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Stark Provisions in 2009 Inpatient Prospective Payment System Rule Will Lead to Major Changes for Physician Joint Ventures

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On July 31, 2008, the 2009 final Hospital Inpatient Prospective Payment System (IPPS) rules were put on display at the *Federal Register* and on the CMS web site. These rules will be published in the August 19, 2008 issue of the Federal Register. In this rule, CMS finalized three provisions, which taken together will have a significant impact on the provision of designated health services (DHS) by physician- owned entities. These provisions (i) expand the definition of DHS "entity"; (ii) prohibit percentage- based payments for space and equipment leases; and (iii) prohibit per-click arrangements for space and equipment leases.

A major change in these new Stark regulations is the expansion of the definition of DHS "entity." Until now, the term DHS entity had been defined only as the entity that bills Medicare for a DHS service. In the final IPPS rule, effective October 1, 2009, CMS has expanded the definition to include any entity that performs a DHS service, notwithstanding that another entity billed for the service. In situations where one entity bills for a service and a separate entity furnishes the service, both entities will be considered DHS entities.

The preamble to the IPPS rules includes commentary stating that CMS felt compelled to take this action to prohibit physician ownership in joint ventures that typically provide services "under arrangements" with hospitals. CMS has taken the view that Congress did not intend to allow physicians to have an ownership interest in a service company, when the physician would not have been able to refer patients to the company if it billed Medicare for those services. The preamble includes a lengthy section explaining its concerns with such arrangements. A typical hospital "under arrangements" transaction with a physician joint venture, as described by CMS, would be structured so that the joint venture would provide a complete service to a hospital. The hospital would then bill for such services "under arrangements." The hospital typically would pay the joint venture for the services on a per-service basis. Commonly, the physicians who own the joint venture would be those physicians who refer their patients to the hospital for that service. For example, a group of

interventional cardiologists joint venture with the hospital to create a diagnostic cath lab. The joint venture owns the space and the cath lab equipment. The cath lab leases employees from the hospital or uses its own employees. Patients who are registered at the hospital as hospital outpatients, go to the cath lab, where the cath lab joint venture performs the services. The hospital bills for the services and pays the cath lab for each cath lab procedure performed.

According to the new rules, the cath lab entity would be considered to be performing a DHS service. CMS refuses to define ® the word “perform” and rather defaults to the “common” meaning of “perform” to determine whether a joint venture entity has performed a service. Further commentary states that a procedure would be “performed” if the components of the services provided by the entity would otherwise permit that entity to submit a claim to Medicare. Since the cath lab joint venture in the example above is providing all of the cath lab services, it is likely that CMS would consider such a joint venture a DHS entity under the new definition.

Once it is determined that the joint venture is a DHS entity, any referrals by physician owners of the joint venture to the entity would need to meet a Stark exception. There are few Stark exceptions for ownership and none that apply to these arrangements, except perhaps if the entity is located in a rural area. Accordingly such joint venture arrangements will need to be unwound or restructured.

While the Preamble commentary focuses on hospital “under arrangements” transactions with physician-owned joint ventures, the regulation text is much broader than such arrangements. Specifically, the regulatory text provides that any “entity” that performs DHS will be considered a DHS entity under the new definition. There is no requirement that such an entity have physician ownership. In situations where that entity provides services to a physician group and the physician group bills for the DHS, there are two financial relationships that will need to meet an exception. First, it will be necessary for the physician group to meet the in-office ancillary services exception for the DHS for which it bills and second, the DHS entity performing the service will need to meet an exception for the referrals it receives from the physicians.

In restructuring physician-owned joint venture “under arrangements” transactions, (whether with hospitals or with physician group practices) it is likely that providers and physicians will necessarily move toward arrangements for which Stark exceptions already exist, e.g., space and equipment leases and management and billing services. By prohibiting per-click and percentage lease payment arrangements for space and equipment leases, CMS has prevented such arrangements from being restructured as equipment leasing arrangements with those common payment methodologies. Clearly, CMS was aware of, and wanted to prevent, physicians from restructuring their arrangements in ways that CMS still considers potentially abusive.

In the 2008 proposed physician fee schedule rule, CMS noted its concern that physicians were using percentage payments for types of arrangements that were not anticipated by CMS. Specifically, CMS notes that it intended that percentage payments were only to be permissible in arrangements for physician professional services. However, more recently, lease arrangements for office space or equipment and other service arrangements have become more prevalent. Accordingly, the 2009 final IPPS Rule prohibits percentage-based payments for space and equipment leases. Notably, the final rule did not prohibit other percentage compensation arrangements, i.e., billing and management services may still be established on a percentage basis. CMS has stated, however, that it will continue to review these types of arrangements and may further limit percentage-based payments in the future if it views them to be abusive.

CMS has similarly been troubled by per-click payments because it believes that such payments are a mechanism for physicians to earn payments for each referral they make. As a result, the final rule generally prohibits perclick payments for space and equipment leases. Interestingly, although CMS notes that time-based payments remain permissible, time-based payments, if scheduled for too short of an interval (i.e., once a week for 4 hours, as noted by CMS) may be problematic for the same reasons as per-click arrangements and plans to continue to study the issue of “block-time” leasing arrangements.

To effectuate the changes noted above, CMS has added the limitations on payment methodologies to the Stark exceptions for space leases, equipment leases, fair market value and indirect compensation arrangements. These regulations are effective October 1, 2009. Accordingly, when restructuring joint ventures or reviewing current space and equipment leases with physicians, careful attention should be paid to compliance with these new regulations.

The IPPS Rule changes will have a major impact on the way health care arrangements are structured. The changes are considerably broader than simply joint ventures that provide services “under arrangements” to hospitals, encompassing certain service arrangements for in-office ancillary services. Additionally, prohibiting percentage and per-click payment methodologies for space and equipment leases will further limit the transactions that health care providers will be able to enter into when physicians are involved. While it will take some time to fully reveal all of the nuances of these new rules, it is clear that there will be a major shift in the way such arrangements are structured and services are provided in the future.