Physician Agreements Require Review after New Commentary

BY RICH SANDERS

Based on a new rule and recent guidance from the Centers for Medicare and Medicaid Services ("CMS") and the Office of Inspector General, U.S. Department of Health and Human Services ("OIG") in September and October, hospitals will need to review certain physician agreements as soon as possible to ensure continued compliance.

Last month, we mentioned that CMS eliminated the hourly safe harbor under its new Stark III rules, effective December 4, 2007. CMS determined that the safe harbor was inefficient and difficult for hospitals to utilize. Although it eliminated the safe harbor, CMS stated in Stark III that hospitals should still rely on independent salary surveys and objective sources to ensure physician pay does not exceed fair market value. As a result, hospitals should reevaluate their medical director agreements and other compensation arrangements to ensure they still meet fair market value without the hourly safe harbor.

OIG issues advisory opinion regarding on-call coverage compensation

On September 20, 2007, the OIG issued an advisory opinion approving an arrangement in which a medical center will compensate physicians for on-call coverage of the emergency department; although it implicates the anti-kickback statute, OIG said it would not exclude from federal healthcare program participation nor impose civil monetary penalties and other administrative sanctions on the participants.

According to the arrangement, the medical center pays a per diem rate to the physicians, based on their specialties and whether the call coverage occurs during the weekday or on the weekend. Physician specialty pay was based on the likelihood that the specialist would have to perform services while on-call. Physicians are also required to provide 18 days per year of call coverage without pay.

The compensation agreement arose after physicians refused to cover the medical center's emergency department without pay. The medical center provides services to several thousand uninsured patients, and these patients were admitted frequently to the medical center for further treatment after a visit to the emergency room. The hospital claimed call coverage in the emergency room is essential for it to achieve its mission of providing care to the residents of its community.

OIG accepted the arrangement because the per diem rate was based on the fair market value of the physician's services. First, the medical center had an outside opinion stating that the compensation was a fair market value rate. Second, the arrangement showed the medical center had a legitimate need for on-call compensation, reducing the likelihood that the compensation was for referrals from the physicians. Third, OIG stated that, under the compensation arrangement, federal healthcare programs were not billed, thereby reducing any risk for fraud.

CMS issues advisory opinion regarding physician recruitment compensation

On October 5, 2007, CMS issued an advisory opinion regarding the physician recruitment exception to the federal physician self-referral prohibition, otherwise known as the "Stark" law. CMS concluded that a hospital could not amend an existing physician recruitment agreement to delete a provision requiring the physician to pay back funds under an income guarantee to the hospital.

In this situation, the hospital agreed to provide three loans to a physician as recruitment compensation. CMS focused on the income guarantee loan, which guaranteed the physician monthly revenue for actual start-up costs and operating expenses, less the amount collected by the physician. The income guarantee loan also included an excess receipts provision, which gave the hospital any excess revenue generated by the physician over the actual costs, up to the amount of the loan.

The hospital and physician entered this agreement prior to the effective date of Phase II regulations to Stark. Phase II only allowed a recruitment agreement to include practice expenses that were actual additional incremental costs attributable to the recruited physician. When the physician joined a group practice, the parties amended the recruitment agreement to limit the guaranty to those expenses attributable to the physician. The "excess receipts" provision was then capped at a set amount.

The hospital asked CMS whether an amendment to delete the "excess receipts" provision would be in compliance with the physician recruitment exception to Stark. CMS concluded that an amendment to delete the provision would give the physician additional compensation, over the amount allowed, because the amendment lowers the physician's monthly liability under the "excess receipts" provision. Thus, CMS determined that the amendment fell outside the physician recruitment exception and could possibly generate prohibited compensation.

Taken together, hospital administrators should address these new developments in hospital-physician arrangements immediately to determine whether any amendments to these contracts are necessary.

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