

STARK CHANGES AS CMS FINALIZES IPPS 2009 RULE

On July 13, 2008, the Centers for Medicare and Medicaid Services (“CMS”) issued the final Hospital Inpatient Prospective Payment Systems for Fiscal Year 2009 (“IPPS 2009”) and published the rule in the Federal Register on August 19, 2008. Many of the changes set forth in the final rule contradict the initial proposals issued by CMS during the comment period this past July. CMS admitted responding to public comments and attempted to provide clarification and maintain some flexibility to allow exceptions to be met. Several noteworthy changes in the IPPS 2009 final rule include modification to the “stand in the shoes” doctrine, prohibited non-rural “under arrangements,” prohibited “per-click” leases and clarification regarding the period of disallowance.

“STAND IN THE SHOES” DOCTRINE

The “stand in the shoes” doctrine was introduced in Stark Phase III on December 4, 2007. Under this doctrine, many of the indirect compensation arrangements became direct compensation arrangements, forcing parties to find a direct compensation exception. As it stood, physician owners, employees and independent contractors all stood in the shoes of their physician organizations. Then in April 2008, CMS set forth two different proposals to amend the “stand in the shoes” doctrine, neither adopted by CMS. Instead, under the IPPS 2009 final rule, no non-owner physicians are required to stand in the shoes of their organization, allowing parties to continue using indirect compensation exceptions.

“Titular” physician owners (i.e., those physicians who do not have any right to receive financial benefits for their ownership or investment) will not be required to stand in the shoes of their physician organization. However, physician non-owners may elect to stand in the shoes of their organization in order to fit into a direct compensation exception. By allowing for such an election, CMS has provided a flexible standard that will allow parties to engage in arrangements that fit into an exception, whether direct or indirect. Although this modification will take effect on October 1, 2008, CMS provides that any arrangement in compliance with the “stand in the shoes” doctrine prior to these changes will not require restructuring until the expiration of its original term.

Although proposed in April, CMS did not create an exception for “mission payments” between physician organizations and academic medical centers. Instead, the “stand in the shoes” doctrine will not apply to such arrangements. In addition, CMS did not make a final rule regarding the DHS entity “stand in the shoes” proposal. Under this proposal, a DHS entity would have stood in the shoes of its affiliated or subsidiary entity. Although CMS did not issue this rule, it cautioned that the use of affiliated entities to bypass the intended restrictions under Stark will be highly scrutinized.

“UNDER ARRANGEMENTS”

Effective October 1, 2009, CMS will adopt a new definition of the term “entity” which is to

include both persons or entities that not only bill for DHS services, but also perform such services. Essentially, if a physician is an owner of the “under arrangement” service provider, an ownership exception must be met to allow that physician to make any referrals to the provider. Despite this new definition, the IPPS 2009 final rule did not limit the rural provider ownership exception. This change demonstrates CMS continued concern regarding overutilization through “under arrangements.”

“PER CLICK” LEASING AGREEMENTS

Under the IPPS 2009 final rule, CMS now prohibits “per-click” space and equipment lease payments. This prohibition against “per-click” payment is not limited to situations where the physician is the lessor, but also when the referring physicians has an interest in an entity acting as the lessor. The same prohibition will apply if the DHS entity is a lessor leasing to a lessee physician. Importantly, this prohibition includes all leases operating on a “per-click” basis, not just those used to provide DHS. By making such a change, CMS has closed a loop hole that allowed referring physicians or entities to benefit from every referral made.

PERIOD OF DISALLOWANCE

Effective October 1, 2008, CMS set forth the outermost duration of the period of disallowance in certain situations. CMS now clarifies that where the reason(s) a financial relationship does not meet an exception is not related to compensation, the period of disallowance will begin on the first date of non-compliance and end no later than the date the arrangement was brought into compliance. Conversely, where the reason(s) is related to excess compensation, the period of disallowance will begin on the first date of non-compliance and end no later than the date the excess compensation was returned by the party receiving it to the party that provided it and all other requirements of the applicable exception are met.

Clients are strongly encouraged to examine existing arrangements to determine the type of compensation arrangement and ensure compliance under the IPPS 2009 final rule. Should you have any questions regarding an existing arrangement or require an alternative for compliance under these changes, please contact a member of our Health Care Group.

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