

Recent CMS Guidance Foreshadows Demise of "Under Arrangements" Transactions

BY JUDD HARWOOD

Medicare has historically permitted hospitals to contract with third-party service providers to obtain services for its patients that the hospital did not previously provide — or did not wish to directly provide for its patients — by outsourcing such services "under arrangements." In essence, an "under arrangements" relationship is no more than a means by which a hospital can purchase hospital services from another entity and offer those services to its patients as its own. In many cases, the third-party service provider is a physician-owned company or a joint venture owned collectively by physicians and the participating hospital.

As the healthcare marketplace and economy have changed, many hospitals and physicians have developed new, more expansive "under arrangements" models that the Centers for Medicare and Medicaid Services (CMS) believe exist for no legitimate reason other than to allow referring physicians an opportunity to make money on referrals for separately payable services.

On July 12, 2007, CMS published in the Federal Register the 2008 Medicare Physician Fee Schedule (PFS) proposed rule. In addition to providing new policies and payment rates for physicians and other providers who are paid under the Medicare physician fee schedule, CMS proposed a number of major revisions to the Stark Law and related Medicare reimbursement rules directed at physician self-referral arrangements. Perhaps the most dramatic proposal in the PFS proposed rule is an amendment to the Stark regulations aimed at limiting the existence of "under arrangements" transactions.

In the PFS proposed rule, CMS noted that it was very concerned with the proliferation of perceived abusive "under arrangements" ventures, especially "under arrangements" models that are owned by referring physicians and a participating hospital. CMS has taken the position that these arrangements serve no purpose other than to give the physicians an opportunity to profit from referring patients for the "under arrangements" services. Because a referring physician who owns the "under arrangements" supplier refers the patient to the hospital for treatment rather than to the "under arrangements" supplier, the Stark Law exceptions for compensation arrangements apply, rather than ownership exceptions. This makes compliance with the Stark Law more feasible. In an effort to limit such arrangements, CMS has proposed to amend the definition of "entity" under the Stark regulations to include the per-

son or entity that bills the Medicare or Medicaid program as well as the person or entity that actually "performs the designated health service."

The practical effect of this proposed change would be to require referring physicians who own an interest in an entity that provides designated health services to a hospital "under arrangements" to satisfy an ownership exception to the Stark Law. In general, this would be possible only where: (i) the service provider is a rural provider or (ii) the service provider is owned solely by physicians who are not deemed to make a "referral" to the entity for purposes of the Stark Law (e.g., radiologists).

On November 1, 2007, CMS issued the final 2008 Physician Fee Schedule rule and advised that it was not prudent to finalize the provisions dealing with the physician self-referral prohibition that were included in the PFS proposed rule. CMS cited the number of physician self-referral proposals, the significance of the provisions both individually and together, and the volume of public comments for its decision to not include the self-referral provisions at this time. CMS indicated, however, that it has sufficient information to finalize revisions to the physician self-referral regulations without the need for new proposals and additional public comment. At a later date, CMS intends

to publish a final rule that addresses the physician self-referral proposals highlighted in the PFS proposed rule.

Whether the proposed change to the Stark Law regulations is adopted in the form included in the PFS proposed rule or another variant, it is substantially likely that CMS will adopt a regulatory change that will severely limit "under arrangements" transactions between hospitals and referring physicians. Healthcare providers that have entered, or are considering enter-

ing, into "under arrangements" services transaction ventures that involve designated health services should be aware that these proposed revisions, if finalized, may prohibit or otherwise necessitate the restructuring or termination of such arrangements.



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