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ALERT

CMS PROPOSES MEDICARE FEE CUTS, TIGHTER STARK RESTRICTIONS

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In a notice to be published in the July 12, 2007 Federal Register, the Centers for Medicare and Medicaid Services (CMS) proposes a controversial across-the-board Medicare physician fee reduction of nearly 10%, to be effective in 2008. What failed to make headlines was a long list of proposed changes which would tighten a variety of common exceptions under the Stark physician self-referral statute and jeopardize the continued validity of ventures structured to meet the existing exceptions.

Anti-Markup Provision: CMS would limit the fee for any purchased technical or professional service, or any service performed by a practitioner or provider who assigns his or her right to payment to the billing provider, to no more than the "net charge" of the party performing the service, except for services provided by full-time employees. The end result would be to eliminate any potential profit from common arrangements where a medical practice contracts with another party for professional or technical services.

Burden of Proof: CMS would clarify its rules to place the burden of proving compliance with the Stark law on the provider billing for the designated health service.

In-Office Ancillary Services: Citing a long list of alleged abuses, CMS solicits comments on whether to tighten up its most commonly-used Stark exception, particularly to limit therapy to services that qualify as "incident-to" a physician's services; to modify the definitions of "same building" and "centralized building"; to limit the ability of nonspecialist physicians to order specialized services; and to otherwise curtail program or patient abuse. Expect vigorous lobbying from interested parties on both sides.

Obstetrical Malpractice Insurance Subsidies: CMS responds to claims that the current exception is too narrow by soliciting suggestions on how to broaden it, and lists nine potential safeguards for consideration and comment.

Unit-of-service (Per-click) Payments in Space and Equipment Leases: In a reversal of its prior position, CMS proposes banning the use of per-click fees in leases where the payments are made to a physician who refers the patient for services, such as where a physician leases space or equipment to a company that provides diagnostic testing to the physician's patients. CMS solicits comments on whether the reverse situation should also be curtailed, i.e., where the physician leases space or equipment from a party who refers patients to the physician for designated health services.

"Set In Advance" and Percentage-Based Compensation Arrangements: CMS would narrow the current rule to permit percentage-based compensation to a physician only for services personally performed by the physician and based only on revenue received for such services.

Stand in the Shoes: CMS would deem an entity that provides designated health services (such as a hospital) to "stand in the shoes" of any other entity it controls which may have a compensation arrangement

with a referring physician (such as a foundation or other subsidiary), thereby making it more difficult to characterize the physician's compensation arrangement with the DHS provider as "indirect" and exempt from Stark.

Services Furnished "Under Arrangements": CMS reacts to the growth of physician-owned entities which contract with hospitals to provide services to be billed by the hospitals, and questions their motives and validity. CMS proposes changing its definition of "entity" to include both the entity that performs the DHS as well as the entity that submits the claims. Therefore, joint ventures including referring physicians which do not bill Medicare but instead contract with hospitals to provide services under arrangements would be directly subject to the same Stark rules as the hospitals. Coupled with the anti-markup provision, these changes would likely result in the termination of most "under arrangements" deals which include referring physicians.

Non-Stark Changes: CMS also proposes to implement a number of the controversial proposed restrictions on Independent Diagnostic Testing Facilities (IDTFs) which were withdrawn in February, including prohibiting all space-sharing arrangements for fixed-site ITDFs and limiting the number of IDTFs that one physician may supervise. Additional changes would impact CORFs, telemedicine, DRA payments for ophthalmic imaging, PT and OT qualifications, and a variety of other services.

Comment Period: CMS will accept comments on the Proposed Rule until August 31, 2007. The full rule can be accessed at http://tinyurl.com/yuvulp. But, be forewarned – it's 924 pages long.

To understand how these changes would affect you if they are adopted in final form, please contact:

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