

Legal Insights

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Sunshine Series – Installment Five – CMS FAQ Indicates Possible Flexibility in Determining the Date of a Transfer of Value

As part of its educational outreach to assist Applicable Manufacturers in preparing for Sunshine Law compliance, the Centers for Medicare & Medicaid Services (“CMS”) has published a number of Frequently Asked Questions in the CMS OPEN PAYMENTS web site. The FAQs are available [here](#). In this installment of our Sunshine Series, we review one such FAQ regarding the date of payment for disclosure purposes.

Under the federal Sunshine Law, Applicable Manufacturers must report information about certain transfers of value made to physicians and teaching hospitals, including the date the transfer is made. While in most instances, the date of payment is evident, CMS acknowledges that Applicable Manufacturers may have flexibility in assigning the date in some circumstances. The FAQ states as follows:

Q: If a medical professional society’s annual conference is held prior to August 1, 2013 and a physician received a direct payment for consulting or other service, is the date of payment the date of the event?

A: Applicable manufacturers must report the date that a payment or transfer of value was provided to the covered recipient. In certain circumstances, applicable manufacturers have flexibility to determine the methodology for reporting when the date of the transfer of value was “provided.” For example, in the instance of travel benefits, there is flexibility for reporting travel because the purchase date (of airline tickets, for example) may be different than the date the transfer of value is actually “provided” to the covered recipient (i.e., when the physician takes the flight). Applicable manufacturers have some flexibility to choose which payment date they will use in this type of situation; however, the methodology used must be consistent within a single nature of payment category (such as travel).

If a physician provides a consulting or other service prior to August 1, 2013, but an applicable manufacturer does not pay the physician for the service until August 1, 2013 or after, such payment would be reported because the payment was provided to the physician after the start of the reporting requirements. Applicable manufacturers do not have flexibility to designate the date of the physician’s service as the

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"date of payment." Rather, the date of payment would be the date the applicable manufacturer post-marked the check or funds transfer to the physician to compensate him/her for the services rendered. CMS FAQ8153, available [here](#).

Compliance Pointer: Develop a Policy for Consistency in Date Reporting

Applicable Manufacturers should determine in advance how they intend to report the date of transfer in areas where two or more dates might be appropriate. CMS's example of travel is one such area. The regulations implementing the Sunshine Law also discuss that Applicable Manufacturers have flexibility in reporting the dates of transfers related to a series of payments. That is, for payments made over multiple dates rather than as a one lump sum (for example, installment payments in a research agreement), the company may report the entire sum as of the date the first payment is made, or the company may make multiple reports covering each of the individual payments.

As part of Sunshine Law compliance, Applicable Manufacturers have the option of developing and submitting to CMS an "assumptions document" which explains the reasonable assumptions made and methodologies used when reporting transfers of value. The use and/or submission of the assumptions document is voluntary; however, whether the Applicable Manufacture intends to develop an assumptions document or just a set of internal guidelines, consistency in reporting is important. As such, we recommend that, in the least, companies develop a set of guidelines which address areas of flexibility so that reports are made in a consistent manner.

Compliance Pointer: Make All Outstanding Payments On or Before July 31, 2013 to Avoid Unnecessary Reporting

In light of CMS's confirmation that the date of payment, as opposed to the date of service, is the relevant date in the context of physician services, Applicable Manufacturers would be wise to review their accounts payable and to make any outstanding payments for services rendered before the August 1, 2013 reporting date. For example, if a physician provided a consulting service in June 2013 but the service agreement gives the company 60 days in which to remit payment, the company should consider making the payment early so as to avoid including the payment in its Sunshine disclosure. Further, Applicable Manufacturers should encourage physicians to promptly remit invoices so that payments may be made before August 1, 2013.