



HEALTH CARE ALERT

December 19, 2008

CMS' Disclosure of Financial Relationships Report

The Center for Medicare and Medicaid Services ("CMS") announced its intention to proceed with the Disclosure of Financial Relationships Report ("DFRR") survey of hospitals on August 19, 2008. CMS published an additional notice regarding the DFRR in the Federal Register on December 19, 2008. CMS will send a DFRR form to up to 400 general acute care and specialty hospitals nationwide in order to audit the compliance of such hospitals with the Ethics in Patient Referrals Act, commonly known as the Stark Law. Participation in the survey by DFRR recipients is mandatory, and failure to respond in timely fashion could result in a civil monetary penalty of \$10,000 per day until the survey is completed. Although CMS will not begin sending out DFRR forms until at least 30 days after the December 19 publication in the Federal Register, hospitals should become familiar with the information and records required to respond to a DFRR survey to be prepared in the event that they receive the survey.

What is DFRR and What Information Does it Require?

DFRR is a nationwide effort by CMS to audit hospital compliance with the Stark Law. CMS currently intends to conduct the DFRR as a one-time survey, with no requirement of ongoing or regular reporting. However, hospitals should be aware that CMS' position may be subject to change via future rulemaking, particularly if CMS identifies widespread problems with Stark compliance as a result of the survey.

DFRR recipients will be required to provide detailed information regarding (1) physician investment in the hospital; (2) payments made by physician investors to the hospital (including, but not limited to, initial investments, assessments, capital calls, and loan guarantees); (3) investment reconciliations for physician investors; and (4) compensation arrangements with physicians (both investors and non-investors), including, but not limited to, rentals, personal service arrangements and recruitment arrangements. The hospital must also provide information about isolated transactions with physicians (including sales of property or sales of practices); any remuneration to physicians that is not related to designated health services; other payments or charitable donations by physicians to the hospital; non-monetary compensation or incidental medical staff benefits; returns on capital investments; loans or loan guarantees; and payments made by the hospital on behalf of any physician. Hospitals must provide such information with respect to individual physicians, and must also provide such physicians' NPI numbers. Hospitals must also provide detailed documentation in support of their responses to the DFRR questions including, but not limited to, audited financial statements and written agreements with respect to compensation arrangements for which disclosure is required. CMS estimates that each DFRR recipient will require approximately 100 hours to complete its responses to the DFRR form, at a total cost to each recipient of approximately \$4,080. The Chief Executive Officer, Chief Financial Officer or comparable officer of each responding hospital must certify that all of the hospital's responses are true and correct to the best of such officer's belief and knowledge.

How Will CMS Use DFRR Responses and Who May Have Access to DFRR Responses?

CMS intends to use the DFRR survey in order to (1) identify arrangements that may not be in compliance with the Physician Self-Referral statute and regulations, and (2) gather information about hospital practices that may assist CMS in future rulemaking concerning reporting requirements and other physician self-referral provisions. CMS has also indicated that it may share DFRR information with Congress and other federal agencies as permitted or mandated by law. However, confidential business information and any individual-specific information are protected from disclosure under the Freedom of Information Act (“FOIA”) pursuant to Exemptions (4) and (6) of FOIA (5 U.S.C. § 522(b)(4), (6)). The Federal Trade Secrets Act (18 U.S.C. § 1905) also prohibits CMS from releasing confidential business data except as authorized by law.

Who May Receive a DFRR Form?

In CMS’ August 19 announcement, CMS indicated its intention to send DFRR forms to 500 Medicare-participating hospitals. At present, however, CMS has reduced the expected number of DFRR recipients to 400 hospitals. Of the 400 expected recipients, 290 will consist of hospitals that failed to respond to a 2006 CMS voluntary survey of physician financial relationships. CMS may further reduce the total number of recipients depending on the comments it receives during the 30-day comment period after the December 19 notice. All DFRR recipients must respond to the request for information contained in the DFRR unless a recipient can certify that it furnishes a total of fewer than 20 Medicare services during a calendar year.

When Will CMS Send DFRR Forms to Hospitals?

CMS will not begin sending DFRR forms to hospitals until it has allowed 30 days for comments on the December 19 notice, plus some additional time for final approval of the DFRR form by the Office of Management and Budget. However, hospitals should take note of the information that the DFRR will request and ensure that, if they receive a request, they will be able to respond within the required timeframe.

How Much Time Will Hospitals Have to Respond?

Hospitals will have 60 days from the date stamped on the cover letter or e-mail transmission accompanying the DFRR to respond. CMS will consider requests for additional time if based on good cause.

What are the Penalties for Failure to Comply?

Hospitals that fail to respond by the deadline are potentially subject to a penalty of \$10,000 per day until the DFRR is received. However, CMS has indicated that it will not impose penalties until CMS requests explanation for the delay and provides an opportunity for the hospital to respond. As noted above, CMS will also accept requests for extension of time if a hospital has good cause.

As noted, an officer of each responding hospital must certify that the responses to the DFRR are true and correct to the best of such officer's belief and knowledge. Such officer may be subject to a fine or imprisonment of up to five years for false statements contained in the responses. It is also likely that CMS will consider hospitals that submit false responses to be subject to the \$10,000 per day penalty for failure to respond. In addition, hospitals providing false responses may also be subject to penalties under the federal False Claims Act if CMS decides to make compliance with the DFRR a Condition of Participation in the Medicare program.

Because of the burden that the DFRR will impose on hospitals to provide detailed responses and supporting documentation in a very limited time frame, and the potential consequences for inaccurate responses, facilities that may receive the DFRR should begin preparations in order to make a timely and accurate response. Hospitals should also ensure that physicians are made aware of the DFRR and the mandatory nature of the report, and should enlist their assistance in ensuring that the hospital provides accurate information. For more information regarding DFRR and how to respond, or if you have questions regarding this Alert, please feel free to contact any of the following, or the member of the firm who handles your Stark Law/physician contracting matters:

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