CMS declined to provide additional guidance on what constitutes a specialty hospital. Instead, CMS indicated that it will continue to review on a case by case basis whether a hospital is “primarily engaged” in treating patients with a cardiac condition, patients with an orthopedic condition, or patients receiving a surgical procedure or any other specialized category of services designated as being inconsistent with the purpose of permitting physician ownership and investment interests in a hospital.

No repeal of the whole hospital exception with respect to specialty hospitals

Critics of the broad whole hospital exception under the Stark law continue to push for repeal of its application to specialty hospitals, claiming that specialty hospitals “cherry pick” profitable patients, leaving acute care hospitals to service a disproportionate number of low-income patients and provide more charity care. Just prior to the issuance of the Final Report, Senators Charles Grassley (R-Iowa) and Max Baucus (D-Montana) urged CMS to extend its administrative suspension of new specialty hospital enrollments. According to Senators Grassley and Baucus, the data used in the Final Report was flawed and necessitates further study on specialty hospitals’ operations. CMS explicitly declined to extend the suspension. Senator Grassley may continue to seek repeal of the whole hospital exception with respect to specialty hospitals.

If you have any questions about this Health Law Update or would like to discuss the impact that these proposed rules might have on your business, please contact one of the Bass, Berry & Sims attorneys in the Health Law Practice Area on the following page.

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