

CMS Modifies Stark, *Again*: Implications Abound for Physicians

The Center for Medicare and Medicaid Services (“CMS”) recently released updates of its third phase of final regulations to the federal physician self-referral law (the “Stark Law”). The third phase of final regulations is appropriately titled “Stark III.” Stark III clarifies, and in some cases substantially revises, various concepts, definitions, and exceptions to the Stark Law. As a result, hospitals, group practices, physicians and other health care providers may need to review and modify certain existing contractual relationships to ensure compliance with a Stark Law exception.

The Stark Law bans Medicare payments to entities providing designated health services (“DHS”) if patients were referred by physicians who have a financial relationship with the entity (unless an exception applies). Phase III finalizes the 2004 interim final rule known as Phase II of Stark II. Some of the important changes in the Stark final rule, published in the Sept. 5, 2007 Federal Register, include:

- Closing what CMS views as a loophole involving indirect compensation;
- Relaxing the physician recruitment exception;
- Eliminating the fair-market-value compensation "safe harbor";
- Expanding the scope of the FMV exception; and
- Making holiday events less stressful Stark-wise.

Although Phase III relaxes the Stark Law in certain respects, it gets stricter in other areas, making it essential for health care providers to be aware of the changes that affect their business practice. For instance, CMS made major changes to the indirect compensation exception that will likely have a significant effect on many existing compensation arrangements structured to comply with previous CMS interpretations of that exception.

Health care providers cannot look at Stark III as an isolated ruling because it stems from a long line of regulations and many years of development. Instead, Stark III must be interpreted in conjunction with the provisions of Stark I and Stark II, which in some areas could prove to be a rather tedious task. Effective compliance is attainable when those persons interpreting the Stark Law and its various phases are familiar with the history of the law, its relevant changes, and have experience with interpreting and applying legal provisions. As a health care provider, you need to determine how Stark III affects you.

TOP FIVE CHANGES RELATED TO STARK III

- (1) The physician recruitment exception has substantial revisions; now reasonable practice restrictions can be imposed on the recruited physicians, including covenants not to compete.
- (2) Personal service arrangements now have a six-month "holdover" period.
- (3) The \$329 non-monetary compensation exception now acknowledges continued compliance even if gifts and benefits exceeding the limit are exceeded by no more than 50%, so long as the physician repays the excess.
- (4) Hospitals can sponsor one formal event (i.e., Christmas party) for members of their medical staff per year without having to track expenses under the \$329 non-monetary compensation exception.
- (5) The fair-market-value "safe-harbor" definition has been eliminated.¹

¹ *CMS Opens Some Doors, Closes Others in its Third Regulatory Go-Round on the Stark Physician Self-Referral Law*, Health Business Daily, September 14, 2007.