

CMS Requires Disclosure of Financial Relationships Under Stark

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Practice Area: Health Law

The Centers for Medicare & Medicaid Services (CMS) has announced that it will be requiring certain hospitals to submit information on physician investment, ownership and compensation arrangements in order to determine whether they are in compliance with the Stark physician self-referral law. The selected hospitals will be required to complete a Disclosure of Financial Relationships Report (DFRR) and return the information to CMS within 45 days, with civil monetary penalties for late submission. The DFRR must be certified by the hospital's CEO or CFO.

This announcement serves as a reminder to all Medicare-participating hospitals of the need to track financial relationships with physicians, whether or not a hospital receives a request to submit the DFRR to CMS.

Background. In the proposed Stark II regulations issued in January 1998, CMS indicated that it intended to require annual reporting of financial relationships between hospitals and referring physicians. When it issued Phase II of the final rules in 2004, however, CMS retreated from periodic mandatory reporting in favor of an approach that required entities to furnish reportable information upon request. Hospitals may be required to report the name and UPIN (or NPI, if available) of the physician, the covered services provided by the entity, and the nature of the financial relationships with the physician or the physician's immediate family members. Hospitals must be given at least 30 days to provide requested information. Failure to report can result in civil monetary penalties of up to \$10,000 per day.

Following an August 2006 report to Congress concerning financial relationships under Stark, CMS sent a voluntary survey to selected specialty and competitor hospitals in an effort to obtain more information on the proportionality of physician investment in specialty hospitals. 290 hospitals did not respond to that voluntary questionnaire. CMS now intends to target those 290 hospitals with the mandatory disclosure under the DFRR. CMS will select an additional 210 hospitals to complete the DFRR for a total of 500 hospitals. The requests for information are scheduled to be issued in September 2007.

Information Requested.

Ownership Interests. The principal focus of the DFRR will be on direct ownership and investment interests held by physicians and hospitals. The DFRR explicitly does not seek information regarding indirect ownership or investment interests, however (hospital ownership interests held by physicians through an intermediate entity). The DFRR seeks particulars on physician ownership on an individual as well as aggregate basis, and requests data on ownership percentages as well as detailed physician payment information such as initial investments, assessments and capital calls. The DFRR also requires disclosure of loans and loan guarantees by the hospital on behalf of physician owners.

Under Arrangements. The DFRR includes a section pertaining to lease or "under arrangements" relationships involving land, improvements, and capital equipment. For each of these areas, the DFRR requires the responding hospital to identify whether the hospital is the sole owner of the assets used in hospital operations, and if not, the hospital is required to identify the owner and provide further information on the nature of the relationship between the hospital and the owner of that asset.

Compensation Arrangements. Finally, responding hospitals are required to disclose certain compensation arrangements under Stark. This includes arrangements with physicians involving office and equipment rentals, personal services, and recruitment; for each of these, the hospital is required to provide a copy of the written agreement in place with the physician during the period ending in 2006. The DFRR also requires identification of certain other types of compensation arrangements, including isolated transactions, so-called "unrelated" transactions, charitable donations, non-monetary compensation, and medical staff incidental benefits. These latter two categories only need to be disclosed if they involve compensation in excess of the relatively low dollar thresholds set forth in the Stark regulations.

The DFRR is notable for what it does not request. Perhaps most significant is that the DFRR does not explicitly request information on indirect compensation arrangements. Absent indication from CMS to the contrary, hospitals apparently will not be required to report financial relationships with physician practice groups as opposed to individual physicians.

Even as to direct compensation arrangements, CMS is not requiring disclosure of the full range of relationships identified in the Stark regulations. The most conspicuous exception involves physician employment agreements, which need not be reported. In addition, the DFRR does not require disclosure of compensation arrangements involving risk sharing, compliance training, obstetrical malpractice insurance subsidies, professional courtesy, retention payments, and communitywide health information systems.

Open Issues. As noted previously, this initial request will be directed to 500 hospitals identified by CMS. Information submitted by CMS pursuant to the Paperwork Reduction Act suggests that this is a one-time disclosure. It remains to be seen whether, depending upon the results of this initial round, CMS will expand the program to include all Medicare-participating hospitals or require regular reporting on a periodic basis.

The DFRR itself may be open to interpretation as far as what relationships must be disclosed. As noted above, the DFRR appears to apply only to compensation arrangements directly between physicians and hospitals, and not to indirect compensation arrangements as defined under the Stark regulations. The DFRR generally keys its disclosure categories to specific regulatory exceptions for compensation arrangements. While CMS does not specifically seek information on indirect compensation arrangements, certain of the categories for which CMS does seek information (for example, personal service arrangements and physician recruitment arrangements) may apply to group practices as well as individual physicians. The DFRR also does not explicitly require disclosure of arrangements that qualify for the fair market value exception, although hospitals presumably would still be required to identify lease, personal services, and other arrangements specifically listed in the DFRR even if the arrangement would otherwise meet the criteria under the fair market value exception.

Implications for Non-Recipients. Disclosure will be mandatory for hospitals that receive the DFRR in September. This development is noteworthy for other hospitals as well, however. As noted at the outset, hospitals that have financial relationships with referring physicians are required to retain information and documentation regarding these financial relationships, and provide information to CMS or the Office of Inspector General upon request. If they have not already done so, hospitals should seriously consider implementing a tracking system for reportable financial relationships that would facilitate reporting in the future. The DFRR may provide a starting point in structuring such an internal tracking mechanism, but hospital compliance officers would be well advised to track all reportable financial relationships, not just those that are specifically identified in the DFRR.

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