Health Care Reform: Be Careful Out There! - continued from page 3

understandable. The first disclosure submissions are due to CMS by March 31, 2013, which may include information from 2012. CMS has issued a proposed rule regarding the Sunshine Act which excludes from the reporting requirements transfers of value of less than $10.00 unless the aggregate amount paid or transferred exceeds $100.00 in a calendar year.

Disclosure of Imaging Ownership

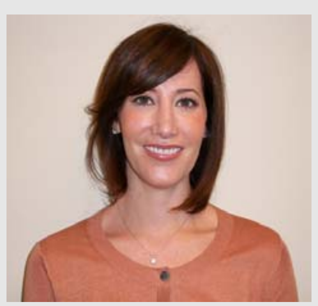
The ACA now requires physicians referring patients for imaging services within their group practice to give their patients written notice that the patient may obtain the imaging service outside the physician's group practice. The physician must also provide a written list of alternative suppliers in the area where the patient resides.

Mandatory Return of Overpayments of Medicare and Medicaid Funds

The ACA creates a new obligation for health care providers regarding overpayments associated with Medicare and Medicaid. Upon discovery of an overpayment, the provider is now required to report and return the overpayment within 60 days. The 60-day rule applies not only to common claims-related overpayments, such as duplicate billings, but also to claims submitted pursuant to referrals made in violation of the Stark or Anti-Kickback laws. Because of the technical nature of the Stark Law and the lack of any intent requirement, simply an expired agreement or the failure to obtain a signature can yield a potential substantial overpayment liability. Failure to report and return the overpayment also exposes the provider or entity to potential False Claims Act and Civil Monetary Penalty statute liability.

Although this 60 day reporting requirement was effective beginning March 23, 2010, CMS did not publish its proposed rules regarding the 60 day requirement until February 16, 2012. There are many questions left unanswered by the proposed rule that will hopefully be cleared up in the final rule yet to be published.

This is just a sampling of a few of the provisions which apply to health care providers. It is by no means a comprehensive review of all the provisions that will impact healthcare providers. If you are interested in a more comprehensive review of the laws and regulations that may affect your practice, please contact us.❖



ANGELA E. ATKIN SPOTLIGHT: Angela E. Atkin recently joined RQ&N's Tax, Trusts and Estate Planning Section. Ms. Atkin, a Shareholder, focuses on all aspects of estate, probate and trust matters, including estate planning, estate and trust administration, gift, estate and generation-skipping transfer tax issues, as well as the formation and ongoing operation of family business entities and tax-exempt corporations. Ms. Atkin also has experience with trials and settlements involving the Internal Revenue Service and the Utah State Tax Commission. She received her J.D., *cum laude*, from Brigham Young University in 2001. Ms. Atkin may be contacted at (801) 323-3362 or aatkin@rqn.com.

Tax & Business Newsletter

Samuel A. Lambert – Editor

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Spring 2012 Issue

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Also Inside This Issue

SEC Focus: JOBS Act Eases Restrictions on Capital-Raising Transactions

By Mark A. Cotter

On April 5, 2012, the Jump Start Our Business Startups Act (JOBS Act) was signed into law. The JOBS Act revises securities reporting and registration requirements with a view toward easing access to capital for small businesses. Among other things, the JOBS Act:

(1) provides an "on-ramp" for "emerging growth companies" (firms of less than $1 billion in annual revenue and less than $700 million in public float) seeking to go public by exempting them from certain internal control reporting and executive compensation and governance disclosures (this provision would reduce publicly available information for roughly 98% of public-bound companies);

(2) raises the SEC periodic reporting trigger (Forms 10-K, etc.) to either (a) 2,000 or more shareholders of record or (b) 500 or more shareholders of record who are not "accredited investors" (from the long-standing 500 shareholders of record trigger);

(3) provides an exemption from Securities Act of 1933 registration requirements for "crowdfunding" offerings of up to $1,000,000 involving smaller dollar investments by numerous investors, provided that certain conditions are met (such as conducting the offering through a registered broker or funding portal); and

(4) eliminates the prohibition on general advertising and solicitation with respect to private placements to "accredited investors" under SEC Regulation D, Rule 506.

While each of these provisions (and others) will impact companies seeking to raise capital, the modification of the Rule 506 exemption to now permit general advertising and solicitation for "accredited investors" represents a drastic change in securities regulation. Oddly enough, even though Rule 506 is a "safe harbor" for "private offerings," it will now permit general advertising and solicitation (e.g., newspaper ads, online banner advertisements, e-mails, etc.). While this has been proposed and discussed within the securities bar over a period of years, it will soon be effective following SEC rulemaking.

The JOBS Act has been supported by small business groups, venture capital associations and others. However, SEC Chairman Mary Shapiro and other SEC commissioners have opposed the JOBS Act on the grounds that it will significantly erode investor protections. In coming months, we will be watching whether and to what extent the staff of the SEC seeks to inject its concerns into the new rules it is required to promulgate under the JOBS Act. The SEC is currently soliciting public comments (even though the SEC has not yet proposed regulatory reform rules and amendments).❖

ESTATE TAX SPOUSAL PORTABILITY: IRS EXTENDS THE DEADLINE FOR CERTAIN ESTATES

By Gregg D. Stephenson

On December 17, 2010, President Obama signed into law the Tax Reform Act of 2010 (the "Tax Reform Act"), which made significant changes to the estate tax laws. Most significantly, the Tax Reform Act increased the estate and gift tax exclusions to $5,000,000 per person for 2011 and 2012 (adjusted for inflation to $5,120,000 in 2012). The Tax Reform Act also enacted a new provision creating "Spousal Portability," a system to allow the unused exclusion amount of a deceased spouse to be transferred to the surviving spouse.

Spousal Portability may be explained by an example. Assume a married couple, Jeff and Susan, have $8 million in assets divided equally between the two of them. Also assume that Jeff died in April of 2011 with no estate planning in place, and under state law his entire estate passes to Susan. There is no estate tax due, and Jeff did not use any of his $5 million estate tax exclusion, because all of Jeff's assets passed to a surviving spouse. However, Susan now has $8 million, and an estate tax exclusion amount of only $5.12 million. Prior to 2011, Jeff's estate tax exclusion would have probably been lost, absent some creative and successful post mortem planning (such as a disclaimer of Jeff's assets by Susan, but pity the advisor who has to inform Susan that she has to refuse to accept her husband's $4 million estate). However, under the new Spousal Portability rules, if Jeff's personal representative files a federal estate tax return which lists Susan as the surviving spouse, then an election is deemed to have been made to permit Susan to use Jeff's unused estate tax exemption amount. Susan still has $8 million in assets, but she now also has a $10.12 million estate tax exclusion (her $5.12 million plus Jeff's $5 million unused exemption) which will completely eliminate any estate taxes due at her death unless there is a change in circumstances which disallows the use of Jeff's unused exclusion. Susan can also use the $10.12 million exclusion to make gifts during her lifetime.

As stated above, the Spousal Portability election is made by timely filing a federal estate tax return (i.e., Form 706). The due date for filing Form 706 is nine months after the date of the decedent's death. However, an automatic six month extension of time to file Form 706 is granted when the estate files an application for such an extension (i.e., Form 4768) within nine months after the decedent's date of death. Because 2011 is the first year in which Spousal Portability applied, there are many executors of estates of decedents dying in 2011 that did not have proper guidance regarding how to elect Spousal Portability, and they might have been unaware of the requirement of filing a Form 706. Consequently, on February 17, 2012, the IRS issued Notice 2012-12, which grants certain estates of married individuals who died during the first six months of 2011 an automatic six month extension to file Form 706 and therefore make the Spousal Portability election. In the example above, Jeff's Form 706 would have been due in January of 2012, but it is now extended until July of 2012 even if the personal representative did not file an extension. The automatic extension does not apply to estates of decedents who were not survived by a spouse or whose gross estate exceeded $5 million and were therefore required to file Form 706 regardless of the desire to make the Spousal Portability election.

Of course, the devil is in the details, and filing a Form 706 just to make the Spousal Portability election does not make sense in all cases. Nevertheless, individuals and advisors who are working with the estates of individuals who died in 2011 should evaluate whether making the Spousal Portability election by filing a Form 706 is appropriate. Absent further action by Congress, Spousal Portability may disappear in 2013, but for 2012 it is the law and should be considered.

For more details on the basic rules governing Spousal Portability, and to discuss how they may apply to you and your particular situation, please contact a member of the Ray Quinney & Nebeker's Tax, Trusts and Estate Planning Section.❖

HEALTH CARE REFORM: BE CAREFUL OUT THERE!

By David J. Castleton

Healthcare reform has been discussed, reviewed, and challenged by patients, government entities, politicians, providers, insurers and businesses for over a century. Because healthcare continues to be an ever-increasing percentage of GDP in America, studies and discussions have recently accelerated among employers, federal and state governments, insurance companies, and healthcare consumers. Some healthcare delivery models used for decades have become ineffective and inefficient. New models are continually being introduced, tested and adopted throughout the country. While Utah has been making efforts to reform the medical system for a number of years, the federal government has recently become very active in an effort to bring comprehensive reform to the healthcare system.

Federal legislation receiving the most attention is the Patient Protection and Affordable Care Act of 2010, as amended by the Health Care Education Reconciliation Act of 2010 (hereinafter collectively referred to as "ACA"). It is the most comprehensive legislation on healthcare in decades. Although challenges to the ACA are currently being reviewed by the United States Supreme Court, many of its provisions are already in effect with other provisions scheduled to phase in over the next few years. It is important to note that ACA is not the only legislation that has had a substantial impact on medical practices. Numerous other developments in healthcare law are changing the landscape for the practice of medicine. Some of the more significant recent developments in the health law arena include the following:

HIPAA

In addition to the plethora of regulations in existence concerning the protection of individual health information, beginning January 1, 2013, many physicians and other health care providers will be required to provide a patient with an "access report" identifying who has accessed the patient's electronic health record.

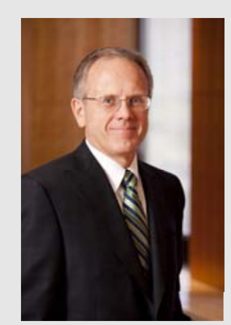
Public Reporting of Physician Performance

The ACA requires the Secretary of Health and Human Services to establish a website accessible to the public that will contain information about Medicare enrolled physicians, such as: patient health outcomes; efficiency; patient experience; patient, caregiver and family engagement; safety; effectiveness and timeliness of care; and continuity and coordination of care.

Transparency of Vendor Gifts to Physicians

The Physician Payments Sunshine Act, also enacted as part of the ACA, requires the reporting of payments and other transfers of value from certain drug, biologics, and device manufacturers to physicians and teaching hospitals, as well as physician ownership and investment interests in applicable manufacturers and group purchasing organizations. The Sunshine Act also requires the creation of a public website to present the disclosures in a format that is searchable, downloadable, and

Health Care Reform: Be Careful Out There! - continued on page 4



DAVID J. CASTLETON SPOTLIGHT: David J. Castleton joined RQ&N last year and is a member of its Corporate, Healthcare and Real Estate Sections. Mr. Castleton represents clients in a wide variety of business and real estate transactions, including business formations, purchases and sales, employment, joint ventures, mergers, acquisitions, leasing, development, and related matters. He also has extensive experience representing healthcare providers in all aspects of their practice, including business formation, joint ventures, regulatory compliance, licensing, contracts and employment matters. Mr. Castleton also has extensive experience in tax and estate planning. Mr. Castleton received his J.D. from Cornell University in 1981.