Prior to July 2007, hospitals and physicians had significant opportunities to work together for mutual benefit. This past summer, however, many opportunities for physician ownership came under attack. On July 2, 2007, Centers for Medicare & Medicaid Services (CMS) issued the 2008 Proposed Medicare Fee Schedule and will finalize certain aspects of the Fee Schedule November 27, 2007, effective January 1, 2008. On September 5, 2007, CMS issued Phase III of the Stark II final rule. Each raised a number of different issues affecting joint ventures. The Stark II changes take effect on December 4, 2007, while the Fee Schedule changes could take effect January 1, 2008. What is the status of physician ownership and hospital/physician joint ventures under these final and proposed regulations?

### CURRENT LEGISLATIVE AND REGULATORY ACTION

CMS challenged various hospital and physician business arrangements under the Stark Law and proposed to limit the opportunities for doctors and hospitals to participate in (1) “under arrangements” joint ventures and (2) per-click lease arrangements. The U.S. House of Representatives added to the confusion by proposing to eliminate the whole-hospital Stark exception by passing the Children’s Health and Medicare Protection Act of 2007, which would expand the State Children’s Health Insurance Program (SCHIP). The whole-hospital amendment, sponsored by Congressman Pete Stark, and other Medicare amendments did not make it out of the conference committee, and ultimately, President Bush vetoed the whole bill. But the SCHIP provisions may signal changes that could limit current and future hospital and physician business transactions.

### JOINT VENTURES WITH “UNDER ARRANGEMENTS” BILLING

The conventional “under arrangements” transaction involves a joint venture that provides services for which the hospital bills Medicare. The non-billing provider is currently permitted to make referrals without violating Stark, assuming certain requirements are met. By proposing to amend the definition of “entity” to include the entity that provides services to the entity actually billing Medicare, CMS could make a referral by a physician joint venture owner to the joint venture providing health services “under arrangements” a prohibited referral. In the Preamble to the Fee Schedule, CMS expressed great concern that these joint ventures are nothing more than enterprises established other than to allow referring physicians an opportunity to make money on referrals for separately payable services. Many of the services furnished by the joint venture were previously furnished directly by the hospitals, and in most cases, could continue to be furnished directly by hospitals.

While not included in the final Fee Schedule, if the proposed change is made, hospitals and physicians will lose a popular Stark-compliant joint venture structure. Hospitals and physicians need to examine their current joint ventures and any of those in process to reconsider other joint venture options.

### PER-CCLICK LEASE ARRANGEMENTS

Under the Fee Schedule, CMS is proposing to narrow the permissible use of per-click leases. Specifically, CMS voiced its suspicion of per-click leases where the aggregate rental charge on equipment leased to a hospital by a physician-owner lessor varies based on the number of patients referred by the physician-owner. CMS believes that this type of arrangement is subject to abuse, since the more patients the physician-owner refers, the more the physician-owner profits. Accordingly, CMS proposed to disallow these per-click lease arrangements to the extent they enable the referring physician to profit from the volume of services referred. If this proposal becomes final, per-click leases would offer limited financial opportunities for physicians and hospitals to collaborate in this manner.

### IN-OFFICE ANCILLARY EXCEPTION

Although not technically a physician/hospital issue, CMS in Stark II clarified certain questions that had been raised in the comment period concerning the in-office ancillary exception (the Exception). This Exception was intended to be used for groups of physicians to share in ancillary revenue under a certain set of defined circumstances. Although CMS did not make substantial changes to the Exception, CMS stressed its concern that the current use of the Exception may be inconsistent with the original intent in practice. For example, CMS believes that the Exception’s original purpose was to allow physicians to be readily able to perform tests closely connected to the physician practice. Now, for example, very expensive imaging technology has migrated to physicians’ offices through the use of the Exception. CMS believes that some of the current Exception arrangements are nothing more than enterprises established for the self-referral of designated health services. Consequently, both in the Fee Schedule and in Stark II Phase III, CMS has stated it is examining whether certain services should not qualify for the Exception, specifically, sophisticated imaging equipment and in-office pathology. Whether or not the Exception is eventually limited could affect how physicians compete with hospitals. If the Exception no longer applies to imaging services, hospitals may gain opportunities to expand or re-gain a share of this outpatient service.

### SO, WHERE DO WE GO FROM HERE?

Congress and CMS are focused on any opportunity for physicians and hospitals to profitably collaborate, but they still left some joint venture opportunities unchanged. Physician ownership of hospitals through the whole-hospital exception to Stark was left untouched. It is possible that over time even that opportunity will be a target. At present, hospitals and physicians will have to examine their current business arrangements and be prepared for the possibility of having to unwind or restructure profitable business arrangements.

If you have a question or would like to discuss legal services, please contact us at healthcare@duanemorris.com.

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