ReedSmith

Gail L. Daubert
Direct Phone: +1 202 414 9241
Email: gdaubert@reedsmith.com

Reed Smith LLP
1301 K Street, N.W.
Suite 1000 - East Tower
Washington, D.C. 20005-3373
Tel +1 202 414 9200
Fax +1 202 414 9299
reedsmith.com

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Via Overnight Mail

Federal Trade Commission
Office of the Secretary, Room H-113 (Annex X)
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Health Care Workshop, Project No. P13-1207

Dear Commissioners and Agency Administrators:

We write to submit questions in advance of the Federal Trade Commission ("FTC") and the U.S. Department of Justice's ("DOJ", collectively, the FTC and DOJ are referred to as the "agencies" herein) second public workshop, "Examining Health Care Competition," scheduled for February 24-25, 2015 in Washington, DC. The FTC's notice announcing the public workshop and opportunity for comment, published at 80 *Fed. Reg.* 5533 (Feb. 2, 2015), invites comments on "[t]he kinds of changes occurring with respect to health care provider organization and payment models" and "the economic, quality enhancing, technological, regulatory and legislative factors that may be influencing such changes." Further, the Notice indicates that the agencies are "particularly interested" in receiving comments on alternatives to traditional fee-for-service payment models. As the agencies know, the Centers for Medicare & Medicaid Services ("CMS") are already testing numerous alternatives to traditional fee-for-service payment models, including bundled payments. Specifically, the Center for Medicare & Medicaid Innovation's ("CMMI's") Bundled Payments for Care Improvement Initiative ("BPCI" or the "Initiative") uses financial incentives with the goal of improving quality and efficiency.

One financial incentive mechanism that the Initiative uses to improve quality and efficiency is the sharing of "savings" with providers and suppliers participating in the Initiative. However, we believe that the providers and suppliers participating in bundled payment models, including the Initiative, must be appropriately incentivized in order to achieve the goal of improving quality and efficiency. Unfortunately, however, the current framework of the BPCI may prevent providers and suppliers participating in BPCI from truly benefiting from the financial incentives incorporated into the Initiative when successfully improving efficiency and reducing costs to the Medicare program. For this reason, we recommend that the agencies address the following type of scenarios and questions during the public workshop:

1. Scenario 1. A physician group is the Awardee Convener under the Initiative. The physician group is gainsharing with some of its individual physicians. Positive Net Payment Reconciliation Amount (NPRA) is generated in a given calendar quarter. The physician group distributes the funds to the individual, gainsharing physicians until the individual physicians hit their cap

(of 150% of normal, fee-for-services charges). After distribution, additional, positive NPRA (money) remains. In this situation-

- How may the physician group utilize the positive NPRA funds without violating the prohibition against making payments that directly or indirectly benefit physicians who are not approved by CMS for gainsharing and who have not signed gainsharing agreements with the Awardee Convener?
- For example, can the physician group purchase equipment (which would be used by the entire practice) with the funds or apply the funds to overhead?

2. Scenario 2. A physician group is the Awardee Convener under the Initiative and is not gainsharing with any of its individual physicians. A positive Net Payment Reconciliation Amount is generated in a given calendar quarter.

- How may the physician group utilize the positive NPRA funds without violating the prohibition against making payments that directly or indirectly benefit physicians who are not approved by CMS for gainsharing and who have not signed gainsharing agreements with the Awardee Convener?
- For example, can the physician group purchase equipment with the funds or apply the funds to overhead?

3. Scenario 3. If a non-provider third-party is an Awardee Convener, can the Awardee Convener enter into a gainsharing arrangement with a physician group where it equally shares all positive NPRA with the group but does not enter into gainsharing agreements with the individual physicians in that group?

- In this situation, how may the physician group utilize the positive NPRA funds without violating the prohibition against making payments that directly or indirectly benefit physicians who are not approved by CMS for gainsharing and who have not signed gainsharing agreements with the Awardee Convener?
- For example, can the group purchase equipment with the funds or apply the funds to overhead?

4. Scenario 4. A non-provider third-party is an Awardee Convener and enters into a gainsharing arrangement with a physician group and some of the individual physicians in that group. Positive NPRA is generated in a given calendar quarter. The Awardee Convener distributes 50% of the positive NPRA to the group, and the group distributes the funds to the individual, gainsharing physicians until the individual physicians hit their cap (of 150% of normal, fee-for-services charges). However, additional, positive NPRA remains after completing such distributions.

- In this situation, how may the physician group utilize the positive NPRA funds without violating the prohibition against making payments that directly or indirectly benefit

physicians who are not approved by CMS for gainsharing and who have not signed gainsharing agreements with the Awardee Convener?

- For example, can the group purchase equipment with the funds or apply the funds to overhead?

5. In Scenarios 1-4 above, would CMS' view differ if the funds utilized in gainsharing with physicians was from Internal Cost Savings instead of positive NPRA?

Please reach out to me at (202) 414-9241 with any questions regarding the above. Thank you in advance for your consideration.

Very truly yours,

Gail L. Daubert

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