

## HEALTH CARE UPDATE



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October 2010

The Katten Muchin Rosenman LLP Health Care Practice is pleased to present this newsletter to keep our clients and friends informed on developments in health care law and the implications for their business. Please feel free to share this with others who may be interested.

### CMS Update

In the past few months, we have seen a flurry of activity from the Centers for Medicare & Medicaid Services (CMS). Katten attorneys and clients have been working hard to keep pace with the agency. The following summary of some of our recent projects involving CMS is provided by Katten partner [Lisa Ohrin](#), who previously served as Director of the Division of Technical Payment Policy at CMS. For more information, please see "Practice News."

#### *Agency Rulemaking*

Almost like clockwork (and we say that tongue-in-cheek when dealing with federal agencies), CMS releases annual Medicare payment system updates through proposed and final rules published in the Federal Register. Not only are the payment updates included in these publications, but myriad coverage, billing and other policies that affect health care providers are proposed and finalized. For example, proposed changes to the physician self-referral (Stark) regulations were included in both the CY 2011 Physician Fee Schedule (PFS) proposed rule and the CY 2011 Hospital Outpatient Prospective Payment System (OPPS) proposed rule. We assisted several clients with preparing and submitting comments to the PFS and OPPS proposed rules on policies that varied from changes in the direct practice expense inputs for certain codes under the PFS to the calculation of full-time equivalent resident caps for purposes of hospitals' graduate medical education and indirect medical education reimbursement, including the criteria that will be utilized to redistribute resident graduate education training slots upon closure of a teaching hospital. CMS must publish the final rules by November 1 (or 60 days before the effective date of the final policies). We will review the final rules as soon as they are available and report on any significant policy or reimbursement changes relevant to our clients. The FY 2011 Hospital Inpatient Prospective Payment System (IPPS) proposed and final rules were published in April and August, respectively. The policies included in the IPPS final rule took effect on October 1. For more information, see the Katten Client Advisory [Changes to the Medicare Three-Day Payment Window](#).

#### *Meetings with Agency Policy Makers*

Katten has stepped up its presence before CMS policy makers in recent months. We have facilitated (and attended) meetings with clients and the relevant CMS decision makers on a variety of issues involving payment and other policy. Our representation spans across the agency, from the Chronic Care Policy Group and its Division of Technical Payment

### Focus On: Health Care Civil Litigation

Katten's Health Care Civil Litigation Practice combines cutting-edge litigation practices with deep experience in health care to achieve business-savvy, sustainable results that allow our clients to spend fewer resources on litigation and more on their business. The group is dedicated to all types of civil litigation relating to the delivery of and payment for medical services. For more information, click [here](#).

Policy (which is responsible for certain transplant centers and organ procurement organizations, the Stark policy and regulations, and other payment policies) to the Hospital and Ambulatory Policy Group and its Division of Practitioner Services (which oversees all issues related to payment for services under the PFS). We also regularly attend meetings of the Medicare Payment Advisory Commission to monitor the policy and payment recommendations that this group makes to Congress with respect to the Medicare program.

### ***Client Representation before the Agency***

In addition to in-person meetings with CMS policy makers, we have been active in our representation of clients on specific issues for which agency input or cooperation is necessary. For example, we have interacted with the Division of Provider and Supplier Enrollment on complicated billing and enrollment issues when the Medicare Administrative Contractor (MAC) could not resolve matters in a manner satisfactory to our clients. We also have worked with the Office of Financial Management on complicated coding and billing issues and to resolve identified overpayments. We are pleased to have an excellent working relationship with this part of the agency, particularly in light of the revisions to the False Claims Act that now require the reporting and refunding of identified overpayments within 60 days. We have worked with several of the MACs to help clients resolve claims denials by educating the MAC medical directors and other clinical review staff, and by informing legal staff of Medicare laws and regulations that require coverage in our clients' circumstances. We also have addressed CMS Region II and CMS Central Office concerning proposed New York State Plan Amendments (SPAs) involving Medicaid reimbursement for hospitals, nursing facilities and other providers, including SPAs authorizing disproportionate share hospital and upper payment limit adjustments. Finally, we continue to represent clients in over a hundred hospital cases pending before the Provider Reimbursement Review Board, and to negotiate with a MAC successful administrative resolutions of those cases.

For more information regarding these matters or if you have any questions, please feel free to contact [Lisa Ohrin](#) or [Joseph Willey](#).

### **Medicaid Audits and Investigations**

Katten is representing providers facing audits and investigations by various New York State Medicaid investigative agencies. For example, we are opposing, on behalf of hospital and nursing facility clients, audits by the New York Office of the Medicaid Inspector General (OMIG) involving "bed hold" payments to nursing facilities; timeliness of providers' claims submissions; payments for services furnished to undocumented immigrants; and payments for outpatient mental health services. We also are representing providers facing investigations by the State Attorney General's Office involving Medicaid payments for pharmaceuticals, home health agency services and medical supplies. Finally, we have assisted clients in reporting overpayments pursuant to the OMIG self-disclosure protocol. For more information, please feel free to contact [Joseph Willey](#).

## **About the Health Care Practice**

Katten's Health Care Practice represents clients involved in the development, delivery and financing of health care services. Our attorneys are experienced in providing sophisticated legal guidance to health care clients as they seek to address the challenges in their businesses and industries. For more information on our health care practices and services, please click on any of the following links:

- [Health Care Civil Litigation](#)
- [Health Care Compliance](#)
- [Health Care Finance](#)
- [Health Care Financial Restructuring](#)
- [Health Care Mergers and Acquisitions](#)
- [Health Care Real Estate](#)
- [Health Care Regulatory](#)
- [Health Care Tax Exempt](#)
- [HIPAA/Privacy](#)
- [Insurance and Health Care Fraud Litigation](#)
- [Managed Care](#)
- [Medicare/Medicaid Reimbursement](#)
- [Medico-Legal and Hospital/Physician Relations](#)
- [Physician Practices and Transactions/Joint Ventures](#)

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## Monitoring Health Care Reform and ACO Activity

### *Voluntary Self-Referral Protocol*

On September 23, as required by the Patient Protection and Affordable Care Act (the Affordable Care Act), CMS published on its website the [Voluntary Self-Referral Disclosure Protocol](#) outlining the structure of a new voluntary program in which Medicare providers can disclose to the government potential and actual violations of the physician self-referral law (often referred to as the Stark law). The most important provision regarding the SRDP enacted in the Affordable Care Act gave CMS authority where none had existed before to compromise the amount of an overpayment due to the government resulting from services furnished pursuant to improper referrals. Partners [Joshua Berman](#), [Glen Donath](#) and [Lisa Ohrin](#) provided a summary of the SRDP, an analysis of the guidance provided by CMS, and recommendations for provider audits and compliance activity in their teleconference “To Tell or Not to Tell: Voluntary Disclosures Under Stark in the Post-Health Care Reform World.”

If you were unable to participate, click [here](#) to listen to a recording of the teleconference or download presentation materials.

### *ACO Workshop*

Katten also presented a webinar debriefing on the October 5 FTC/CMS/OIG Workshop on the Legal Issues Related to Accountable Care Organizations (ACOs). Partners [Michael Callahan](#) and [J. Phillip O'Brien](#) summarized the key issues addressed at the workshop, and discussed how different ACO structures can affect price and quality of services delivered to publicly and privately insured individuals; how the antitrust, anti-kickback, physician self-referral and civil monetary penalty laws should be addressed in proposed CMS regulations; and whether the FTC, CMS or OIG should propose any safe harbors, exceptions, exemptions or waivers to federal laws to accommodate ACOs. Click [here](#) to view the webinar or download presentation materials. For the actual Workshop transcripts and recordings, click [here](#).

### *Impact of Reform Legislation on Fraud Enforcement*

Katten recently presented “Not Your Average Fraud Seminar: A Strategic Approach to Managing Risk in an Environment of Heightened Scrutiny,” a panel discussion on proactive strategies and practical tools for minimizing fraud and abuse exposure featuring partners [Joshua Berman](#), [Laura Keidan Martin](#) and [Gil Soffer](#), and moderated by partner [Michael Callahan](#). The program covered topics including health reforms that give the government new tools and resources to pursue kickback and False Claim Act (FCA) violations, how providers can prevent quality issues from morphing into FCA problems, how to handle overpayment issues to minimize liability exposure, common compliance program gaps and how to fix them, and systemic and policy changes that providers should implement to manage risk in an environment of heightened scrutiny. [Download the presentation materials.](#)

## Practice News .....

### **Katten Expands National Health Care Practice with Addition of Washington Attorneys**

This year, Katten welcomed five attorneys to the Health Care Practice in Washington, D.C. Partners [Joshua Berman](#), [Glen Donath](#), [Lisa Ohrin](#) and [Howard Rubin](#), along with associate [Robert T. Smith](#), joined the firm from Sonnenschein Nath & Rosenthal LLP, establishing a strong presence in Washington for our nationally recognized health care practice. The addition of white collar litigators Mr. Berman and Mr. Donath, who have an extensive background in health care fraud and compliance and government investigations, expands the depth and scope of our Health Care Litigation Practice and compliance-related legal services. Ms. Ohrin's substantial experience in health care fraud and abuse, including Stark and anti-kickback laws, and Medicare/Medicaid reimbursement, is a valuable complement to Katten's existing practice in this area. Mr. Rubin, an appellate attorney with a strong health care litigation practice, which includes representing coalitions of medical specialty practices across the country, adds considerable depth to Katten's health law services. Mr. Donath, Mr. Berman and Ms. Ohrin also previously served in senior positions with the Department of Justice and the Centers for Medicare & Medicaid Services, respectively.

## Accolades

Katten's Health Care Practice was once again highly ranked by *Chambers USA: America's Leading Lawyers for Business*, and attorneys [Michael Callahan](#), [Laura Keidan Martin](#), [Kenneth Davis](#), [Steven Olson](#), [Louis Glaser](#) and [Peter Nadel](#) were recognized for their work. In addition, Ms. Martin, Mr. Callahan, Mr. Glaser and Mr. Nadel were included in the 2011 edition of *The Best Lawyers in America*, and, along with [J. Phillip O'Brien](#) and [Joseph Willey](#), named 2010 Super Lawyers. Katten also achieved two top-tier rankings for health care in the inaugural *U.S. News & World Report* and Best Lawyers Best Law Firms rankings.

## Recent and Upcoming Events

### Ancillary Services Under Attack—The Battle at the State Level

*North Carolina Orthopaedic Association 2010 Annual Meeting*

October 9

Partner Howard Rubin discussed the impact of the executive, judicial and legislative branches on ancillary services and reviewed key court cases. [Download the presentation.](#)

### Coalition Building and the Protection of Urological Interests in Pennsylvania from Legislative and Regulatory Attacks

*Urological Association of Pennsylvania Annual Meeting*

October 16

Partner Howard Rubin discussed the value of coalition building, citing specific examples in Maryland, New Jersey and Pennsylvania, and reviewed lessons learned. [Download the presentation.](#)

### Negligent Credentialing Developments: Impact of Recent Cases and New Joint Commission Medical Staff Standards

*University HealthSystem Consortium's 2010 Legal & Compliance Council Annual Meeting*

October 18

Partner Michael Callahan covered the basics of negligent credentialing, including examples of important cases, Joint Commission standards, preventative steps and peer review. [Download the presentation.](#)

### Physician Employment: Contracting, Compensation & Financial Performance Improvements

*HFMA Fall Seminar Series – Denver*

October 19

Partner Louis Glaser addressed two areas crucial to successful physician-hospital alignment: the struggle to develop joint venture arrangements for ambulatory services and the structuring of strong, collaborative physician employment agreements to achieve both mission and budgetary goals. [Download the presentation.](#)

### Sunshine on the Healthcare Industry: PPACA's "Physician Transparency" Provisions

*Illinois Association of Healthcare Attorneys Health Law Symposium*

October 26

Partner Megan Hardiman provided an overview of Section 6002 of the Patient Protection and Affordable Care Act, including its implications and how to prepare for the new disclosure laws. [Download the presentation.](#)

### Physician Self-Referral Disclosure After PPACA

*Webinar presented by Strafford Publications*

October 27

Partner Lisa Ohrin served as a panelist for this program, which outlined best practices for self-referral disclosure and applying the new CMS guidance.

## Disruptive Physicians: From Credentialing to Disciplinary Action

*Webinar presented by Strafford Publications*

November 4  
1:00–2:30 p.m. (Eastern)

Partner Michael Callahan will be speaking. Click [here](#) for more information.

## Large Urology Group Practice Association Annual Meeting

November 4–6  
Chicago

Partner Lisa Ohrin will present a [health policy update](#) and partner J. Phillip O'Brien will present an [update on ACOs](#). Click [here](#) for more information.

## Maryland Association Medical Staff Services Fall Conference

November 5  
Annapolis, Maryland

Partner Michael Callahan will be speaking all day on a wide range of medical staff, legal and accreditation subject areas. Click [here](#) for more information.

## Greeley's Advanced Credentialing and Privileging Retreat

November 6–7  
Boca Raton, Florida

Partner Michael Callahan will be speaking. Click [here](#) for more information.

## Greeley's Medical Executive Committee Institute

November 6–7  
Boca Raton, Florida

Partner Michael Callahan will be speaking. Click [here](#) for more information.

## Greeley's Mastering Medical Leadership

November 6–7  
Boca Raton, Florida

Partner Michael Callahan will be speaking. Click [here](#) for more information.

## Physician Hospital Alignment Relations

*Presented by the HFMA Metropolitan New York Chapter*

November 15  
New York

Partner Lisa Ohrin will speak on hospital-physician relationships under Stark and Health Care Reform. Click [here](#) for more information.

## National Forum on Clinical Integration

*Presented by the American Conference Institute*

November 15–17  
Washington, D.C.

Lisa Ohrin will speak on "Overcoming Legal Obstacles to Implementation." Click [here](#) for more information.

## The New Reality of Stark Self-Disclosures: What to Do and Not Do

*Webinar presented by the American Health Lawyers Association*

1:00–2:30 p.m. (Eastern)  
November 19

Partner Lisa Ohrin will serve as a panel member, along with CMS representatives, for this discussion of legal and practical questions regarding disclosure of potential Stark violations. Click [here](#) for more information.

## HFMA Fall Seminar Series – Chicago

December 6

Partner Louis Glaser will speak on "Physician Employment: Contracting, Compensation & Financial Performance Improvements." For more information, click [here](#).

## Legal Issues Affecting Academic Medical Centers and Other Teaching Institutions

*Presented by the American Health Lawyers Association*

January 27–28, 2011  
Washington, D.C.

Partner Lisa Ohrin will speak on Stark, Anti-kickback and False Claims Act issues for academic medical centers. Click [here](#) for more information.

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## Greeley's Advanced Credentialing and Privileging Retreat

January 29–30, 2011  
Palm Springs, California  
Partner Michael Callahan will be speaking. Click [here](#) for more information.

## Greeley's Medical Executive Committee Institute

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## Additional Presentations Available Online Now .....

### Radiology Business Management Association Fall Educational Conference

Partner Kenneth Davis delivered four presentations at this annual RBMA event: "Provider-Based, Under Arrangement, Sale or Roll-Up: Alternatives for Restructuring Imaging Centers," "Social Media Strategies and Their Legal Implications," "Legal Issues That Lots of People Ask About Lately" and "The Legal Risks in Marketing Your Practice." [Download the presentations.](#)

### Gainsharing—Is It Still Feasible?

At the 2010 Illinois Chapter ACC Practice Management Symposium, partner Kenneth Davis provided an overview of gainsharing as a model for cardiovascular care. [Download the presentation.](#)

### The Impact of the PPACA on Fraud and Abuse Issues

Partner Lisa Ohrin served as a panelist for this ABA Health Law Section webinar, which reviewed the PPACA's new fraud and abuse and program integrity protections that health lawyers need to know when advising hospitals and other providers of services, physicians, DME companies, pharmaceutical companies and other entities affected by the PPACA's changes. [Download the presentation.](#)

### Physician-Hospital Alignment: Maximizing Collaboration and Minimizing Subsidizations

At this Healthcare Financial Management Association seminar, partner Louis Glaser addressed the struggle to develop joint venture arrangements for ambulatory services and the structuring of collaborative physician employment agreements. [Download the presentation.](#)

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## Contact Us

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