New Stark Regulation Will Eliminate Most Under Arrangements Joint Ventures

By Daniel Murphy

The Centers for Medicare & Medicaid Services (CMS) recently adopted a regulation that will eliminate most hospital-physician "under arrangements" joint ventures effective October 1, 2009. In a final rule released on August 1, CMS enacted changes to the Stark regulations that will prohibit physician ownership in under arrangements joint ventures with hospitals, other than those that meet the Stark law "rural provider" exception.

Existing under arrangements joint ventures that cannot comply with the new rule will have to be unwound by the effective date. Although the new rule will outlaw physician ownership in most under arrangements joint venture entities, it is important to note that contractual services arrangements directly between hospitals and physicians, in which no ownership relationship exists, will remain permissible if properly structured.

The Under Arrangements Model.

An under arrangements relationship is a transaction in which a hospital contracts with a third party to provide services to the hospital and the hospital bills for the services. Although the third party actually provides the service to the Medicare patient, the hospital is permitted to bill for the service under its provider number. Under arrangements relationships take two forms: (1) purely contractual arrangements directly between a hospital and a physician or physician group practice; and (2) joint venture arrangements in which the hospital and physician or physician group take ownership interests in a company that, in turn, contracts with the hospital to provide the services.

Changes to the Regulations.

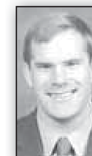
The new rule will make it impossible for non-rural providers to find a Stark law exception to protect physician ownership in under arrangements joint venture companies. CMS implemented these restrictions indirectly by revising the definition of the term "entity." For the Stark law to apply to a physician referral, the referral must be to an "entity" with which the physician has a financial relationship. The definition of this term currently covers only the person or company that that submits claims to CMS for designated health services (DHS). Under the new rule, the definition of "entity" will be expanded to include the entity that actually performs the DHS. Currently, a physican-hospital under arrangements company does not constitute an entity under the Stark law because it does not bill Medicare: the hospital does. After the rule takes effect, both the billing hospital and the under arrangements joint venture company that performs the services will be considered "entities" under the Stark law.

Because physician ownership in an under arrangements company will constitute a "financial relationship" with an "entity" under the Stark law, this relationship must either (1) meet an available Stark law exception, or (2) be terminated. Generally, the only under arrangements ownership relationships that will survive the new rule will be those that can meet the Stark law rural provider exception. As noted above, Stark law exceptions will still be available to protect contract-only under arrangements relationships.

Industry Reactions.

CMS received numerous comments both in favor and in opposition to the under arrangements changes. Physician specialists in areas in which expensive equipment is available to perform procedures reimbursable under a hospital's provider number, such as radiologists, oncologists (*e.g.* intensity modulated radiation therapy equipment), cardiologists (*e.g.* cardiac catheterization) and urologists (*e.g.* lithotripters), fought the rule. For these specialists, under arrangements joint ventures previously represented a Stark-compliant way to share in hospital technical fees for procedures that would otherwise result only in professional reimbursement. The physician opponents of the rule argued that under arrangements joint ventures expand patient access to specialized care by encouraging investment in services and new technology that hospitals alone would not undertake.

On the other hand, hospitals argued that the prior ability of physicians to own equity in an under arrangements



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