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Health Care News

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IRS and Congress Focus on Tax-Exempt Hospitals

On June 14, 2007, the IRS released a "discussion draft" of revised IRS Form 990, the information return filed by tax-exempt organizations, including hospitals. On July 19 and 20, 2007, both the IRS and U.S. Senator Charles Grassley issued reports addressing concerns and issues affecting tax-exempt hospitals nationwide. These documents are generating significant discussion in the health care community, due to their focus on financial matters affecting tax-exempt hospitals and the expectation that they will culminate in significant regulatory and legislative activity this fall.

Draft IRS Form 990 contains many new schedules that would replace the open-ended and "attach explanation" questions in the existing form. The proposed schedules require disclosure of focused information on such topics as executive compensation, financial transactions with key employees and insiders, compliance with tax-exempt bond financing requirements and, notably, verifying and measuring provision of charity care. The July 19, 2007 report released by Senator Grassley is a compilation of legislative staff work undertaken in response to a committee hearing last fall on charity care and community benefit in non-profit tax-exempt hospitals. While not in the form of a legislative proposal, it contains dramatic recommendations for revising how hospitals qualify for and maintain tax-exempt status. The recommendations cover such topics as quantifying charity care, measuring community benefit in joint ventures with for-profit entities, and Sarbanes-Oxley type transparency and conflict rules for governing boards. The IRS report, which followed Senator Grassley's release by one day, provided a preliminary analysis of data collected from approximately 500 hospitals in response to an IRS "Community Benefit Compliance Check Questionnaire". The questionnaire focused on a variety of financial measures, including data validating community benefit and executive compensation. While this preliminary analysis focused solely on verification of community benefit, a second report is expected that will provide data on executive compensation.

The IRS has set September 14, 2007 as the deadline for comments on proposed Form 990, with hopes of implementing it for FY 2008 reporting. Further action on the Grassley report and the IRS data analysis is also expected at that time.

Feds Issue Startling Proposals to Expand Stark Prohibitions

The Centers for Medicaid and Medicare Services ("CMS") have proposed changes to the Stark regulations which could adversely affect arrangements between physicians and entities such as hospitals that were previously considered to be in compliance with the law. The Stark law prohibits Medicare and Medicaid reimbursement for "designated health services" or "DHS" if the ordering physician has certain financial relationships with the entity providing or billing for the DHS. As part of the proposed CY 2008 Medicare Physician Fee Schedule (72 Federal Register 38122, July 12, 2007), CMS has targeted a number of key definitions and exceptions to the Stark self-referral prohibition in ways that could significantly narrow the array of permitted financial relationships between physicians and the entities to which they refer patients for DHS.

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For example, CMS has proposed expanding the prohibition on marking up the cost of physician-ordered diagnostic tests to include both the technical and the professional components of such tests and to impose the prohibition whether such components are purchased from an outside supplier or are performed by someone other than a full-time employee of the ordering physician or his/her practice, but billed by the ordering physician through reassignment. CMS has also requested comments on perceived abuses of the in-office ancillary services exception to Stark, including (i) whether billing should be prohibited for services that are not needed to assist in the diagnosis and treatment of a patient at the time of his/her visit, (ii) whether the definitions of "centralized building " and "same building" should be changed to avoid sham arrangements, and (iii) whether non-specialists should be permitted to provide specialist services (so-called "turn-key" operations).

In a complete reversal of its previous position, CMS also proposes prohibiting reimbursement for services ordered by a physician, if such services are performed on equipment leased by the ordering physician to an entity (such as a hospital) on a "per-click" or per use basis. The impact of this proposal could increase significantly if CMS acts on comments suggesting that it will promulgate regulations that collapse ordering physicians and entities providing DHS into any entities they own or control, for purposes of analyzing Stark compliance. CMS has also made significant proposals relative to the definition of "set in advance" as it impacts percentage compensation arrangements, as well as billing rules for DHS provided "under arrangement" by a physician or physician-owned entity.

CMS will accept comments on its proposals through August 31, 2007, after which it will promulgate final revised regulations.

New Law Regulates Office-Based Surgery

A new state law requires private physician practices which provide certain in-office surgical and invasive procedures to be accredited by nationally-recognized accrediting agencies. The law, imposing Department of Health oversight of physician office practice, surprised many in the industry but appears to be the final step in a long-standing battle by the Department of Health to gain authority over office-based surgical procedures. Covered by the mandate are physician practices that offer in-office surgical or invasive procedures requiring general anesthesia or moderate or deep sedation. Practices providing certain liposuction procedures will also have to be accredited. While both the accredited practices themselves and the accrediting agencies will be required to report adverse events (such as unexpected hospital admissions, serious complications or death) to DOH, the law provides that such reports shall be shielded from discovery in civil litigation. Affected physician practices have until July of 2009 to obtain the required accreditation. Between now and then, physicians must await DOH's issuance of regulations to cover details such as which accrediting agencies will be acceptable to the state, what procedures are encompassed within the mandate, and whether the mandate will be expanded to other providers, such as dentists and podiatrists.

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