

# HEALTH CARE LAW UPDATE

August 2006

*Hospital Law Issues*

## Pay Fair Market Value!

### Enforcement of Anti-Kickback & Stark Laws Continues to Heat Up

In July, a hospital entered into a \$3.75 million settlement and CIA with the U.S. Department of Justice and various federal agencies, to resolve a whistleblower's claims that the hospital paid compensation to a physician far exceeding fair market value as part of an alleged scheme to reward physicians who admitted large volumes of patients, in violation of the Anti-Kickback and Stark Laws.

This highlights: (i) the potential ramifications under the Anti-Kickback and Stark Laws for hospitals that pay referring physicians in excess of fair market value for services, and (ii) the escalating federal enforcement of these laws.

Below is a brief summary of the allegations and settlement in this matter, followed by a description of the significance of this matter and recommendations for hospitals to avoid similar liabilities.

1. The Allegations. This matter was commenced with a "whistleblower" lawsuit filed in 2004 under the False Claims Act by a former employee of the hospital. The plaintiff alleged that the hospital paid a physician compensation more than double the fair market value for the services provided by the physician, in order to reward such physician's large volume of referrals to the hospital.

The hospital's payments to the physician which exceeded fair market value violated the Anti-Kickback and Stark laws. The Anti-Kickback statute

prohibits payments to induce or reward referrals. The Stark Law prohibits physicians from referring patients to an entity with whom they have a compensation arrangement, unless the compensation is at fair market value and the arrangement satisfies various other conditions.

The alleged Anti-Kickback and Stark Law violations formed the basis for claims against the hospital under the False Claims Act.

2. The Settlement. The government agreed to dismiss the lawsuit in exchange for \$3,750,000, and the hospital's execution of a 5-year Corporate Integrity Agreement (CIA) with the government.

The CIA is detailed and intrusive in several respects, setting forth various requirements that the hospital must implement including, for example:

- Establishing a written review and approval process for all existing and new arrangements with physicians and other referral sources, to be performed by legal counsel with experience with the Anti-Kickback and Stark laws;
- Maintaining a database of all such arrangements, and tracking and monitoring them (including activity logs) and actual payments made, on an ongoing basis;
- Providing all officers, employees, physicians and billing contractors 2 hours of compliance training (and 1 hour annually thereafter);

- Providing management level employees involved in arrangements with physicians and other referral sources 3 hours of additional training (and 2 hours annually thereafter);
- Providing all staff and contractors involved in the coding and/or claims submission process 2 hours of additional training (and 2 hours annually thereafter); and
- Hiring an experienced Independent Review Organization to actively monitor the hospital's adherence with the provisions of the CIA, and to conduct ongoing audits of billings and claims.

The former-employee whistleblower received over \$610,000 from the settlement.

3. Significance/Recommendations. This settlement demonstrates the continued increase in federal enforcement efforts against hospitals, including enforcement against hospitals that compensate referring physicians above fair market value for services.

Hospitals should examine their new and existing compensation arrangements with referring physicians to ensure that such payments do not exceed fair market value for the services provided by the physicians.

It is advisable (i) to obtain a written analysis from an independent third party consultant with expertise in the health care field to confirm that the payments are fair market value for the services being provided, or (ii) to maintain documents in your file containing comparable data that you relied upon to support the fair market value of the compensation.

It is also important that hospitals periodically monitor (preferably on an annual basis) their agreements with physicians, to ensure that in each case the physicians are actually providing the required services and are being compensated at the levels set forth in their agreements.

To facilitate such monitoring, hospitals should maintain a database of all physician

compensation agreements and implement a tracking system (preferably automated) to ensure that each agreement is reviewed periodically. Each such review should be fully documented, and should consider:

- Is the physician actually performing all of the duties set forth in the agreement? If not, the payments may not be fair market.
- Are payments being made in accordance with the agreement? Are additional payments or items of value being provided to the physician?
- Have assumptions changed since the onset of the physician compensation arrangement? For instance, if the hospital agreed to pay \$5,000 per month based on the physician spending on average 25 hours per month, it would be problematic if in fact he or she only spends 15 hours per month to perform the necessary services.

It may be advisable for the consultant who issued the initial fair market value report to re-evaluate the arrangement based on changed circumstances, to assess whether the arrangement is still consistent with fair market value, and to issue a written report (or to supplement the initial report) setting forth his/her conclusions.

Finally, as this and several other recent settlements demonstrate, whistleblowers are prevalent, and have in part fueled the increase in government enforcement. Therefore, hospitals should take steps to monitor these and other compliance issues with respect to their arrangements with physicians.

*We send these Updates to our clients and friends to provide information on recent developments in the law. The Updates, however, should not be relied on for legal advice in any particular matter. If you would like additional information, please contact Gary W. Herschman at gherchman@sillscummis.com or at 973-643-5783, or Anjana D. Patel at apatel@sillscummis.com or at 973-643-5097.*

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