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# WEST TENNESSEE PHYSICIANS LAW ALERT

April 2010 Issue

## HEALTH REFORM ACT: WHAT PHYSICIANS MAY NEED TO DO NOW

The landmark healthcare reform bill that was signed into law on March 23, 2010, the Patient Protection and Affordable Care Act (the "Act"), sets forth changes that will be implemented at various times over the next decade. There are a few provisions of the Act, however, that are already effective or that will be effective this year that will affect physicians.

**1. Disclosure of Financial Interest in Advanced Imaging Equipment.** Section 6003, which amends the physician self-referral prohibition (known as the Stark Law), is currently effective. This provision requires physicians who furnish MRI, CT or PET tests within their practices to provide a written disclosure to their patients. Although there have been spirited debates among healthcare lawyers nationwide over whether the requirement was effective as of January 1, 2010 or March 23, 2010 or is not yet effective until later regulations are published because of poor and unclear drafting in the Act, it is our opinion that it was most likely effective March 23, 2010 for MRI, CT and PET. Therefore, it is our recommendation that physician practices that provide these tests should comply now with the disclosure requirements.

Section 6003 of the Act adds a requirement that physicians who furnish MRI, CT or PET services for their Medicare patients in reliance on the in-office ancillary services exception to Stark inform the patient in writing at the time of the referral for the test that the patient may obtain the MRI, CT or PET test from others. The physician is also required to provide a written list of suppliers who furnish those services in the area where the patient resides.

**2. Restriction on Physician Ownership in Hospitals.** The Act amends the Stark law to prevent the formation of new physician-owned hospitals. The Act permits existing physician-owned hospitals to continue to qualify for the prior Stark exception regarding physician-owned hospitals, but the Act prohibits such hospitals from increasing the percentage of their physician ownership interests above such percentages as of the effective date of the Act.

**3. Obligation to Report Overpayments.** The Act sets forth an affirmative obligation for any provider or supplier that has received an overpayment to report and return the overpayment to the Secretary of the Department of Health and Human Services, the state, intermediary, carrier or contractor, along with the reason for overpayment. Generally, these actions must be taken in 60 days from the date the overpayment is identified. The Act creates corresponding False Claims Act liability for knowingly concealing or knowingly and improperly avoiding an "obligation" to repay money to the government. To healthcare lawyers and the providers and suppliers they advise, this provision is extremely significant. For example, often, a practice may discover that it has inadvertently assigned or billed an incorrect code or modifier with no intent to defraud the government. In such events, practices may have responded by simply fixing the problem and moving forward. This provision will require the practice retrospectively to audit prior claims submitted to governmental programs and to return any discovered overpayments along with an explanation of why they occurred.

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## STATUS OF MEDICARE PHYSICIAN PAYMENT CUTS

The Act made no change to the Medicare Physician Fee Schedule. On Monday, April 12, 2010, the Senate cleared a procedural hurdle allowing them to break a Republican hold on legislation that temporarily stays a 21% pay cut. By a 60-34 vote, a handful of Republicans joined Democrats to advance the legislative package, which staves off the pay cut until April 30, 2010. A final vote on the bill could come later this week.

## TENNESSEE ATTORNEY GENERAL OPINION ON HEALTHCARE REFORM

In a Tennessee Attorney General ("AG") Opinion dated April 6, 2010, the AG addressed the question of whether certain bills and a proposed constitutional amendment would be effective in Tennessee and whether or not they would be superseded by the federal health reform Act. The proposed bills would enact the Tennessee Health Freedom Act. This state act would declare that the public policy of the State of Tennessee is that every person within the State is free to choose or decline to choose any mode of securing health care services without penalty or threat of penalty by the federal government. It would prohibit public officials, employees and agents of the State and of its political subdivisions from imposing, collecting, enforcing or effectuating any penalty in the State that would violate the public policy declared by the foregoing. The proposed constitutional amendment would amend Article XI of the Tennessee Constitution to provide that no law or rule may compel, directly or indirectly, any person, employer or health care provider to participate in any health care system. It would further prohibit persons, employers, and health care providers from being penalized or fined for paying directly for, or accepting direct payment for, lawful health care services. The Tennessee Attorney General held that a court would probably determine that these bills and the constitutional amendment would be preempted by conflicting provisions of the federal Patient Protection and Affordable Care Act and thus would be ineffective.

In an April 7 statement, Florida Attorney General Bill McCollum said that the following five states "will be added to the suit" he filed challenging the federal healthcare reform law on March 23: Arizona, Indiana, Mississippi, Nevada, and North Dakota. These states join Alabama, Colorado, Idaho, Louisiana, Michigan, Nebraska, Pennsylvania, South Carolina, South Dakota, Texas, Utah, and Washington in the suit(s).

### ANGELA C. YOUNGBERG TO SPEAK TO MEMPHIS COLLEGE OF HEALTHCARE EXECUTIVES



**Angela Youngberg** will be speaking to the Memphis College of Healthcare Executives on the topic of health reform on April 15, 2010, in Memphis, Tennessee. She will be presenting the "Top 10 Things Providers Need to Know Now about Health Reform." Angela is a member of Rainey, Kizer, Reviere & Bell, PLC and Group Leader of the Firm's Healthcare Practice Group. She practices in the areas of healthcare law, acquisitions, mergers and joint ventures, and general corporate/business law. She represents hospital, physician, and other healthcare clients in a variety of matters and areas, including acquisitions, joint ventures, Stark Law, Anti-Kickback Law, False Claims Act, HIPAA, Medicare compliance, Medicare and payor audits, new practice formations, physician employment agreements, and various other types of contracts. She is a member of the Board of Directors of the Jackson-Madison County Bar Association and a member of the Executive Council of the Health Law Section of the Tennessee Bar Association. She has been selected by her peers to Best Lawyers in America in the field of healthcare law and by Mid-South Super Lawyers as a Rising Star in the field of healthcare law.

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