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By Lydia Wheeler

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### Hospitals' Risk May Rise as Anti-Fraud Proposal Narrows Loophole

By Lydia Wheeler 2019-10-24T05:34:16000-04:00

CMS plans to narrow existing exemption in Stark law

Carve-out now used to catch mistakes

Hospitals and other health-care providers largely got what they wanted from the Trump administration in a long-sought plan to revise the physician self-referral rule, but one change could see some pushback.

The Centers for Medicare & Medicaid Services wants to narrow an existing exception for isolated financial transactions that attorneys say has been a safety net to catch mistakes that would otherwise result in costly violations under the Stark Law.

Hospitals could find themselves having to repay Medicare and Medicaid for millions of dollars in claims all because they forgot to put a financial relationship with a physician in writing.

“What’s different about this change is it’s certainly one of the only situations in the proposed rule in which CMS has moved to tighten an exception as opposed to making exceptions more flexible and workable for providers,” said Karen Lovitch, who chairs the health law practice at Mintz.

The change was part of an Oct. 9 proposal in which the agency mapped out broad, new exceptions to the law that bans doctors from referring Medicare patients for medical services that they or an immediate family member would financially benefit from.

In its proposal the CMS said it realized some believe the Stark law’s current exemption for isolated financial transactions can be used to protect financial arrangements where a health-care facility pays a physician for multiple services over an extended period of time in one single payment.

**‘Just Slip-Ups’**

That was never what Congress intended, the CMS said. The exception was designed to protect isolated payments like a one-time sale of property or a medical practice. A hospital payment to a doctor who temporarily fills an on-call shift is an example that the CMS gave of the types of arrangements now trying to squeeze into the exception.

“The proposed rules are saying this can no longer be used for that purpose,” said Randi Seigel, a partner at Manatt, Phelps & Phillips LLP.

The CMS noted in its proposal that Congress created an exception for personal services that would typically cover these types of payments, but the compensation must be set in advance in a written agreement that’s signed by the parties and lasts for at least a year.

“We do not believe that the Congress would impose such requirements for service arrangements under this exception, and then permit parties to avoid these requirements as long as the parties made one retrospective payment for multiple services provided over an extended period of time relying on the exception for isolated transactions,” the CMS said.

But attorneys who have seen the exception used in this way say it was to correct an unintentional mistake —not cover up corruption.

“I don’t think these Stark cases necessarily reflect bad conduct. It’s usually just slip-ups,” said Judy Waltz, a San Francisco-based attorney, who co-chairs the health-care industry team at Foley & Lardner LLP.

“Somebody just never connected what they were doing with a Stark issue.”

Intent is not a factor the law considers, and penalties for violators are severe. Hospitals could be excluded from the federal health programs. As a result, Waltz said, attorneys look hard at the actual language of exemptions to get out of bad situations.

“I think probably based on its language and people being good lawyers and taking the actual language that this might have been more of a catch-all than CMS intended,” she said.

How often the exemption is being stretched to cover single payments for multiple services is unclear.

“I don’t know where they are seeing it, but clearly they are correcting something they are seeing too often,” said Donna Thiel, a shareholder at Baker Donelson.

### **Consolation Prize**

As a consolation prize, Seigel said, the CMS added a new exception to its proposal.

The carve-out would cover one-time payments for multiple services that would not otherwise be protected under another Stark Law exception. But those payments are limited to no more than \$3,500 annually.

Some attorneys say that threshold is way too low.

"If they are really aiming to cover these on-call arrangements or things like that, I think it should be higher," Seigel said. "On average a physician is getting paid probably \$200 or \$300 an hour for call coverage and even more if they are taking call coverage by the day or a 24-hour period."

Waltz, who represented the CMS when she served as assistant counsel at the Department of Health and Human Services, thinks \$3,500 is a reasonable amount. If a doctor makes \$350 an hour, she said that accommodation will cover 10 hours of consulting or on-call work.

"It's not enough to buy a doctor's loyalty and it's not a pittance either," she said.

While the CMS said in its proposal that it believes a \$3,500 annual aggregate limit is sufficient, the agency did ask for comments on whether the limit is appropriate, too high, or too low.

"I wouldn't expect the agency to change its mind," said Tom Bulleit, who heads the health-care practice at Ropes & Gray LLP.

"Maybe they would kick up the threshold from \$3,500 to some larger dollar amount, but they clearly are trying to say we don't want to give you a free pass on not getting your agreements documented," he said.

### **Best Practices**

Regardless, Seigel doesn't think narrowing the isolated financial transactions exception will create any new risk for health-care facilities.

"The best practice is to document your arrangements with physicians," she said. "I think relying on the isolated transaction exception in any of the cases where a single payment was made to a physician for multiple services over time was probably pretty risky to begin with."

Other attorneys think it will open the door for violations.

Waltz said there will be some situations where people will find themselves without a viable exception they can argue and will then be on the hook to pay back all the designated health services that were provided as a result of that improper arrangement.

"I do think this will have some implications for the situations where someone for whatever reason just botched it," she said.

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