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Health Advisory: CMS Moves Forward with a Modified Disclosure of Financial Relationships Initiative

9/9/2008

As discussed in the Inpatient Prospective Payment System (IPPS) 2009 final rule (final rule) published in the August 19, 2008 Federal Register, the Centers for Medicare and Medicaid Services (CMS) is moving forward with its Disclosure of Financial Relationships Report (DFRR) initiative,[1] the purpose of which is to assess compliance with the Stark law by requiring surveyed hospitals to provide detailed information about their ownership, investment, and compensation arrangements with physicians. CMS solicited comments last April about a number of issues relating to the DFRR. Hospitals, physicians, and other healthcare providers and suppliers should pay attention to this initiative whether or not they (or their hospitals) are among those facilities being asked to complete the survey. Because CMS will use the results from the DFRR to assess compliance with the Stark law, we expect that the survey will not be a self-limiting assessment tool.

The DFRR grew out of a voluntary survey form sent by CMS in June 2006, to 130 specialty hospitals and 322 general acute-care hospitals. The survey was implemented pursuant to Section 5006 of the Deficit Reduction Act of 2005 (DRA), with an initial focus on certain issues relating to physician investment in specialty hospitals. Of the hospitals receiving the voluntary survey, 290 did not respond or provided incomplete responses regarding the financial relationships between the hospitals and physicians.

Due to the limited response, CMS felt that it had not received enough information through the voluntary process to analyze physician investment in specialty hospitals, and therefore developed a new mandatory form called the Disclosure of Financial Relationships Report (DFRR). In June 2007, utilizing its authority under Section 1877(f) of the Social Security Act and 42 C.F.R. §411.361, CMS issued a notice of proposed information collection regarding the form, which was to be sent to 500 hospitals, including those that were previously sent the voluntary survey but did not respond. CMS also published a revised version of the DFRR in September 2007. In accordance with the Paperwork Reduction Act (PRA), the Office of Management and Budget (OMB) was required to clear the form. However, the OMB took no action on the DFRR, and, after several months, on April 8, 2008, CMS withdrew the DFRR from the OMB's review.

CMS has indicated that it is preparing a revised PRA submission for the DFRR form, which will be published in a separate 30-day Federal Register notice. Accordingly, CMS noted that the guidance set forth in the IPPS rule may change based on CMS's further review, as well as on comments received from the public in response to the revised PRA submission. By way of example, CMS has stated that it may decide to decrease the number of hospitals to whom the survey will be sent.

The DFRR form annexed to the April 30, 2008 proposed IPPS rule (as well as prior communications relating to the DFRR) requested the information with regard to cost reporting periods ending in 2006.[2] The final rule makes no mention of the cost reporting period to be used.

In April, CMS requested comments on several aspects of the proposed DFRR information collection instrument,[3] and what follows is CMS's current position on those items as articulated in the final rule:

- CMS plans to use the DFRR as a one-time information collection effort, with no present plans for annual or other periodic information collection. However, CMS may propose future rule-making to use either the DFRR or some other information collection instrument.
- CMS has concluded that it is collecting the correct information (both as to type and amount), and will be making only minor modifications to the DFRR. As noted above, a revised PRA notice will be published separately in the Federal Register, and there will be opportunity for public comment on the DFRR instrument.
- CMS sought information about the amount of time it would take hospitals to complete the DFRR and the costs associated with completing the DFRR, as well as the amount of time that should be given to hospitals to complete and return their responses to CMS. In 2007, CMS estimated that it would take each hospital about 31 hours to complete the form. This estimate has been increased to 100 hours. Notably, the 31-hour estimate was priced at $50 per hour, and the current 100-hour estimate is priced at $40.80 per hour. The $50-per-hour rate was based on "accounting personnel" preparing the form, while the new estimate relies on a combination of 60 hours of administrative and accounting staff and 40 hours of legal counsel time.[4] (When the DFRR was initially developed, the estimate was that it would take 4 hours to complete; a revised estimate was 6 hours, and now we are at 100 hours.) The prior version called for completion of the form within 45 days, with $10,000 per day in civil monetary penalties accruing for late submissions. The current rule gives the hospitals 60 days to complete the form, running from the date on the CMS cover letter or e-mail. While CMS notes that it has the authority to impose the $10,000 per day penalties, it has committed that, prior to imposing the penalties, CMS will send each tardy hospital a letter asking why the DFRR was not returned on time. Additionally, CMS is giving hospitals the ability to request an extension for good cause.
- CMS is planning to send the DFRR only to those 500 hospitals previously identified. However, as noted above, CMS intends to use the results of the information collection to develop future rulemaking.

We also note that in the 2007 version of the DFRR, CMS asked for copies of each agreement. CMS has revised Worksheet 7 of the DFRR and the related instructions to allow hospitals to submit one copy of a uniform rental or recruitment agreement. CMS notes that this mechanism can be used only if all of the material terms of the agreement are the same. Thus, leases for medical office space with the value of the space and the price per square foot being equal—even if different physicians rent different sized offices—may be considered uniform. However, if the price per square foot varies from tenant to tenant, copies of all agreements should be submitted. CMS notes that if the "uniform" threshold can be met, the hospital still must identify each physician who has entered into the uniform agreement. On the issue of what is "uniform," however, the devil may be in the details: what is a "material" term may be subject to interpretation. CMS has provided examples of office lease situations that are obviously "uniform" as well as examples that are obviously not "uniform," leaving it to the providers to guess on close cases.

This Health Advisory is an update of Mintz Levin's June 22, 2007 Health Advisory about the DFRR. Please click here for a link to that Health Advisory.

Given that CMS is moving forward with the DFRR initiative, this is a good time for hospitals to review the ownership, investment, and compensation relationships they have with physicians (and their family members). The review should include not only a substantive review of the relationships for compliance with the Stark law but, because many hospitals maintain this documentation in a decentralized fashion, the development of a centralized inventory of where the information is located is also a wise move.

Endnotes

[1] *See* 73 Fed. Reg. 48740-48745 (Aug. 19, 2008).

[2] *See* 73 Fed. Reg. 23825-23938 (Apr. 30, 2008).

[3] 73 Fed. Reg. 23698 (Apr. 30, 2008).

[4] 73 Fed. Reg. 48743 (Aug. 19, 2008).

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If you would like further information on any subject covered in this Advisory, please contact:

Thomas S. Crane
Boston: **(617) 348-1676**
Washington: **(202) 661-8787**
TSCrane@mintz.com

Karen S. Lovitch
Washington
(202) 434-7324
KSLovitch@mintz.com

Margaret D. Kranz
New York
(212) 692-6882
MKranz@mintz.com

or the Mintz Levin attorney who ordinarily handles your legal affairs.

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