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CMS Proposes Stark Law Modifications

On July 15, 2015, the U.S. Centers for Medicare and Medicaid Services (CMS) proposed Medicare Part B physician fee schedule rulemaking is expected to be published in the Federal Register. Included therein are proposals for substantial changes to, and clarifications of, the federal physician self-referral law (Stark Law) that could have a substantial impact on providers if finalized. CMS proposes two new exceptions, proposes relaxing requirements under certain existing exceptions while tightening requirements under others, and proposes to clarify areas of ambiguity made obvious to CMS through reports received via the Self-Referral Disclosure Protocol. Some of the most notable proposed changes are as follows:

New Exception for Non-Physician Recruitment Assistance

CMS proposes a new exception to the Stark Law for non-physician practitioner recruitment assistance. This exception would allow hospitals, FQHCs, and RHCs to make payments to physicians to assist physicians in recruiting and employing physician assistants, nurse practitioners, clinical nurse specialists, and certified nurse midwifes (non-physician practitioners) in the areas of general internal medicine, general family practice, obstetrics and gynecology, and pediatrics. The proposed rules would include geographic and durational limitations, would not apply to the engagement of nurse anesthetists, would not allow payment to physicians to recruit specialty non-physician practitioners in areas such as cardiology or surgery, and would not allow payment to physicians for the recruitment of non-physician practitioners on an independent contractor basis.

New Exception for Timeshare Arrangements

A new exception for timeshares was proposed and would apply where space is used on a less-than-exclusive basis without any actual transfer of dominion or control over the premises, equipment, personnel, items, supplies, and services. This exception would allow for short-term, less than one year arrangements, and would not require exclusive use of the space. Fees under a timeshare could be paid on a daily or hourly basis, or paid on any other time-based scale, but the proposed regulations specifically prohibit any compensation methodologies based on the number of patients seen. Licensors must

be hospitals or physician organizations.

"Agreement" and "Writing"

The proposed rules would revise all exceptions that reference an "agreement" to instead reference an "arrangement," and clarify that where arrangements require a "writing," this "writing" need not be a single contract or agreement. Instead, a series of contemporaneous documents evidencing the arrangement could be used to show the course of conduct between the parties so long as it would allow the government to verify compliance with the applicable exception.

Signature Requirements – Temporary Noncompliance

The proposed rules would allow 90 days to obtain missing signatures whether the signature was inadvertently or purposely left off a document. This would give more flexibility to contracting parties in comparison to the 30 days currently allowed for missing signatures that are not inadvertent.

One-Year Term

Under the proposed rules, writings would not specifically have to state that the arrangement would continue for a term of one year; instead the parties could rely on a collection of documents as evidence the arrangement lasted for one year, or alternatively, where the arrangement terminated during year one, the parties could rely on a collection of documents as evidence that no other arrangement was entered into during year one for the same space, equipment, etc., as the case may be.

Holdover Arrangements

CMS proposes more flexibility in terms of holdover arrangements for space leases, equipment leases, and personal services arrangements. Holdovers are currently limited to six months on the same terms as the expired arrangement. CMS proposes allowing holdover to continue indefinitely, or alternatively, for definite periods of time (e.g., one year, three years, etc.). But, CMS also proposes to clarify that payment under the holdover arrangement must be fair market value at the time the lease expires and remain fair market value throughout the holdover period.

FQHCs and RHCs – Geographic Area

The proposed rules would add a new definition of "geographic area" for recruiting physicians to those areas served by a FQHC or RHC to ensure the definition appropriately captures the areas where FQHC and RHC patients reside and to provide certainty to FQHCs and RHCs that physician recruitment arrangements satisfy an exception.

Definition of Remuneration

The definition of "remuneration," specifically excludes items "'used solely' to collect, transport, process or store specimens for the entity providing the items, devices or supplies, or to order or communicate the results of tests . . ." The definition was revised to make clear that whether these items are used for one *or more* of the six functions listed, the items will still be considered to be "used solely" for a permitted purpose, and therefore will be excluded from the definition of remuneration.

Stand in the Shoes

The proposed rules would clarify that while only owner or investor physicians and those who volunteer to "stand in the shoes" of their physician organizations will stand in the shoes for purposes of the signature requirements under certain exceptions, *all physicians* engaged by the organization will be deemed parties to the arrangement (including employees and independent contractor physicians) for purposes of applying all other requirements under the exceptions.

Physician-Owned Hospitals – Disclosure

Physician-owned hospitals (POH), which are required to disclose physician ownership on any "public website for the

hospital," would not have to disclose the physician ownership on certain social media and patient portals as these certain social media sites and patient portals would not fall under the definition of "public website for the hospital."

Physician Owned Hospitals – Bona Fide Investment

CMS proposes reversing its prior stance on the issue of non-practicing or retired physician ownership in POHs. CMS previously took the position that non-referring physician owners would not be included in calculating the level of physician investment. The proposed rules would change the way ownership is calculated and could include both referring and non-referring physicians. If finalized, some POHs might be required to make adjustments to levels of physician investment to comply.

As noted above, these changes are not yet final. CMS will be accepting comments on a number of the proposed changes and clarifications through Sept. 8, 2015.

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