FMV Vantage Point

HealthCare Appraisers INCORPORATED

Buy vs. Lease Analysis May be Required to Establish The Reasonableness of Non-Exclusive Equipment Use Arrangements

On July 30, 2008, CMS issued its final rule regarding the Hospital Inpatient Prospective Payment System (IPPS). CMS elected to allow healthcare service providers until October 1, 2009 to restructure or unwind certain current arrangements that were impacted by the final rule. At the time of the issuance of the IPPS, many per-click under arrangements involving physician-owned ventures (including lithotripsy) were deemed to require restructuring in order to remain in compliance with the law.

On January 22, 2009, CMS issued Stark law Frequently Asked Question (FAQ) ID - 9556 addressing the permissibility of a per-click or percentage-based model for the provision of a lithotripter and a skilled technician. CMS's response to this question has generally led the industry to conclude that lithotripsy services can continue to be provided on a per-click basis, while other equipment use arrangements (*e.g.*, urology lasers and mobile diagnostic equipment) must be provided on a flat-fee basis (*e.g.,* a block lease or a fixed annual payment).

Included in CMS's responses to commentary to the IPPS under the heading of *Unit of Service (Per Click) Payments in Lease Arrangements* was the following commentary regarding high-volume per-click leasing arrangements (from pages 1077-1078):

> *"...As a further example, we would also have a serious question as to whether an agreement is commercially reasonable if the lessee is performing a sufficiently high volume of procedures, such that it would be economically feasible to purchase the equipment rather than continuing to lease it from a physician or physician entity that refers patients to the lessee for DHS. Such agreements raise the questions of whether the lessee is paying the lessor more than what it would have to pay another lessor, or is leasing equipment rather than purchasing it, because the lessee wishes to reward the lessor for referrals and/or because it is concerned that, absent such a leasing arrangement, referrals from the lessor would cease. In some cases, depending on the circumstances, such arrangements may also implicate the anti-kickback statute."*

The comment was intended to address circumstances where a per-click rate that is presumed to be consistent with Fair Market Value (FMV) (and which is otherwise allowable under Stark) may fall out of FMV when applied to a high-volume arrangement. In addition, it is reasonable to assume that CMS would have the same concern with respect to flat-fee arrangements. For example, if a hospital leases an ultrasound machine and technician under a block lease arrangement for a sufficiently large block of time, analysis of the resulting annual compensation might demonstrate that the hospital's more prudent decision would have been to purchase the equipment.

FMV Pitfall

While arrangements involving the non-exclusive use of equipment often offer many mutual benefits to healthcare providers, failure to consider the implications of a *buy vs. lease analysis* as cautioned by CMS may expose the parties to allegations of improper payments.