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# CMS Proposes New Stark Exception for Gainsharing and Incentive Payment Programs

BY DANIEL MURPHY

The Centers for Medicare and Medicaid Services (“CMS”) issued a new proposed rule that would add a regulatory exception to the Stark law to protect gainsharing and incentive payment programs between hospitals and physicians. Properly structured gainsharing arrangements present hospitals with an opportunity to provide physicians with an incentive to reduce costs by sharing cost savings. Similarly, incentive payment programs allow hospitals to offer physicians economic incentives to provide top quality patient care.

In a proposed rule published on July 7, CMS issued its proposed 2009 Physician Fee Schedule along with other proposals, including the new Stark exception. The proposed Stark exception would cover incentive payment programs, also known as “pay-for-performance” or “value-based purchasing”, and shared savings programs. Shared savings programs are commonly referred to as “gainsharing” arrangements. Under a typical gainsharing agreement, a hospital contracts with a group of physicians to set targets for cost savings in the use of supplies, such as surgical supplies, or services used by the physicians at the hospital. The participants in the arrangement measure baseline (historical) costs for the items or services covered by the agreement, and compare costs incurred during the arrangement to the baseline. The hospital then pays the physicians a portion of savings achieved. In a typical pay-for-performance (“P4P”) arrangement, hospitals make incentive payments to physicians for achieving objective, clearly defined quality of care measures.

The new exception constitutes the first effort by CMS to directly address the guidelines of acceptable P4P and gainsharing arrangements under the Stark Law. Although the Department of Health and Human Services, Office of Inspector General (“OIG”) has issued ten advisory opinions and a Special Advisory Bulletin about gainsharing, CMS has offered little guidance on the status of gainsharing or P4P under the Stark Law. Hospitals and physicians have previously relied on incorporating gainsharing elements into arrangements protected by other Stark exceptions. These other exceptions, such as those

for *bona fide* employment relationships, personal services arrangements, fair market value compensation, or indirect compensation arrangements, were not set up to deal with the complexities of P4P or gainsharing arrangements. By proposing an exception designed specifically for P4P and gainsharing arrangements, CMS is providing clear instructions on how to structure these arrangements in compliance with the Stark Law for the first time.

Three key provisions of the proposed rule define its scope. First, the proposed exception only applies to programs offered by hospitals, and cannot be offered by any other Medicare providers or suppliers. Second, the incentive payment and shared savings programs can only be offered to physicians or “qualified physician organization[s],” as defined in the proposed rule. Under the proposed rule, “qualified physician organization” means “a physician organization comprised entirely of physicians participating in the same incentive payment or shared savings program.” Finally, the exception would only apply to “cash or cash equivalent” forms of payment, and would not cover non-monetary remuneration. For example, a hospital could not provide free or discounted office space or equipment as compensation to a physician under the exception.

In formulating the exception, CMS explained the fraud, waste and abuse risks against which it intended to protect. According to CMS, P4P arrangements present the risks of disguised payments for referrals, participants cherry-picking healthy patients and steering sicker patients to other hospitals. Gainsharing arrangements, according to CMS, present the risks of: disguised payments for referrals; physicians not using quality, but more expensive, devices, tests or treatments; cherry picking healthy patients; steering sicker patients to other hospitals; and discharging patients quicker than clinically indicated.

CMS has divided the 16 requirements of the exception into three conceptual categories: (1) design of the program; (2) payments; and (3) arrangements between a hospital and the participating physician or qualified physician organization.

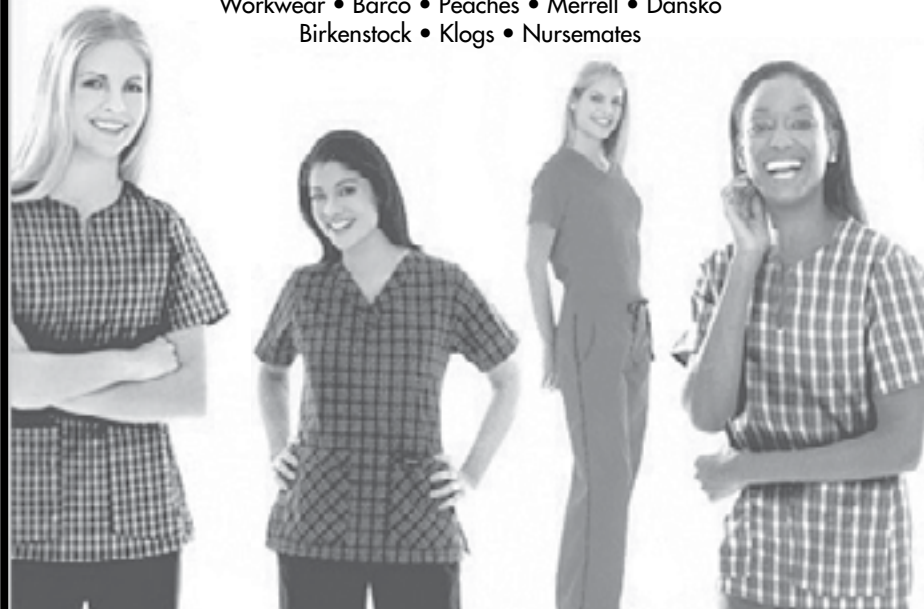
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## Grand Rounds

### Alacare's John G. Beard, Mba/jd Appointed To Alabama Quality Assurance Foundation Board Of Directors

John G. Beard, MBA/JD, Chairman and President of Alacare Home Health & Hospice, has been appointed to the Board of Directors of the Alabama Quality Assurance Foundation (AQAF).



John G. Beard

As an AQAF board member, Mr. Beard will work with the Foundation to improve the quality of health care for the state's 780,000 Medicare beneficiaries. He will continue to work directly with state and federal government officials, as well as private organizations, to coordinate contracts that ensure the constantly improving caliber of health care throughout Alabama.

Mr. Beard has shown a commitment to providing excellent care for Alabamians throughout his career in the field. He was recently appointed to the State-wide Health Coordinating Council by Governor Bob Riley. Mr. Beard begins his three-year appointment to the AQAF Board at the end of June.

Mr. Beard has been employed with Alacare Home health & Hospice for over 32 years. He earned his BS in Business Administration from Auburn University in 1972 and a Masters in Business Administration at Samford University in 1976. That same year, Mr. Beard earned a Juris Doctorate degree at Cumberland School of Law. Mr. Beard is a Member of the Alabama Bar Association, American Bar Association and American Health Lawyers Association.

### Brookwood Medical Center receives American Heart Association's Awards

Brookwood Medical Center recently received the American Heart Association's Get With The Guidelines –Coronary Artery Disease (GWTG–CAD) Gold Performance Achievement Award as well as the Get With The GuidelinesSM–Heart Failure (GWTG–HF) Silver Performance Achievement Award. Brookwood is only Birmingham-area hospital to receive the Gold award, and is one of only two recipient hospitals in the state of Alabama.

The Gold award recognizes Brookwood's commitment and success in implementing a higher standard of cardiac care that effectively improves treatment of patients hospitalized with coronary artery disease.

The Silver award signifies that Brookwood has reached an aggressive goal of treating heart failure patients with 85% compliance for one year to core standard levels of care as outlined by the American Heart Association/American College of Cardiology secondary prevention guidelines for heart failure patients.

Hospitals that receive the GWTG–CAD Gold Performance Achievement Award have demonstrated for 24 consecutive months that at least 85 percent of its eligible coronary patients (without contraindications) are discharged following the American Heart Association's recommended treatment guidelines.

The GWTG-Heart Failure module, developed with support from an unrestricted educational grant from GlaxoSmithKline, is being implemented in hospitals around the country.

## CMS Proposes New Exception, *continued from page 24*

Key elements of the exception include:

- Only hospitals may offer P4P or gainsharing programs.
- Only physicians or qualified physician organizations may participate in a program.
- Only cash or cash equivalent forms of payment are covered by the exception.
- Quality measures must be listed in the CMS Specification Manual for National Hospital Quality Measures.
- The term of the arrangement must be between one and three years.
- The arrangement must set baseline and target performance levels that are objective and verifiable. Baselines must include all previous P4P or gainsharing initiatives.
- Payments must be set in advance, not vary during the term of the agreement, not take into account the volume

or value of referrals or other business generated by the parties, and may not be based on reductions in lengths of stay.

Gainsharing and P4P arrangements provide hospitals with an effective lever for encouraging physicians to support hospital cost saving and patient care quality initiatives. Although the proposed rule is somewhat complex, it also gives hospitals and physicians the clearest guidance to date under the Stark Law on implementing these arrangements. CMS will accept comments from the public on the proposed rule until August 29, 2008 and anticipates that the final rule will be issued by November 1, 2008.



Daniel Murphy is an attorney in the Health Law Practice Group of Balch & Bingham law firm.