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## **Client Alert**

### **CMS Proposes Changes to Physician-Owned Hospital Regulations**

*By: David Jose*

The Center for Medicare & Medicaid Services (CMS) recently published proposed regulations as part of its proposed Physician Fee Schedule and Other Revisions to Part B for CY 2016. The Proposed Rule is extremely comprehensive and addresses many changes to certain details of the Stark Law, including several changes to the Physician-Owned Hospital regulations. The proposals for physician-owned hospitals are directed at current requirements that (1) a physician-owned hospital disclose the fact that the hospital is partially or wholly owned by physicians on any public website or advertising for the hospital; and (2) the percentage of the total value of the ownership or investment interests held in a hospital by physician owners or investors in the aggregate cannot exceed the percentage present as of March 23, 2010. The proposed rule seeks to clarify and modify several issues related to these requirements.

#### **Public Website for the Hospital**

CMS seeks to clarify what constitutes a public website. For example, CMS is proposing that the following do not constitute public websites and are, therefore, exempt from the disclosure requirements: (1) social media websites; (2) posting a video or posting messages via a social media website; (3) electronic patient payment portals; (4) electronic patient care portals; or, (5) electronic health information exchanges. CMS also seeks comment on whether it should include an inclusive definition of what would be considered a “public website for the hospital” and, if so, recommendations for such a definition. Lastly, CMS noted that the content of a posting may require a disclosure of physician ownership due to the “public advertising” requirement even though the website may not constitute a “public website.”



### **Public Advertising for the Hospital**

CMS also has proposed a definition of “public advertising for the hospital” for purposes of the physician self-referral laws. CMS is proposing to define it as “any public communication paid for by the hospital that is primarily intended to persuade individuals to seek care at the hospital.” It would not, however, include communications made for the primary purpose of recruiting hospital staff, public service announcements or community outreach. CMS also clarifies that its primary focus for analysis will be the content of the communication rather than the type of advertising medium, such as billboards or radio ads.

### **Sufficient Statement of Physician Ownership**

CMS also proposes to clarify what constitutes a sufficient statement of physician ownership for purposes of the public website and advertising disclosure requirement by stating that any language that would put a reasonable person on notice that the hospital may be physician-owned is deemed a sufficient statement of ownership. CMS gave several examples, including the following: (1) This hospital is owned or invested in [or partially owned or invested in] by physicians; (2) Founded by physicians; (3) Managed by physicians; or, (4) Operated by physicians. CMS also noted that the disclosure must be located in a conspicuous place on the website, such as the “about us” section.

### **Noncompliance With the Public Website Disclosure Requirement**

If a hospital has been non-compliant with these requirements, they must self-report any overpayments under the Self Reporting Disclosure Protocol. Since physician-owned hospitals were required to comply with the disclosure requirements by September 23, 2011, this is the earliest possible date for non-compliance. CMS also seeks comments on how to calculate the period of non-compliance. CMS stated that the period of noncompliance is the duration of the applicable advertisement’s predetermined initial circulation, unless the hospital amended the advertisement at an earlier date to comply with the disclosure requirements. For example, if an advertisement in a monthly magazine is



noncompliant, the period of noncompliance would only be the one month of actual circulation, even if the magazine continued to be available in the archives. CMS recently encouraged physician-owned hospitals to self-disclose violating of the physician ownership disclosure requirement. That recent encouragement, followed by these proposed regulations, suggests increased monitoring and enforcement in this area.

### **Determining the Bona Fide Investment Level**

Lastly, CMS seeks to change the definition of a “physician owner or investor” for purposes of establishing the baseline bona fide investment level and any bona fide investment level thereafter. This could have broad implications for those hospitals that previously qualified under this exception or pre-operational hospitals. CMS proposes to require that the baseline bona fide investment level and the bona fide investment level include direct and indirect ownership and investment interests held by a physician regardless of whether the physician referred patients to the hospital or was retired at the time of ownership. Currently, the calculation excludes counting physicians that do not refer patients to the hospital. This change could cause hospitals that have been compliant under the current methodology to become noncompliant under the proposed, more expansive definition of “ownership or investment interest.” CMS acknowledges that this proposed change may affect some physician-owned hospitals that relied on the current rule.

A copy of the Proposed Rule can be found here:

<http://www.gpo.gov/fdsys/pkg/FR-2015-07-15/pdf/2015-16875.pdf>. CMS asks that all comments be submitted to CMS no later than 5 pm on September 8, 2015.

If you have any questions about the rules and regulations for physician owned hospitals, including the new proposed regulations published by CMS, please contact David Jose at [djose@psrb.com](mailto:djose@psrb.com) or 317-637-0700.