

HEALTH CAPITAL

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Topics

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CMS Regulatory Updates: 2009 IPPS Rule Finalized

In the August 19, 2008 copy of the Federal Register,¹ CMS finalized many of the provisions found in the 2009 Inpatient Prospective Payment System Proposed Rule.² Notably, CMS finalized its proposals regarding the "stand in the shoes" provision, the prohibition of "per click" leasing arrangements and percentage based rent, and the expansion of the definition of "entity" to include under arrangement service providers.

"Stand in the Shoes" Provision

In the 2009 Inpatient Prospective Payment System Final Rule (Final Rule)³, CMS has issued a more straightforward approach to the "stand in the shoes" doctrine than it had previously proposed. Under the final "stand in the shoes" provision, CMS elected to apply the mandatory provision only to physicians with an ownership or investment interest in the physician organization, and only where that interest includes the ability or right to receive financial benefits.⁴ However, in situations where a physician organization has both owner and non-owner physicians, the Final Rule allows Designated Health Services (DHS) entities to treat the non-owner physicians as standing in the shoes of the physician organization so that two different compensation analyses are not required.⁵ Also excepted from the provisions are arrangements which meet the requirements of the academic medical centers exception.⁶ Additionally, CMS chose not to finalize the proposed rule that would have required a DHS entity to "stand in the shoes" of any organization in which it had a 100% ownership interest. This decision is the result of CMS' desire to make the Final Rule as straightforward as possible by eliminating the necessity of determining the order in which to apply the "stand in the shoes" provisions.

Prohibition of "Per-Click" Arrangements and Percentage Based Rent

CMS also finalized its proposal which prohibits basing the charge for rented space and equipment on a "per-click", or per-unit basis, i.e. , physicians and DHS entity lessors may not charge physician lessees rent based on the number of services provided by the lessees which are referred to them by the lessors. This limitation is imposed under the space and equipment lease exception to Stark, the fair market value exception, and the indirect compensation arrangement exception.⁷ CMS concluded that "on demand" time-based rental arrangements are also considered per-click arrangements and therefore fall under the limitation, as well.⁸



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Similarly, CMS finalized the rule it had proposed which prohibits rental charges based on a percentage of revenues earned in the rented space or with the rented equipment, regardless of whether the services were referred from the lessor.⁹ Excluded from this prohibition are arrangements where physicians pay on a percentage basis for management and billing services. CMS also declared that the rule would not prohibit gainsharing arrangements, as long as they are properly structured incentive payment and shared saving programs.¹⁰ While the rule has been finalized, the potential need for restructuring has led CMS to delay the implementation of these "per-click" limitations until October 1, 2009.

CMS Expands Definition of "Entity" to Include Under Arrangement Service Providers

Also part of the 2009 IPPS Final Rule, CMS included a provision which changes the framework of "under arrangements" such that both the physician-owned entity which provides the service, as well as the hospital which bills for the service, are considered DHS entities for purposes of Stark law.¹¹ The result of this provision is that it will preclude physician-owned entities from performing services on hospital patients "under arrangements" with the hospitals unless the physician-owner(s) can satisfy the ownership exception under Stark. CMS concluded that any entity that performs a service under arrangement for a hospital which is then billed by the hospital is now considered a DHS entity, even if that service would not have been considered a DHS entity if the service was done outside the hospital setting. The only exception to this final conclusion is for lithotripsy services.¹² This provision, as it will also require time for restructuring of arrangements, will also not be implemented until October 1, 2009.

Changes to Incident-to Billing Rules Rescinded

Earlier this summer, after significant pressure from physician organizations and physician advocates, CMS decided to rescind Transmittal 87 concerning its "incident-to" billing rules.¹³ While CMS felt that the changes would only make the incident-to billing rules, clearer, many physician advocate groups challenged the transmittal for substantive changes it would impose. "Incident-to" billing has traditionally been a way for physicians, particularly family care physicians, to be reimbursed by Medicare for services provided under their supervision by non-physician practitioners.¹⁴ Under the proposed changes, there would have been more influence given to Medicare contractors over decisions concerning which services can be billed incident to a physician's care; the definition of "clinic" would have been modified such that only services provided incident to physician care in physician owned and operated clinics would be reimbursed; and, burdensome documentation requirements would have been imposed, including the requirement that all non-physician practitioners include their credentials in every patient's medical file.¹⁵ While rescinding the changes presented in Transmittal 87, however, CMS has indicated that it could present other changes to the incident-to billing rules in the future.

¹73 Fed. Reg. 48433 (Aug. 19, 2008).

²73 Fed. Reg. 23528 (April 30, 2008).

³73 Fed. Reg. 48433 (Aug. 19, 2008).

⁴"Stark Rule Proposals Finalized," By Cathy Dunlay and Kevin Hilvert, Schottenstein Zox & Dunn Resources, 8/13/08, <http://www.szd.com/resources.php?NewsID=1184&method=unique> (Accessed 8/14/08)

⁵"Stark Rule Proposals Finalized," By Cathy Dunlay and Kevin Hilvert, Schottenstein Zox & Dunn Resources, 8/13/08, <http://www.szd.com/resources.php?NewsID=1184&method=unique> (Accessed 8/14/08).

⁶"IPPS rule finalizes certain physician self-referral provisions," AHAnews.com, Aug. 4, 2008, http://www.ahanews.com/ahanews_app/jsp/display.jsp?dcrpath=AHANEWS/AHANewsNowArticle/data/ann_080804_niche&domain=AHANEWS (Accessed 8/20/08).

⁷"Stark Rule Proposals Finalized," By Cathy Dunlay and Kevin Hilvert, Schottenstein Zox & Dunn Resources, 8/13/08, <http://www.szd.com/resources.php?NewsID=1184&method=unique> (Accessed 8/14/08).

⁸"Stark Rule Proposals Finalized," By Cathy Dunlay and Kevin Hilvert, Schottenstein Zox & Dunn Resources, 8/13/08, <http://www.szd.com/resources.php?NewsID=1184&method=unique> (Accessed 8/14/08).

⁹"Stark Rule Proposals Finalized," By Cathy Dunlay and Kevin Hilvert, Schottenstein Zox & Dunn Resources, 8/13/08, <http://www.szd.com/resources.php?NewsID=1184&method=unique> (Accessed 8/14/08).

¹⁰"Stark Rule Proposals Finalized," By Cathy Dunlay and Kevin Hilvert, Schottenstein Zox & Dunn Resources, 8/13/08, <http://www.szd.com/resources.php?NewsID=1184&method=unique> (Accessed 8/14/08).

¹¹73 Fed. Reg. 48721 (Aug. 19, 2008).

¹²73 Fed. Reg. 48730 (Aug. 19, 2008).

¹³"CMS rescinds changes to incident-to billing rules," MGMA, <http://www.mgma.com/policy/default.aspx?id=20030> (Accessed 9/3/08).

¹⁴"The Ins and Outs of 'Incident-to' Reimbursement," By Alice G. Gosfield, J.D., American Academy of Family Physicians, Nov/Dec 2001, <http://www.aafp.org/fpm/20011100/23thei.html> (Accessed 9/3/08).

¹⁵"CMS rescinds changes to incident-to billing rules," MGMA, <http://www.mgma.com/policy/default.aspx?id=20030> (Accessed 9/3/08).



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HEALTH CAPITAL CONSULTANTS (HCC) is an established, nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, Missouri, with regional personnel nationwide. Founded in 1993, HCC has served clients in over 45 states, in providing services including: valuation in all healthcare sectors; financial analysis, including the development of forecasts, budgets and income distribution plans; healthcare provider related intermediary services, including integration, affiliation, acquisition and divestiture; Certificate of Need (CON) and regulatory consulting; litigation support and expert witness services; and, industry research services for healthcare providers and their advisors. HCC's accredited professionals are supported by an experienced research and library support staff to maintain a thorough and extensive knowledge of the healthcare reimbursement, regulatory, technological and competitive environment.



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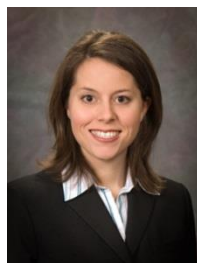
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Mr. Cimasi is the author of numerous additional chapters in anthologies; books, and legal treatises; published articles in peer reviewed and industry trade journals; research papers and case studies; and, is often quoted by healthcare industry press. In 2006, Mr. Cimasi was honored with the prestigious *“Shannon Pratt Award in Business Valuation”* conferred by the Institute of Business Appraisers. Mr. Cimasi serves on the Editorial Board of the Business Appraisals Practice of the Institute of Business Appraisers, of which he is a member of the College of Fellows.



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